

EXHIBIT 19

1 **BEFORE THE NEVADA TAX COMMISSION**

2 **IN RE:**

3)
4) **OLYMPUS GARDEN, INC., D.I. FOOD &**
5) **BEVERAGE OF LAS VEGAS, LLC, SHAC, L.L.C.,,**
6) **D. WESTWOOD, INC., K-KEL, INC., THE**
7) **POWER COMPANY, INC.,**

8) **Appellants.**
9)

10 **AFFIDAVIT OF KEVIN KELLY**

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

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16 1. I am an adult resident of the State of Nevada, and I make this affidavit based upon personal
17 knowledge.
- 18 2. I am the President of K-Kel, Inc., doing business as *Spearmint Rhino Gentlemen's Club*,
19 located at 3344 S. Highland Avenue, Las Vegas, Nevada, 89109.
- 20 3. Since the Live Entertainment Tax was imposed upon K-Kel, Inc., in 2004, it has not raised
21 its admission charge, or its costs for food, refreshments or merchandise, in amounts
22 equivalent to the Live Entertainment Taxes due on such charges, as a way to recoup the Live
23 Entertainment Taxes owed on such charges/purchases. In addition, K-Kel, Inc., has never
24 assessed, and the customers of K-Kel, Inc., have never paid, an "add on" fee, whether
25 segregated or not, for admission charges, food, refreshments and merchandise, in order to
26 account for the Live Entertainment Taxes owed on such charges/purchases.
- 27 4. K-Kel, Inc., pays the Live Entertainment Tax by simply determining the amount of revenues
for taxable admission charges, food, refreshments and merchandise, and remitting the
appropriate statutory percentage of those charges/purchases to the Nevada Tax Department.
As such, the Live Entertainment Taxes that have been paid by K-Kel, Inc., have come out
of the revenues that the club would have otherwise realized, have reduced the profits of the
club commensurately, and do not represent some sort of additional charge to the customer

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

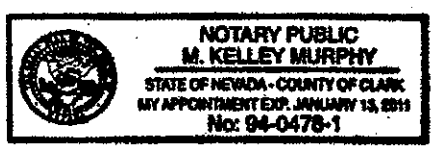
FURTHER DEPONENT SAYETH NOT.

Dated: July 27, 2007

Kevin Kelly
Kevin Kelly

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

M. Kelley Murphy
Notary Public, Clark County, Nevada
My commission expires 1-13-11



BEFORE THE NEVADA TAX COMMISSION

IN RE:

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

Appellants.

AFFIDAVIT OF PETER FEINSTEIN

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

1. I am an adult resident of the State of California, and I make this affidavit based upon personal knowledge.
2. I am the Managing Member of SHAC, LLC, doing business as *Sapphire*, located at 3025 Industrial Road, Las Vegas, Nevada, 89109.
3. Since the Live Entertainment Tax was imposed upon SHAC, LLC, in 2004, it has not raised its admission charge, or its costs for food, beverage or merchandise, in amounts equivalent to the Live Entertainment Taxes due on such charges, as a way to recoup the Live Entertainment Taxes owed on such charges/purchases. SHAC, LLC has, however, raised the prices on such charges/purchases in amounts equivalent to its competitors in the Las Vegas area, but this increase was not based on the Live Entertainment Tax. In addition, SHAC, LLC, has never assessed, and the customers of SHAC, LLC, have never paid, an "add on" fee, whether segregated or not, for admission charges, food, refreshments and merchandise, in order to account for the Live Entertainment Taxes owed on such charges/purchases.
4. SHAC, LLC, pays the Live Entertainment Tax by simply determining the amount of revenues for taxable admission charges, food, refreshments and merchandise, and remitting the appropriate statutory percentage of those charges/purchases to the Nevada Tax Department. As such, the Live Entertainment Taxes that have been paid by SHAC, LLC, have come out of the revenues that the club would have otherwise realized, have reduced the profits of the club commensurately, and do not represent some sort of additional charge to the customer as a separate fee for the amount of the Live Entertainment Tax due. Consequently, any

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

FURTHER DEPONENT SAYETH NOT.

Dated: July 31 ~~August~~, 2007

Peter Feinstein
Peter Feinstein

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

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



1 BEFORE THE NEVADA TAX COMMISSION

2
3 IN RE:

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

7
8 Appellants.

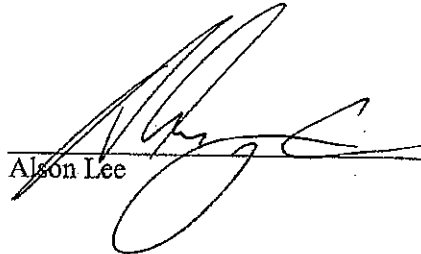
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10 AFFIDAVIT OF ALSON LEE

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

- 12 1. I am an adult resident of the State of Nevada, and I make this affidavit based upon personal
- 13 knowledge.
- 14 2. I am the General Manager of D. Westwood, Inc., doing business as *Treasures*, located at
- 15 2801 Westwood, Las Vegas, Nevada, 89109.
- 16 3. Since the Live Entertainment Tax was imposed upon D. Westwood, Inc., in 2004, it has not
- 17 raised its admission charge, or its costs for food, refreshments or merchandise, in amounts
- 18 equivalent to the Live Entertainment Taxes due on such charges, as a way to recoup the Live
- 19 Entertainment Taxes owed on such charges/purchases. In addition, D. Westwood, Inc., has
- 20 never assessed, and the customers of D. Westwood, Inc., have never paid, an "add on" fee,
- 21 whether segregated or not, for admission charges, food, refreshments and merchandise, in
- 22 order to account for the Live Entertainment Taxes owed on such charges/purchases.
- 23 4. D. Westwood, Inc., pays the Live Entertainment Tax by simply determining the amount of
- 24 revenues for taxable admission charges, food, refreshments and merchandise, and remitting
- 25 the appropriate statutory percentage of those charges/purchases to the Nevada Tax
- 26 Department. As such, the Live Entertainment Taxes that have been paid by D. Westwood,
- 27 Inc., have come out of the revenues that the club would have otherwise realized, have
- 28 reduced the profits of the club commensurately, and do not represent some sort of additional
- charge to the customer as a separate fee for the amount of the Live Entertainment Tax due.
- Consequently, any refund of the Live Entertainment Taxes that have been paid to date are
- owed exclusively to D. Westwood, Inc., and not to the customers of its club.

23 FURTHER DEPONENT SAYETH NOT.

24 Dated: July __, 2007

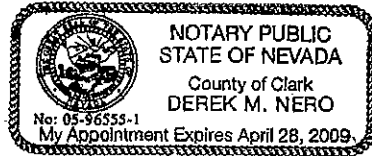
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Alson Lee

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

Derek M. Nero

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



1 **BEFORE THE NEVADA TAX COMMISSION**

2 **IN RE:**

3 **OLYMPUS GARDEN, INC., D.I. FOOD &**
4 **BEVERAGE OF LAS VEGAS, LLC, SHAC, L.L.C.,**
5 **D. WESTWOOD, INC., K-KEL, INC., THE**
6 **POWER COMPANY, INC.,**
7 **Appellants.**

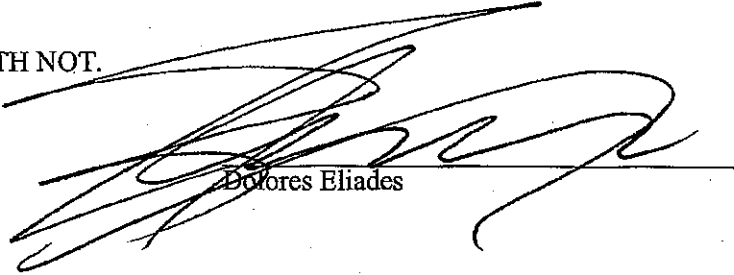
8 **AFFIDAVIT OF DOLORES ELIADES**

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

- 10 1. I am an adult resident of the State of Nevada, and I make this affidavit based upon personal
11 knowledge.
- 12 2. I am the General Manager of Olympus Garden, Inc., doing business as *Olympic Garden*,
13 located at 1531 S. Las Vegas Boulevard, Las Vegas, Nevada, 89104.
- 14 3. Since the Live Entertainment Tax was imposed upon Olympus Garden, Inc., in 2004, it has
15 not raised its admission charge, or its costs for food, refreshments or merchandise, in
16 amounts equivalent to the Live Entertainment Taxes due on such charges, as a way to recoup
17 the Live Entertainment Taxes owed on such charges/purchases. In addition, Olympus
18 Garden, Inc., has never assessed, and the customers of Olympus Garden, Inc., have never
19 paid, an "add on" fee, whether segregated or not, for admission charges, food, refreshments
20 and merchandise, in order to account for the Live Entertainment Taxes owed on such
21 charges/purchases.
- 22 4. Olympus Garden, Inc., pays the Live Entertainment Tax by simply determining the amount
23 of revenues for taxable admission charges, food, refreshments and merchandise, and
24 remitting the appropriate statutory percentage of those charges/purchases to the Nevada Tax
25 Department. As such, the Live Entertainment Taxes that have been paid by Olympus
26 Garden, Inc., have come out of the revenues that the club would have otherwise realized,
27 have reduced the profits of the club commensurately, and do not represent some sort of
28 additional charge to the customer as a separate fee for the amount of the Live Entertainment
Tax due. Consequently, any refund of the Live Entertainment Taxes that have been paid to
date are owed exclusively to Olympus Garden, Inc., and not to the customers of its club.

23 **FURTHER DEPONENT SAYETH NOT.**

24 Dated: July 22, 2007



Dolores Eliades

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

Marcia E Perez

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

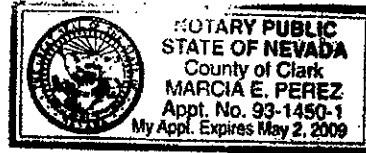


EXHIBIT 20

DISTRICT COURT
CLARK COUNTY, NEVADA

* * * * *

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

BEFORE THE HONORABLE JENNIFER TOGLIATTI, DISTRICT COURT JUDGE

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

THURSDAY, DECEMBER 9, 2010

APPEARANCES:

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

COURT RECORDER:

YVETTE SISON-BRITT
District Court

TRANSCRIPTION BY:

VERBATIM DIGITAL REPORTING, LLC
Englewood, CO 80110
(303) 798-0890

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

23 THE COURT: Through Wikileaks.

24 MS. RAKOWSKY: May I please respond?

25 THE COURT: Yes.

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

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

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

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

1 statute as far as the ability for the Department to give
2 refunds. The imposition of the tax is contained in NRS
3 368(a).200. And Sections 3 and 4, it says that a business
4 entity that collects an amount taxable pursuant to Subsection
5 1 is liable for the tax imposed. But it's entitled to collect
6 the reimbursement for any person.

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

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

20 THE COURT: Have you done discovery on that?

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

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

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

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

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

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

19 THE COURT: So was that argued?

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

1 the wall or did they not?

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

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

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

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

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

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

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

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

4 THE COURT: Well -- I have --

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

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

9 MR. DOERR: Well --

10 THE COURT: Anyway.

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

12 THE COURT: But let me just --

13 MR. DOERR: Okay.

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

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

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

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

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

7 MR. DOERR: Well --

8 THE COURT: -- of the ticket --

9 MR. DOERR: Well, Your Honor --

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

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

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

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

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

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

16 MR. SHAFER: And -- and --

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

20 MR. SHAFER: I don't think so.

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

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

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

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

7 MR. DOERR: I understand.

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

12 MR. SHAFER: Just like every other state.

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

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

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

1 MS. RAKOWSKY: Right.

2 THE COURT: -- who paid or not.

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

5 THE COURT: Or maybe it does. Does it?

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

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

14 MR. POPE: Your Honor --

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

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

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

1 gone there.

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

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

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

15 MR. SHAFER: Your Honor --

16 MR. DOERR: It comes from the customer.

17 MR. SHAFER: Your Honor --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

16 MR. DOERR: -- their first amendment activity.

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

21 MR. SHAFER: Yes.

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

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

25 MR. SHAFER: Yes.

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

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

7 MR. DOERR: We agree.

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

13 MR. DOERR: Is that relevant?

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

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

21 MR. SHAFER: And our affidavits --

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

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

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

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

7 THE COURT: Okay. Are you --

8 MR. DOERR: We've said enough.

9 MR. POPE: Thank you, Your Honor.

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

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

22 MS. RAKOWSKY: Yes.

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

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

25 MS. RAKOWSKY: There was a chart --

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Other Civil Filing

COURT MINUTES

March 15, 2011

06A533273

Little Darlings Of Las Vegas LLC, K-Kel Inc, et al

vs

Nevada Dept Of Taxation, Olympus Garden Inc, et al

March 15, 2011

9:00 AM

All Pending Motions

HEARD BY: Gonzalez, Elizabeth

COURTROOM: RJC Courtroom 14C

COURT CLERK: Damedia Scott

RECORDER: Jill Hawkins

REPORTER:

PARTIES**PRESENT:**

Brown, William H.

Attorney

Doerr, Blake A.

Attorney

Pope, David J.

Attorney

RAKOWSKY, VIVIENNE, ESQ

Attorney

Shafer, Bradley J., ESQ

Attorney

JOURNAL ENTRIES

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

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

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

3/25/11 CHAMBERS STATUS CHECK: CODING REPORT

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.

Electronically Filed
Supreme Court Case No. 60037
Jan 03 2013 04:23 p.m.
Tracie K. Lindeman
District Court Case Clerk of Supreme Court

CORRECTED APPELLANTS' APPENDIX
VOLUME 6, PAGES 1157-1396

INDEX TO CORRECTED APPELLANTS' APPENDIX

Filing Date	Description	Vol.	Page
05/05/2011	3 rd Amended Order Setting Civil Non-Jury Trial and Calendar Call	7	1470-1472
11/29/2011	Amended Case Appeal Statement	10	2113-2121
12/19/2011	Amended Order (Dismissing Case 2 to Proceed as a Petition for Judicial review)	10	2135-2138
03/17/2009	Amended Order Setting Non-Jury Civil Trial	1	230-231
08/04/2009	Amended Order Setting Non-Jury Civil Trial	2	250-251
07/20/2009	Amended Scheduling Order	1	247-249
04/09/2007	Amended Summons – Nevada Board of Examiners	1	52-55
04/09/2007	Amended Summons – Nevada Tax Commission	1	48-51
03/03/2008	Answer to Complaint	1	127-136
04/06/2011	Answer to Verified Amended Complaint for Declaratory and Injunctive Relief, Damages, and Attorney Fees and Costs	7	1433-1449
01/17/2012	Appeal Statement (Case No. 06A533273)	10	2174-2182
11/28/2011	Case Appeal Statement	10	2106-2112
03/22/2011	Certificate of Service – Verified Amended Complaint	7	1429-1430
03/23/2011	Certificate of Service – Verified Amended Complaint	7	1431-1432
01/28/2009	Certificate of Service (Motion to Amend Complaint and Amended Complaint)	1	224-225
03/30/2009	Certificate of Service (Plaintiffs' First Set of Interrogatories and Plaintiffs' First Request for Production of Documents)	1	232-233
04/20/2009	Certificate of Service (Plaintiffs' Notice 30(b)(6) Depositions and Subpoenas)	1	236-237
04/24/2007	Certificate of Service (Substitution of Attorney and Verification)	1	71-101
05/03/2007	Civil Court Minutes	1	102
07/31/2008	Civil Court Minutes	1	137
08/14/2008	Civil Court Minutes	1	172

Filing Date	Description	Vol.	Page
09/18/2008	Civil Court Minutes	1	173
10/16/2008	Civil Court Minutes	1	174
11/06/2008	Civil Court Minutes	1	175
11/13/2008	Civil Court Minutes	1	176
12/11/2008	Civil Court Minutes	1	180
12/16/2008	Civil Court Minutes	1	181
01/15/2009	Civil Court Minutes	1	191
02/03/2009	Civil Court Minutes	1	226
02/12/2009	Civil Court Minutes	1	227
04/02/2009	Civil Court Minutes	1	234
04/16/2009	Civil Court Minutes	1	235
06/17/2009	Court Minutes	1	246
11/13/2009	Court Minutes	3	548
06/30/2010	Court Minutes	4	902-903
08/12/2010	Court Minutes	4	908-909
08/24/2010	Court Minutes	4	910
09/16/2010	Court Minutes	4	911-912
12/09/2010	Court Minutes	4	913
12/28/2010	Court Minutes	5	1057-1058
01/13/2011	Court Minutes	5	1062-1063
01/26/2011	Court Minutes	5	1103
02/10/2011	Court Minutes	5	1105
03/15/2011	Court Minutes	6	1396
05/27/2011	Court Minutes	7	1473
06/24/2011	Court Minutes	7	1474
08/16/2011	Court Minutes	7	1547
08/23/2011	Court Minutes	8	1704-1705
10/20/2011	Court Minutes	9	2014
11/08/2011	Court Minutes	9	2067-2068
11/10/2011	Court Minutes	10	2095
12/16/2011	Court Minutes	10	2122
02/10/2011	Court Minutes (Case No. 08A554970)	5	1104
08/16/2011	Defendants Motion to Compel on an Order Shortening Time	7	1548-1588
08/16/2011	Defendants Motion to Compel - Exhibit A Defendants' Requests for Production of Documents to Plaintiffs	8	1589-1661

Filing Date	Description	Vol.	Page
08/16/2011	Defendants Motion to Compel - Exhibit B Plaintiffs Shac, LLC's Response to Defendants' Requests for Production of Documents	8	1662-1673
08/16/2011	Defendants Motion to Compel - Exhibit C Responses to Defendants' Requests for Production of Documents	8	1674-1689
08/16/2011	Defendants Motion to Compel - Exhibit D Email to Roos from Rakowsky - Dated June 28, 2011	8	1690-1691
08/16/2011	Defendants Motion to Compel - Exhibit E Email to Rakowsky from Roos – Dated July 15, 1011	8	1692-1694
08/16/2011	Defendants Motion to Compel - Exhibit F Email to Brown and Pritzlaff from Doerr – Dated July 13, 2011	8	1695-1696
08/16/2011	Defendants Motion to Compel - Exhibit G Correspondence to Shafer and Sullivan from Diciano (Nevada Dep. of Taxation) Dated October 12, 2007	8	1697-1699
08/16/2011	Defendants Motion to Compel - Exhibit H Email to Roos from Rakowsky – Dated June 29, 2011	8	1700-1701
08/16/2011	Defendants Motion to Compel - Exhibit I Email to Roos from Rakowsky – Dated July 1, 2011	8	1702-1703
05/28/2010	Discovery Commissioner's Report and Recommendations (05/19/2010)	4	886-891
12/09/2010	Memorandum Supporting Request for Specific Discovery Rulings	5	980-982
12/09/2010	Memorandum Supporting Request – Exhibit 1 Correspondence to Hon. Jennifer Tagliatti from Brad Shafer of 12/06/2010	5	983-1042
04/08/2011	Minute Order	7	1456-1457
09/30/2009	Motion to Compel Discovery of Defendants	2	257-280
09/30/2009	Motion to Compel - Exhibit 1 Plaintiffs' First Set of Interrogatories to Defendants	2	281-293
09/30/2009	Motion to Compel - Exhibit 2	2	294-305

Filing Date	Description	Vol.	Page
	Plaintiffs' First Request for the Production of Documents and Things to Defendants		
09/30/2009	Motion to Compel - Exhibit 3 Responses to Plaintiffs' First Set of Interrogatories	2	306-331
09/30/2009	Motion to Compel - Exhibit 4a Responses to Plaintiffs' First Request for the Production of Documents and Things	2	332-395
09/30/2009	Motion to Compel - Exhibit 4b Responses to Plaintiffs' First Request for the Production of Documents and Things	2	396-465
09/30/2009	Motion to Compel - Exhibit 4c Responses to Plaintiffs' First Request for the Production of Documents and Things	3	466-538
09/30/2009	Motion to Compel - Exhibit 5 Affidavit of Matthew J. Hoffer	3	539-540
09/30/2009	Motion to Compel - Exhibit 6 LET Return Forms – Non-Gaming Facilities	3	541-547
11/28/2011	Notice of Appeal	10	2096-2105
01/09/2011	Notice of Appeal (Case No. 06A533273)	10	2171-2173
12/19/2011	Notice of Entry of Amended Order – 12/19/2011	10	2155-2161
01/14/2011	Notice of Entry of Order – (01/13/2011)	5	1086-1090
12/19/2011	Notice of Entry of Order – 12/16/2011	10	2139-2154
12/20/2011	Notice of Entry of Order – 12/19/2011	10	2162-2169
11/02/2011	Notice of Entry of Order – Entered 10/27/2011 – e-filed 11/01/2011	9	2060-2066
04/12/2011	Notice of Entry of Order – Motion for Partial Summary Judgment and Motion to Dismiss – 04/05/2011	7	1464-1469
12/15/2010	Notice of Entry of Order – Motion for Summary Judgment	5	1047-1051
12/15/2010	Notice of Entry of Order – Motion to Dismiss	5	1052-1056
04/12/2011	Notice of Entry of Order – Renewed Motion for Preliminary Injunction – 04/05/2011	7	1458-1463
04/10/2007	Notice of Entry of Order (04/03/2007)	1	60-70
05/15/2009	Notice of Entry of Order (05/11/2009)	1	240-245

Filing Date	Description	Vol.	Page
06/11/2010	Notice of Entry of Order (05/19/2010)	4	892-901
12/22/2008	Notice of Entry of Order (12/19/2008)	1	185-190
04/06/2011	Order (Defendants' Motion for Partial Summary Judgment and Motion to Dismiss)	7	1450-1452
11/01/2011	Order (Granting in Part/Denying in Part Defendant's Motion for Partial Summary)	9	2056-2059
04/03/2007	Order Admitting (Brad Shafer) to Practice	1	46-47
01/05/2011	Order Denying Defendants' Res Judicata Claim	5	1059-1061
01/13/2011	Order Denying Motion for Preliminary Injunction Without Prejudice (hearing held on July 31, 2008)	5	1064-1065
12/10/2010	Order Denying Motion for Summary Judgment without Prejudice	5	1043-1044
12/10/2010	Order Denying Motion to Dismiss Without Prejudice	5	1045-1046
12/16/2011	Order Denying Plaintiff's Motion for Summary Judgment and Granting Defendants' Counter-Motion for Summary Judgment	10	2123-2134
04/06/2011	Order Denying Plaintiffs' Renewed Motion for Preliminary Injunction on Order Shortening Time	7	1453-1455
12/19/2008	Order Granting Motion to Withdraw as Local Counsel of Record for Plaintiffs	1	182-184
05/11/2009	Order Granting Plaintiffs' Motion for Leave to Amend Complaint	1	238-239
03/04/2009	Order Setting Civil Jury Trial	1	228-229
01/03/2011	Order to Statistically Close Case	10	2170
08/04/2010	Order Vacating Prior Order and Coordinating Case	4	904-907
09/23/2011	Plaintiffs' Motion for Summary Judgment on Facial Challenge, for Permanent Injunction, and for Return of Taxes	8	1738-1796
09/23/2011	Plaintiffs' Motion for Summary Judgment - Exhibit 1 Copy of the Version of Chapter 368A adopted in 2003	8	1797-1812
09/23/2011	Plaintiffs' Motion for Summary Judgment -	8	1813-1831

Filing Date	Description	Vol.	Page
	Exhibit 2 Assembly Bill No. 554		
09/23/2011	Plaintiffs' Motion for Summary Judgment - Exhibit 3 2005 Nevada Laws (S.B. 3) - Occupancy	9	1832-1852
09/23/2011	Plaintiffs' Motion for Summary Judgment - Exhibit 4 2007 Nevada Laws (A.B. 487) - Baseball	9	1853-1855
09/23/2011	Plaintiffs' Motion for Summary Judgment - Exhibit 5 Current Codified Version of Chapter 368A	9	1856-1871
09/23/2011	Plaintiffs' Motion for Summary Judgment - Exhibit 6 TN Attorney General Opinion	9	1872-1876
09/23/2011	Plaintiffs' Motion for Summary Judgment - Exhibit 7 United States District Court Order Dismissing Lawsuit	9	1877-1883
09/23/2011	Plaintiffs' Motion for Summary Judgment - Exhibit 8 United States Court of Appeals for the Ninth Circuit Memorandum Affirming Dismissal	9	1884-1885
09/23/2011	Plaintiffs' Motion for Summary Judgment - Exhibit 9 Redacted Sample Copy of Administrative Request for Refund	9	1886-1891
09/23/2011	Plaintiffs' Motion for Summary Judgment - Exhibit 10 Sample Copy of Defendant's Denial of Request for Refund	9	1892
09/23/2011	Plaintiffs' Motion for Summary Judgment - Exhibit 11 Sample Copy of Department's Acknowledgment of Appeal	9	1893
09/23/2011	Plaintiffs' Motion for Summary Judgment - Exhibit 12 Nevada Tax Commission's Order Denying Appeal	9	1894-1895

Filing Date	Description	Vol.	Page
09/23/2011	Plaintiffs' Motion for Summary Judgment - Exhibit 13 Department of Taxation's Responses to Plaintiffs' First set of Interrogatories	9	1896-1920
09/23/2011	Plaintiffs' Motion for Summary Judgment - Exhibit 14 Minutes of the Meeting on May 16, 2005	9	1921-1936
09/23/2011	Plaintiffs' Motion for Summary Judgment - Exhibit 15 Memorandum – Analysis of Revenue Impact	9	1937-1938
09/23/2011	Plaintiffs' Motion for Summary Judgment - Exhibit 16 LET by venue	9	1939-1941
09/23/2011	Plaintiffs' Motion for Summary Judgment - Exhibit 17 Memorandum of November 9, 2004 - Cathy Chambers	9	1942
09/23/2011	Plaintiffs' Motion for Summary Judgment - Exhibit 18 Dicianno Email of April 24, 2005	9	1943
09/23/2011	Plaintiffs' Motion for Summary Judgment - Exhibit 19 Memorandum to Bill Bible re proposed regulations	9	1944-1945
09/23/2011	Plaintiffs' Motion for Summary Judgment - Exhibit 20 Senate Committee on Taxation - April 12, 2005	9	1946-1956
09/23/2011	Plaintiffs' Motion for Summary Judgment - Exhibit 21 Senate Committee on Taxation - June 5, 2005	9	1957-1965
09/23/2011	Plaintiffs' Motion for Summary Judgment - Exhibit 22 Excerpts of Transcripts of Hearing before the Nevada Tax Commission on July 9, 2007	9	1966-1968
09/23/2011	Plaintiffs' Motion for Summary Judgment - Exhibit 23 Excerpts of Transcript of Hearing Before the Nevada Tax Commission on August 6, 2007	9	1969-1978

Filing Date	Description	Vol.	Page
09/23/2011	Plaintiffs' Motion for Summary Judgment - Exhibit 24 Excerpts of Defendants Answering Brief	9	1979-1987
09/23/2011	Plaintiffs' Motion for Summary Judgment - Exhibit 25 Affidavits of Representatives of Plaintiffs Produced Before the Tax Commission	9	1988-1995
09/23/2011	Plaintiffs' Motion for Summary Judgment - Exhibit 26 Excerpts of Transcript of December 9, 2010, Hearing before Judge Togliatti	9	1996-2013
03/03/2010	Plaintiffs' Objection to the Discovery Commissioner's Report and Recommendation Regarding Plaintiffs' Motion to Compel Discovery of Defendants	3	551-575
03/03/2010	Plaintiffs' Objection to Discovery Commissioners Report and Recommendation – Exhibit 1 Plaintiffs' First Set of Interrogatories to Defendants	3	576-588
03/03/2010	Plaintiffs' Objection to Discovery Commissioners Report and Recommendation – Exhibit 2 Plaintiffs' First Request for the Production of Documents and Things to Defendants	3	589-600
03/03/2010	Plaintiffs' Objection to Discovery Commissioners Report and Recommendation – Exhibit 3 Responses to Plaintiffs' First Set of Interrogatories	3	601-626
03/03/2010	Plaintiffs' Objection to Discovery Commissioners Report and Recommendation – Exhibit 4a Responses to Plaintiffs' First Request for Production of Documents and Things	3	627-690
03/03/2010	Plaintiffs' Objection to Discovery Commissioners Report and Recommendation – Exhibit 4b	4	691-760

Filing Date	Description	Vol.	Page
	Responses to Plaintiffs' First Request for Production of Documents and Things		
03/03/2010	Plaintiffs' Objection to Discovery Commissioners Report and Recommendation – Exhibit 4c Responses to Plaintiffs' First Request for Production of Documents and Things	4	761-833
03/03/2010	Plaintiffs' Objection to Discovery Commissioners Report and Recommendation – Exhibit 5 Affidavit of Matthew J. Hoffer	4	834-835
03/03/2010	Plaintiffs' Objection to Discovery Commissioners Report and Recommendation – Exhibit 6 Report and Recommendation of Discovery Commissioner - 2010-02-22	4	836-842
03/03/2010	Plaintiffs' Objection to Discovery Commissioners Report and Recommendation – Exhibit 7 LET Return Forms – Non-Gaming Facilities	4	843-849
05/13/2010	Plaintiffs' Objection to the Discovery Commissioner's Report and Recommendation Regarding Plaintiffs' Motion to Compel Discovery of Defendants (without exhibits)	4	860-885
10/28/2011	Plaintiffs' Opposition to Defendants' Motion for Summary Judgment	9	2015-2040
10/28/2011	Plaintiffs' Opposition to Defendants Motion for Summary Judgment – Exhibit A Deposition Notices/Subpoena	9	2041-2048
10/28/2011	Plaintiffs' Opposition to Defendants' Motion for Summary Judgment – Exhibit B Minutes of August 16, 2011 – Register of Actions	9	2049-2051
10/28/2011	Plaintiffs' Opposition to Defendants' Motion for Summary Judgment – Exhibit C	9	2052-2054

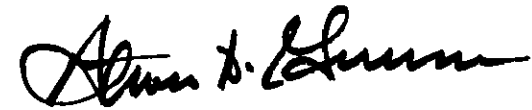
Filing Date	Description	Vol.	Page
	Minutes of August 23, 2011 – Register of Actions		
10/28/2011	Plaintiffs’ Opposition to Defendants’ Motion for Summary Judgment – Exhibit D Casino Entertainment Tax	9	2055
08/15/2011	Plaintiffs’ Opposition to Defendants’ Objection to Subpoena Duces Tecum and Subpoena, Motion to Quash Subpoenas and Motion for Sanctions Pursuant to NRCP 45(C)(1) on Order Shortening Time	7	1475-1490
08/15/2011	Plaintiffs’ Opposition to Defendants’ Objection to Subpoena - Exhibit 1 Email dated March 12, 2009 regarding availability of DiCianno	7	1491-1493
08/15/2011	Plaintiffs’ Opposition to Defendants’ Objection to Subpoena - Exhibit 2 2009 Deposition Notices	7	1494-1516
08/15/2011	Plaintiffs’ Opposition to Defendants’ Objection to Subpoena - Exhibit 3 Email dated May 1, 2009 regarding rescheduling of Depositions	7	1517-1519
08/15/2011	Plaintiffs’ Opposition to Defendants’ Objection to Subpoena - Exhibit 4 Email dated June 29, 2011 from Doerr regarding who will be deposed	7	1520-1521
08/15/2011	Plaintiffs’ Opposition to Defendants’ Objection to Subpoena - Exhibit 5 2011 Deposition Subpoena	7	1522-1537
08/15/2011	Plaintiffs’ Opposition to Defendants’ Objection to Subpoena - Exhibit 6 Defendants' Certificates of Service showing facsimile	7	1538-1541
08/15/2011	Plaintiffs’ Opposition to Defendants’ Objection to Subpoena - Exhibit 7 Plaintiffs' Certificates of Service showing facsimile	7	1542-1544
08/15/2011	Plaintiffs’ Opposition to Defendants’ Objection	7	1545-1546

Filing Date	Description	Vol.	Page
	to Subpoena - Exhibit 8 Email dated August 10, 2011 forwarding info to new email addresses		
01/25/2011	Plaintiffs' Supplemental Brief Summarizing Separation of Powers Issue and Outstanding Discovery Issues		1091-1102
03/05/2010	Receipt of Copy (Pope's Receipt of Plaintiffs' Objection to Discovery Commissioner's Report and Recommendation)	4	850-851
02/18/2011	Renewed Motion for Preliminary Injunction on Order Shortening Time	6	1157-1204
02/18/2011	Renewed Motion for Preliminary Injunction - Exhibit 1 Copy of the version of Chapter 368A adopted in 2003	6	1205-1221
02/18/2011	Renewed Motion for Preliminary Injunction - Exhibit 2 Assembly Bill No. 554	6	1222-1241
02/18/2011	Renewed Motion for Preliminary Injunction - Exhibit 3 Current codified version of Chapter 368A	6	1242-1258
02/18/2011	Renewed Motion for Preliminary Injunction - Exhibit 4 Texas Decision and Statute	6	1259-1284
02/18/2011	Renewed Motion for Preliminary Injunction - Exhibit 5 TN Attorney General Opinion	6	1285-1290
02/18/2011	Renewed Motion for Preliminary Injunction - Exhibit 6 United States District Court Order Dismissing Lawsuit	6	1291-1298
02/18/2011	Renewed Motion for Preliminary Injunction - Exhibit 7 United States Court of Appeals for the Ninth Circuit Memorandum Affirming Dismissal	6	1299-1301
02/18/2011	Renewed Motion for Preliminary Injunction - Exhibit 8 Redacted Sample Copy of Administrative	6	1302-1308

Filing Date	Description	Vol.	Page
	Request for Refund		
02/18/2011	Renewed Motion for Preliminary Injunction - Exhibit 9 Sample Copy of Department's Denial of Request for Refund	6	1309-1310
02/18/2011	Renewed Motion for Preliminary Injunction - Exhibit 10 Sample Copy of Department's Acknowledgment of Appeal	6	1311-1312
02/18/2011	Renewed Motion for Preliminary Injunction - Exhibit 11 Nevada Tax Commission's Order Denying Appeal	6	1313-1315
02/18/2011	Renewed Motion for Preliminary Injunction - Exhibit 12 Orders of Judge Togliatti, December 9, 2010.	6	1316-1320
02/18/2011	Renewed Motion for Preliminary Injunction - Exhibit 13 Minutes of the Meeting of the Assembly Committee on Commerce and Labor recorded during the 73rd Congressional Session on May 16, 2005	6	1321-1337
02/18/2011	Renewed Motion for Preliminary Injunction - Exhibit 14 Chart of LET Collections Created by the Nevada Department of Taxation	6	1338-1340
02/18/2011	Renewed Motion for Preliminary Injunction - Exhibit 15 Excerpts of Transcript of Hearing Before the Nevada Tax Commission on July 9, 2007	6	1341-1344
02/18/2011	Renewed Motion for Preliminary Injunction - Exhibit 16 N.A.C. § 368A.170	6	1345-1346
02/18/2011	Renewed Motion for Preliminary Injunction - Exhibit 17 Excerpts of Defendants' (Appellees') Answering Brief to the United States Court of Appeals for the Ninth Circuit	6	1347-1356

Filing Date	Description	Vol.	Page
02/18/2011	Renewed Motion for Preliminary Injunction - Exhibit 18 Excerpts of Transcript of Hearing Before the Nevada Tax Commission on August 6, 2007	6	1357-1367
02/18/2011	Renewed Motion for Preliminary Injunction - Exhibit 19 Affidavits of Representatives of Plaintiffs Produced Before the Tax Commission	6	1368-1376
02/18/2011	Renewed Motion for Preliminary Injunction - Exhibit 20 Excerpts of Transcript of December 9, 2010, Hearing before Judge Togliatti	6	1377-1395
12/02/2008	Scheduling Order (Discovery)	1	177-179
12/01/2009	Second Amended Order Setting Civil Non-Jury Trial	3	549-550
09/28/2009	Stipulation and Order for Extension of Time to Complete Discovery and to Continue Trial (Second Request)	2	252-256
03/24/2010	Stipulation and Order to Extension of time to Complete Discovery (Third Request)	4	852-857
01/09/2007	Summons – Jacobs	1	34-36
04/09/2007	Summons – Nevada Attorney General	1	56-59
01/09/2007	Summons – Nevada Department of Taxations	1	37-39
01/09/2007	Summons – Nevada Tax Commission	1	40-42
01/09/2007	Summons – State Board of Examiners	1	43-45
04/01/2010	Third Amended Order Setting Non-Jury Civil Trial	4	858-859
07/31/2008	Transcript – Defendants Department of Taxation, Nevada Tax Commission, and Nevada State Board of Examiner’s Motion to Dismiss/and Motion for Preliminary Injunction – Entered 08/13/2008	1	138-171
08/23/2011	Transcript – Hearing on Defendant’s Motion for Partial Summary Judgment – Entered 10/24/2011	8	1706-1737
03/15/2011	Transcript – Hearing on Motions – Entered 04/13/2011	7	1397-1428
12/09/2010	Transcript - Plaintiff’s Motion for Preliminary	5	914-979

Filing Date	Description	Vol.	Page
	Injunction/Separation of Powers Issue, Discovery Issues; and Trial Scheduling Issues – Entered 02/22/2011		
01/13/2011	Transcript – Request of Court (Transferring Case to Judge Gonzalez) – Entered 02/25/2011	5	1066-1085
02/10/2011	Transcript – Status Check – Entered 02/22/2011	5	1106-1156
11/08/2011	Transcript (Defendant’s Motion for Partial Summary Judgment)	10	2069-2094
05/15/2007	Verification – D. Westwood, Inc.	1	109-111
05/15/2007	Verification – D.I. Food & Beverage of Las Vegas, LLC	1	121-123
05/15/2007	Verification – Deja Vu Showgirls of Las Vegas, LLC	1	106-108
05/15/2007	Verification – Don Krontz	1	118-120
05/15/2007	Verification – K-Kel, Inc.	1	124-126
05/15/2007	Verification – Olympus Garden, Inc.	1	112-114
05/15/2007	Verification – Shac, LLC	1	115-117
05/15/2007	Verification – The Power Company	1	103-105
01/28/2009	Verified Amended Complaint - Exhibit A Chapter 368A	1	207-223
01/28/2009	Verified Amended Complaint for Declaratory and Injunctive Relief, Damages, and Attorney Fees and Costs	1	192 -206
12/19/2006	Verified Complaint - Exhibit A Chapter 368A	1	17-33
12/19/2006	Verified Complaint for Declaratory and Injunctive Relief, Damages, and Attorney Fees and Costs	1	1-16



CLERK OF THE COURT

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DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiffs,

vs.

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

Defendants.

Case No.: A533273
Dept. No.: XI

Coordinated with:

Case No. 08A554970
Dept. No. XI

**RENEWED MOTION FOR
PRELIMINARY INJUNCTION
ON ORDER SHORTENING TIME**

Date of Hearing: OST Pending
Time of Hearing: OST Pending

**FILE WITH
MASTER CALENDAR**

1 COME NOW Plaintiffs, by and through their attorneys of record, William H. Brown of
2 the law firm of LAW OFFICES OF WILLIAM H. BROWN, ESQ., LTD., and Bradley J.
3 Shafer, of the law firm of SHAFER & ASSOCIATES, P.C., and hereby respectfully move this
4 Honorable Court for a preliminary injunction in the above-entitled case enjoining the
5 Defendants, and their officers, employees, agents, representatives, and all persons acting by,
6 through, and for them, from enforcing, applying, and implementing Title 32, Chapter 368A of
7 the Nevada Revised Statutes, for the reasons that it is unconstitutional on its face and as
8 applied under Article I, §§ 9 and 10 of the Nevada Constitution, as well as the First and
9 Fourteenth Amendments to the United States Constitution.
10
11

12 This Renewed Motion is made and based upon the Verified Complaint for Declaratory
13 and Injunctive Relief, Damages, and Attorney Fees and Costs, the exhibits thereof, the
14 following Points and Authorities, the exhibits and affidavit attached thereto, the submissions
15 on file in this action, prior arguments of counsel, and the arguments of counsel to be made at
16 the time of the hearing.
17

18 DATED: February 14, 2011
19

20 **LAW OFFICES OF**
21 **WILLIAM H. BROWN, LTD.**

22 By /s/ Williams Brown

23 WILLIAM H. BROWN
24 Nevada Bar No.: 7623
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SHAFER & ASSOCIATES, P.C.

**AFFIDAVIT OF WILLIAM H. BROWN, ESQ., IN SUPPORT OF THE INSTANT
RENEWED MOTION FOR PRELIMINARY INJUNCTION**

1
2 1. I represent the Plaintiffs, K-KEL, INC., d/b/a *Spearmint Rhino Gentlemen's Club*, in
3 this action and I make this affidavit in support of the Motion for Preliminary Injunction.
4

5 2. I request the order shortening time for the reason that the Defendants have filed a
6 motion for partial summary judgment and to dismiss this cause of action, which will be heard
7 by this Honorable Court on March 15, 2011, and the defense of which is related to the
8 matters discussed in this motion.

9 3. That Plaintiffs believe that this Court should have a full understanding of the
10 constitutional matters at stake in this litigation when ruling on that motion for summary
11 judgment and to dismiss, and having this Renewed Motion for Preliminary Injunction heard
12 contemporaneously therewith will accomplish that result.
13

14 4. WHEREFORE, your declarant requests that this Honorable Court hear Plaintiffs'
15 Renewed Motion for Preliminary Injunction on an Order Shortening Time and hear argument
16 on the same concurrently with Defendants' Motion for Partial Summary Judgment, on March
17 15, 2011.
18

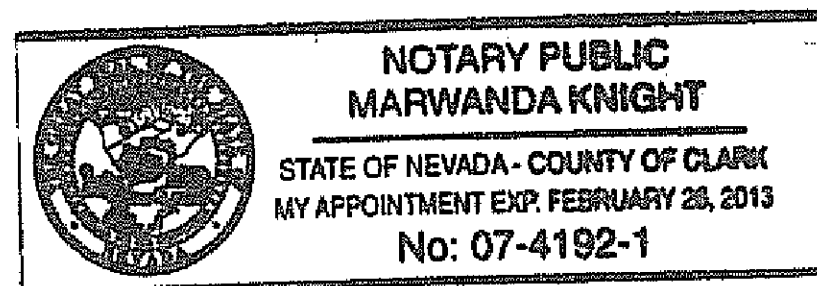
19 I declare under penalty of perjury under the laws of the State of Nevada that the
20 foregoing is true and correct.
21

22 DATED this 14th day of February, 2011

23
24 By 
25 WILLIAM H. BROWN, ESQ.

26 SUBSCRIBED and SWORN to before me
27 this 14th day of February, 2011

28 
NOTARY PUBLIC



1 ORDER SHORTENING TIME

2 Upon application therefore and good cause appearing therefore, it is hereby:

3 ORDERED that the hearing of the above RENEWED MOTION FOR
4 PRELIMINARY INJUNCTION may be shortened to March 15, 2011, at the hour of 9:00 a.m.
5 in Department XI of the above-entitled Court.

6 Dated this 16 day of February, 2011.

7
8 
9 DISTRICT COURT JUDGE
10 

11 NOTICE OF MOTION

12
13 TO: Nevada Department of Taxation, Nevada Tax Commission, Nevada State Board of
14 Examiners, and Michelle Jacobs, Defendants; and

15 TO: Defendants' Attorney, David Pope and Blake Doerr

16 PLEASE TAKE NOTICE that the Plaintiffs will bring their Renewed Motion for
17 Preliminary Injunction on Order Shortening Time for hearing before the District Court,
18 Department XI, on the 15th of March, 2011, at 9:00 a.m., or as soon thereafter as counsel can
19 be heard.
20

21 Dated this 4th day of February, 2011.

22
23 **LAW OFFICES OF**
24 **WILLIAM H. BROWN, LTD.**

25 By /s/ William H. Brown
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MEMORANDUM OF POINTS AND AUTHORITIES

I. BACKGROUND AND FACTS

Plaintiffs operate commercial entertainment establishments in the City of Las Vegas, which present on their business premises live performance dance entertainment to the consenting adult public. Verified Complaint for Declaratory and Injunctive Relief, Damages, and Attorney Fees and Costs (“Comp.”), at ¶¶ 27-34. The entertainment presented by the Plaintiffs constitutes speech and expression, as well as a form of assembly, protected by the First and Fourteenth Amendments to the United States Constitution,¹ as well as by Art. 1, §§ 9 and 10 of the Nevada Constitution.² Comp., ¶ 36.

¹ Because the Federal Constitution represents the “floor” level of protections that can be afforded under the State Constitution (see **S.O.C., Inc. v. Mirage Casino-Hotel**, 117 Nev. 403, 414, 23 P.3d 243 (2001)), the federal case law cited herein is applicable to Plaintiffs’ Nevada constitutional challenges as well.

² Exotic dancing, in the form of 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. Glen Theatre, Inc.**, 501 U.S. 560, 565(1991) (nude dancing receives protections under the Constitution); **City of Erie v. Pap’s A.M.**, 529 U.S. 277, 289 (2000) (same); **Schad v. Borough of Mt. Ephraim**, 452 U.S. 61, 65-66 (1981) (“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

1 On or about July 22, 2003, the State of Nevada enacted Title 37, Chapter 368A of the
2 Nevada Revised Statutes (hereinafter “Chapter 368A, or sometimes the “statute”), which
3 modified the previous “Casino Entertainment Tax” and imposed, for the first time and subject
4 to numerous and various exceptions, an excise tax on admission to any facility that provides
5 defined “live entertainment.” Comp., ¶ 22. This tax is sometimes referred to hereinafter as
6 the “Live Entertainment Tax,” or simply the “LET.” A copy of the version of Chapter 368A
7 adopted in 2003 is attached hereto as Ex. 1. As originally enacted, the tax imposed by
8 Chapter 368A was not applicable, under the terms of N.R.S. § 368A.200(5)(d), to live
9 entertainment that was not provided at a licensed gaming establishment if the facility had a
10 maximum occupancy of less than 300 persons. Ex. 1, § 368A.200(5)(d); and Comp., ¶ 25.

11
12
13 However, on June 17, 2005, Chapter 368A was amended by Assembly Bill No. 554; a copy
14 of which is attached hereto as Ex. 2. Among other things, Assembly Bill No. 554 reduced the
15 scope of the exception as contained in N.R.S. § 368A.200(5)(d) from a maximum seating
16 capacity limitation of 300 to 200. The admitted purpose of this amendment was to specifically
17 extend the tax obligation as contained in Chapter 368A to a number of the Plaintiffs’
18 establishments that were not then subject to the LET. Comp., ¶ 26; and Ex. 2,
19 § 368A.200(5)(d).³ The current codified version of Chapter 368A, incorporating the
20 amendments as contained in Assembly Bill No. 554, is attached hereto as Ex. 3, and unless
21
22
23
24

25 form official regulation”); and **Deja Vu of Nashville, Inc. v. Metropolitan Government of**
26 **Nashville and Davidson County**, 274 F.3d 377, 396 (6th Cir. 2001), *citing* **Roberts v. United**
27 **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’”).

28 ³ See also quotations to Ex. 13 set forth, *infra*.

1 designated to the contrary, any further references to the specific provisions of the Statute refer
2 to the version as found as Ex. 3.

3 The Defendants are the departments, boards, and individuals charged with enforcing
4 Chapter 368A. They take the position that the Plaintiffs are all subject to the Statute, and the
5 Defendants have required the Plaintiffs to pay the LET as mandated therein. Comp., §§ 17-20,
6 27-34, 37. Contrarily, the Plaintiffs contend the tax imposed by Chapter 368A is both illegal
7 and unconstitutional,⁴ and that even if that is not the case, they are specifically exempted from
8 paying the LET pursuant to the statutory exemptions as contained therein. Comp., §§ 38-39,
9 53. Nevertheless, under threat of criminal prosecution and the imposition of fines and other
10 penalties against them, Plaintiffs have all, beginning at various times, paid the LET mandated
11 by Chapter 368A. Comp., §§ 38.

14 Because the tax in question is specifically directed at activities protected by the First
15 Amendment, Plaintiffs have brought their action, in part, pursuant to a federal civil rights
16 statute, 42 U.S.C. § 1983, which permits actions at law and suits in equity to redress
17 deprivations of constitutional rights. Comp., §§ 1, 3, and 66.

19 **II. PROCEDURAL HISTORY**

20 In order to safeguard their constitutional rights, Plaintiffs, on April 18, 2006, filed suit
21 in the United States District Court for the District of Nevada, Case Number CV-S-06-00480-
22 RLH-RJJ, seeking similar remedies sought in the instant lawsuits⁵: A declaration that the LET
23 is unconstitutional, an injunction against the enforcement of Chapter 368A, and return of the
24

26 ⁴ Indeed, a recent state court decision in Texas has invalidated a similar type of law, and the
27 Attorney General of Tennessee previously issued an opinion declaring that a similar tax
proposed in that state would be unconstitutional. *See* Exhibits 4, and 5.

28 ⁵ As discussed herein, a subsequent action for refund, as permitted by Chapter 368A, was filed.
That action has been ordered to be “coordinated” with this case.

1 live entertainment taxes that had been paid. These same Defendants filed a motion to dismiss
2 the federal action, claiming that the Tax Injunction Act (“TIA”), 28 U.S.C. § 1341, precluded
3 the federal court from having jurisdiction over the claims because there existed a “plain,
4 speedy, and efficient remedy” in state court. The district court dismissed Plaintiffs’ complaint
5 on that basis (Ex. 6), and Plaintiffs appealed that dismissal to the United States Court of
6 Appeals for the Ninth Circuit, which affirmed the District Court’s decision on May 20, 2008,
7 in a three-paragraph order. Ex. 7.

9 In order to prevent their constitutional rights from further violation, Plaintiffs filed this
10 instant action (Case No. A533273, referred to in this Renewed Motion as well as in the
11 Department’s pending motion as “Case 1”) in December 2006. The Parties agreed, however,
12 to extend the date for the Defendants to answer that complaint because, in an abundance of
13 caution, a number these Plaintiffs filed, at approximately the same time, administrative claims
14 for refunds which, theoretically, are statutory prerequisites to the filing of an action for refund.

16 Specifically, on February 27, 2007, within the three year statutory period under N.R.S.
17 § 368A.260(1) for the filing of administrative refund claims, Plaintiffs K-Kel, Inc., Olympus
18 Garden, Inc., SHAC, LLC, The Power Company, Inc., D.Westwood, Inc. and D.I. Food &
19 Beverage of Las Vegas, LLC (identified herein as the “K-Kel Plaintiffs”) filed individual
20 requests for refunds of the LET that they had paid during certain months.⁶ A redacted copy of
21
22

23
24 ⁶ Plaintiffs Deja Vu Showgirls of Las Vegas, LLC, and Little Darlings of Las Vegas, LLC (the
25 “Deja Vu Plaintiffs”), did not become subject to the LET until Chapter 368A was amended in
26 June of 2005, to reduce the seating capacity required for a facility to be subject to the LET
27 from 300 to 200 persons. See N.R.S. § 368A.200(5)(d). Pursuant to N.R.S. § 368A.260(1), the
28 statutory three year period for those two Plaintiffs to file their administrative requests for
refunds did not then expire until mid 2008, and those Plaintiffs were not required to have, and
had not yet, filed administrative claims for refund when Case 2 was filed. However, starting in
August, 2008 (for the July 2005 tax period), the Deja Vu Plaintiffs began filing administrative
claims for refund, and responded to the inevitable denials from the Department with monthly

1 one of those refund requests is attached as Ex. 8, which illustrates that the *sole* basis for the
2 request for refund was the asserted unconstitutionality, and therefore inapplicability to the
3 Plaintiffs, of the LET.

4 The K-Kel Plaintiffs' requests for refunds were all summarily denied by the Nevada
5 Department of Taxation on April 3, 2007 (example copy attached as Ex. 9). Those Plaintiffs
6 all filed timely notices of administrative appeals, and the Nevada Tax Commission
7 ("Commission") held hearings regarding the first set of denials in July and August of 2007.
8 After the submission of materials and oral argument, the Commission denied Plaintiffs'
9 appeals in October of 2007 (Ex. 11). On January 9, 2008, in accordance with N.R.S. §§
10 368A.290(1)(b) and 368A.300(3)(b), which govern adverse decisions by the Commission, the
11 K-Kel Plaintiffs timely filed a judicial complaint for refund, declaratory relief, injunctive relief,
12 and damages. That action is also pending before this Honorable Court, and was assigned Case
13 No. A554970 (referred to in the this Renewed Motion, and the Department's pending motion
14 as "Case 2"). The parties to this action then agreed that the Defendants would answer the
15 complaint in this matter in accordance with their deadline to answer that connected lawsuit.
16
17
18

19 Defendants filed answers to both complaints on March 3, 2008, and filed their first
20 motion to dismiss Case 1 on April 18, 2008. On September, 2008, Defendants additionally
21 filed a motion for summary judgment regarding Case 1. Both of these motions were denied by
22 Judge Togliatti. Order, December 9, 2010; Ex. 12.

23
24 Correspondingly, Plaintiffs filed their initial motion for preliminary injunction in this
25 action *on June 5, 2008*. This was basically two weeks after the Ninth Circuit denied the
26

27 notices of appeal to the Commission. Subsequent to the filing of Case 2, the Department has
28 responded to the monthly notices of appeal with identical acknowledgment letters stating that
each appeal was being held in abeyance during the pendency of Case 2. A sample of the
Department's acknowledgment letter is attached hereto as Ex. 10.

1 Plaintiffs' appeal on the federal suit dismissal. The motion for preliminary injunction was
2 argued, and remained pending for 2 1/2 years. Subsequently, it was denied in part, without
3 prejudice, by Judge Togliatti (Order, January 13, 2011), leaving a separation of powers issue
4 pending. During the hearing held before this Court on February 10, 2011, this Court ruled
5 from the bench that the separation of powers issue was moot due to the fact that the Plaintiffs'
6 initial motion for preliminary injunction was dismissed (without prejudice), although the issue
7 could be revisited should a renewed motion for preliminary injunction be filed.
8

9 Plaintiffs filed an amended complaint in Case 1 on or about January 28, 2009, to add an
10 "as applied" cause of action to the challenge against the LET. In addition, Plaintiffs filed an
11 amended complaint⁷ in Case 2, on or about December 19, 2010, which added the Deja Vu
12 Plaintiffs to the action for refund (as they were now required to file administrative claims for
13 refunds, which had all been denied (*see* footnote 6, *supra*)), in addition to an "as applied" cause
14 of action.
15

16 The Department filed its pending motion for partial summary judgment and to dismiss
17 on January 25, 2011, the Plaintiffs have until February 22, 2011, to file their opposition; and
18 the motion will be heard on March 15, 2011. The reason Plaintiffs are seeking this Renewed
19 Motion for Preliminary Injunction on Order Shortening Time is so this motion can be heard on
20 the same day, thereby giving this Court a better understanding of the constitutional matters at
21 issue in these two actions.
22

23 **III. RELEVANT PROVISIONS OF CHAPTER 368A**

24
25
26

27 ⁷ It should be noted that the Defendants have failed to file an Answer to either of the Amended
28 Complaints.

1 Chapter 368A states, at N.R.S. § 368A.200(1), that “[e]xcept as otherwise provided in
2 this section, there is hereby imposed an excise tax on admission to any facility in this State
3 where live entertainment is provided.” If the live entertainment is provided at a facility with a
4 maximum occupancy of less than 7,500,⁸ the rate of tax is 10% of the admission charge to the
5 facility plus 10% of any amounts paid for food, refreshments and merchandise purchased at the
6 facility. If the live entertainment is provided at a facility with a maximum occupancy of at
7 least 7,500, the rate of the tax is 5% of the admission charged to the facility. **Id.**

9 Chapter 368A defines an “[a]dmission charge” in N.R.S. § 368A.020 as:

10 [T]he total amount, expressed in terms of money, of consideration
11 paid for the right or privilege to have access to a facility where live
12 entertainment is provided. The term includes, without limitation,
13 an entertainment fee, a cover charge, a table reservation fee, or a
required minimum purchase of food, refreshments or merchandise.

14 The term “facility” is defined in N.R.S. § 368A.060 as follows:

- 15 (a) Any area or premises where live entertainment is provided and for
16 which consideration is collected for the right or privilege of
17 entering that area or those premises if the live entertainment is
provided at:
- 18 (1) An establishment that is not a licensed gaming
19 establishment; or
- 20 (2) A licensed gaming establishment that is licensed for less
21 than 51 slot machines, less than six games, or any
22 combination of slot machines and games within those
respective limits.
- 23 (b) Any area or premises where live entertainment is provided if the
24 live entertainment is provided at any other licensed gaming
25 establishment.

26 “[L]ive entertainment” is defined in N.R.S § 368A.090 as:

27

28 ⁸ All the facilities operated by the Plaintiffs have maximum occupancies of less than 7,500
persons. Comp., ¶ 35.

1 [A]ny activity provided for pleasure, enjoyment, recreation,
2 relaxation, diversion or other similar purpose by a person or
3 persons who are physically present when providing that activity to
4 a patron or group of patrons who are physically present.

5 This definition includes, *inter alia*, “[d]ancing performed by one or more professional or
6 amateur dancers or performers.” N.R.S. § 368A.090(2)(a)(2).

7 Pursuant to N.R.S. § 368A.200(5), however, the tax imposed by Chapter 368A is not
8 applicable to certain specifically listed situations. One of those exemptions includes “live
9 entertainment that the State is prohibited from taxing under the Constitution, laws or treaties of
10 the United States or Nevada Constitution.” N.R.S. § 368A.200(5)(a).

11 Other provisions of Chapter 368A, and the numerous exceptions/exemptions thereto,
12 will be discussed below.

13 **IV. POINTS AND AUTHORITIES**

14 **A. INJUNCTIVE RELIEF SHOULD BE GRANTED.**

15 The power of this Court to issue the injunctive relief requested here derives from Art. 6,
16 § 6, of the Nevada Constitution, N.R.S. § 33.101, and N.R.C.P. § 65. Injunctive relief should
17 certainly be granted here. All courts should hasten to grant injunctive relief where fundamental
18 constitutional rights are involved, and where there is a chance that those rights will be curtailed
19 or even only just “chilled.” *See, e.g., Sammartano v. First Judicial Dist.*, 303 F.3d 959, 973-
20 74 (9th Cir. 2002). This is the solemn responsibility of the courts to guard and enforce each
21 and every constitutionally protected right. *Zwickler v. Koota*, 389 U.S. 241, 248 (1967).

22 The Nevada Supreme Court has set forth the following criteria to establish whether
23 injunctive relief should be granted:
24

25 A party seeking the issuance of a preliminary injunction bears the
26 burden of establishing (1) a likelihood of success on the merits;
27
28

1 and (2) a reasonable probability that the non-moving party's
2 conduct, if allowed to continue, will cause irreparable harm for
3 which compensatory damage is an inadequate remedy.

4 S.O.C., Inc. v. Mirage Casino-Hotel, 117 Nev. 403, 408, 23 P.3d 243 (2001). See also Univ.
5 & Comm. College Sys. of Nev. v. Nevadans for Sound Gov't, 120 Nev. 712, 721, 100 P.3d
6 179, 187 (2004). Courts also "weigh the potential hardships to the relative parties and to
7 others, and the public interest," when considering whether a preliminary injunction should
8 issue. Id.

9 As will be discussed immediately below, Plaintiffs satisfy each of these standards.

10 1. PLAINTIFFS HAVE A SUBSTANTIAL LIKELIHOOD OF
11 SUCCESS ON THE MERITS.

12 a. The Unconstitutionality of Taxing First Amendment
13 Activities.

14 It is unconstitutional to *directly* tax the engagement and First Amendment protected
15 activities. The Supreme Court has noted:

16 It is one thing to impose a tax on the income or property of a
17 preacher, it is quite another thing to exact a tax from him for the
18 privilege of delivering a sermon. The tax imposed [here] is a flat
19 license tax, the payment of which is a condition of the exercise of
20 these constitutional privileges. The power to tax the exercise of a
privilege is the power to control or suppress its enjoyment.

21 Murdock v. Commonwealth of Pennsylvania, 319 U.S. 105, 112 (1943) (emphasis and
22 clarification added).

23 Stated somewhat differently:

24 A power to tax differentially, as opposed to a power to tax
25 generally, gives a government a powerful weapon against the
26 taxpayer selected. When the State imposes a generally applicable
27 tax, there is little cause for concern. We need not fear that a
28 government will destroy a selected group of taxpayers by
burdensome taxation if it must impose the same burden on the
rest of its constituency.

1 * * *

2 Further, *differential treatment*, unless justified by some special
3 characteristic of the press, suggests that the goal of the regulation
4 is not unrelated to suppression of expression, and such a goal is
5 *presumptively unconstitutional*.

6 Minneapolis Star and Tribune Co. v. Minnesota Commissioner of Revenue, 460 U.S. 575,
7 585 (1983) (emphasis added).

8 The reason for this is simple:

9 *We note that the general applicability of any burdensome tax law*
10 *helps to ensure that it will be met with widespread opposition.*
11 *When such a law applies only to a single constituency, however,*
12 *it is insulated from this political constraint.*

13 Leathers v. Medlock, 499 U.S. 439, 445 (1991) (emphasis added).

14 There are three ways that a tax may violate the First Amendment. First, a direct tax
15 specifically on First Amendment freedoms is unconstitutional.

16 *Freedom of speech, freedom of the press, freedom of religion are*
17 *available to all, not merely to those who can pay their own way . . .*
18 *. [I]t could hardly be denied that a tax laid specifically on the*
exercise of those freedoms would be unconstitutional.

19 Murdock, 319 U.S. at 108, 111 (emphasis added).

20 Second, a tax that targets a narrowly defined group of speakers is unconstitutional, as
21 set forth by the Supreme Court:

22 A tax is also suspect if it targets a small group of speakers.

23 * * *

24 The danger from a scheme that targets a small number of speakers
25 is the danger of censorship; a tax on a small number of speakers
26 runs the risk of affecting only a limited range of views. The risk is
27 similar to that from a content-based regulation: It will distort the
28 market for ideas.

Leathers, 499 U.S. at 447-448.

1 Third, a *content-based tax* is unconstitutional. Leathers, 499 U.S. at 447 (“Finally, for
2 reasons that are obvious, a tax will trigger heightened scrutiny under the First Amendment if it
3 discriminates on the basis of the content of taxpayer speech”).

4 The Live Entertainment Tax violates the First Amendment for all three of these
5 reasons. It is unconstitutional under the first test in that it is, *irrefutably*, a tax “laid specifically
6 on the exercise of [First Amendment] freedoms” (*i.e.*, live entertainment). Murdock, 319 U.S.
7 at 108 (clarification added). In regard to the second test, the large number of exemptions from
8 the LET demonstrates that the tax targets a “narrowly defined group of speakers,” and that its
9 focus is, indeed, on one specific form, or content, of live entertainment; that being exotic
10 dancing. These latter two matters are the focus of the discussion below.

13 The Applicable Level of Constitutional Scrutiny and Burden of Proof.

14 Taxes falling into any of the three categories above are subject to strict constitutional
15 scrutiny, and the *State of Nevada* has the burden to demonstrate the constitutionality of its
16 taxing scheme of live entertainment. *See, e.g., Arkansas Writers’ Project, Inc. v. Ragland*,
17 481 U.S. 221, 231 (1987) (“*Arkansas faces a heavy burden* in attempting to defend its
18 content-based approach to taxation of magazines. *In order to justify such differential*
19 *taxation, the State must show that its regulation is necessary to serve a compelling state*
20 *interest and is narrowly drawn to achieve that end*”), citing Minneapolis Star, 460 U.S. at
21 591-92; Clark v. City of Lakewood, 259 F.3d 996, 1004 (9th Cir. 2001) (“*In all situations . .*
22 *. the government has the burden of proof to justify burdening freedom of expression*”) (all
23 emphasis added). In addition, like all regulations that are subject to strict constitutional
24 scrutiny, a tax upon protected expression is, as referenced above, “*presumptively*
25 *unconstitutional.*” Minneapolis Star, 460 U.S. at 585 (emphasis added).
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1 b. The Live Entertainment Tax is Targeted to a “Narrowly
2 Defined Group of Speakers” and is an Impermissible
3 Content-Based Tax.

4 The LET is a direct tax upon protected expression, and only upon one form of
5 entertainment (applying only to that which is “live”). It does not even tax that particular mode
6 of expression in a unified and even fashion. This is because a wide variety of “live
7 entertainment,” based upon the *content* of that entertainment, is specifically and statutorily
8 *exempted* from the scope of the tax.

9 Initially, the definition of “live entertainment” itself contains numerous *exceptions*,
10 which *exclude*, without limitation, the following activities:

- 11 (1) *Instrumental or vocal music*, which may or may not be supplemented
12 with commentary by the musicians, in a restaurant, lounge or similar
13 area if such music does not routinely rise to the volume that interferes
14 with casual conversation and if such music would not generally cause
15 patrons to watch as well as listen;
- 16 (2) *Occasional performances* by employees whose primary job function is
17 that of preparing, selling or serving food, refreshments or beverages to
18 patrons, if such performances are not advertised as entertainment to the
19 public;
- 20 (3) Performances by performers of any type if the performance occurs in a
21 licensed gaming establishment other than a licensed gaming
22 establishment that is licensed for less than 51 slot machines, less than 6
23 games, or any combination of slot machines and games within those
24 respective limits, as long as the *performers stroll continuously*
25 *throughout the facility*;
- 26 (4) Performances in areas other than in nightclubs, lounges, restaurants or
27 showrooms, if the performances occur in a licensed gaming
28 establishment other than a licensed gaming establishment that is licensed
 for less than 51 slot machines, less than 6 games, or any combination of
 slot machines and games within those respective limits, which *enhance*
 the theme of the establishment or attract patrons to the areas of the
 performances, as long as any seating provided in the immediate area of
 the performers is limited to seating at slot machines or gaming tables;

- 1 (5) Television, radio, closed circuit or Internet broadcasts of live
2 entertainment;
- 3 (6) *Entertainment provided by a patron* or patrons, including, without
4 limitation, singing by patrons or dancing by or between patrons;
- 5 (7) *Animal behaviors* induced by animal trainers or caretakers primarily for
6 the purpose of education and scientific research; and
- 7 (8) An occasional activity, including, without limitation, dancing, that:
- 8 (I) Does not constitute a performance;
- 9 (II) Is not advertised as entertainment to the public;
- 10 (III) *Primarily serves to provide ambience to the facility*; and
- 11 (IV) Is conducted by an employee whose primary job function is not
12 that of an entertainer.

13 N.R.S. § 368A.090(b) (emphasis added).

14 Then, the *exemptions* to the tax contained in N.R.S. § 368A.200(5) apply to:

- 15 (a) *Live entertainment that this State is prohibited from taxing under the*
16 *Constitution, laws or treaties of the United States or the Nevada*
17 *Constitution.*⁹
- 18 (b) Live entertainment that is provided by or entirely for the benefit of a
19 *nonprofit religious, charitable, fraternal or other organization* that
20 qualifies as a tax-exempt organization pursuant to 26 U.S.C. § 501(c), or
21 a nonprofit corporation organized or existing under the provisions of
22 chapter 82 of NRS.
- 23 (c) Any *boxing contest* or exhibition governed by the provisions of chapter
24 467 of NRS.
- 25 (d) Live entertainment that is not provided at a licensed gaming
26 establishment if the facility in which the live entertainment is provided
27 has a maximum occupancy of less than 200 persons.
- 28 (e) Live entertainment that is provided at a licensed gaming establishment
that is licensed for less than 51 slot machines, less than [six] 6 games, or
any combination of slot machines and games within those respective

⁹ If it is determined that Defendants cannot specifically tax Plaintiffs' protected activities, this exemption will be triggered.

1 limits, if the facility in which the live entertainment is provided has a
2 maximum occupancy of less than 200 persons.

- 3 (f) Merchandise sold outside the facility in which the live entertainment is
4 provided, unless the purchase of the merchandise entitles the purchaser
5 to admission to the entertainment.
- 6 (g) Live entertainment that is provided at a *trade show*.
- 7 (h) Music performed by *musicians who move constantly through the*
8 *audience* if no other form of live entertainment is afforded to the patron
- 9 (i) Live entertainment that is provided at a licensed gaming establishment at
10 private meetings or dinners attended by members of a particular
11 organization or by a casual assemblage if the purpose of the event is not
12 primarily for entertainment.
- 13 (j) Live entertainment that is provided in the common area of a shopping
14 mall, unless the entertainment is provided in a facility located within the
15 mall.
- 16 (k) *Food and product demonstrations* provided at a shopping mall, a craft
17 show or an establishment that sells grocery products, housewares,
18 hardware or other supplies for the home.
- 19 (l) *Live entertainment that is incidental to an amusement ride, a motion*
20 *simulator or a similar digital, electronic, mechanical or*
21 *electromechanical attraction*. For the purposes of this paragraph, live
22 entertainment shall be deemed to be incidental to an amusement ride, a
23 motion simulator or a similar digital, electronic, mechanical or
24 electromechanical attraction if the live entertainment is:
- 25 (1) Not the predominant element of the attraction; and
26 (2) Not the primary purpose for which the public rides, attends or
27 otherwise participates in the attraction.
- 28 (m) Live entertainment that is provided to the public in an outdoor area,
without any requirements for the payment of an admission charge or the
purchase of any food, refreshments or merchandise.
- (n) An *outdoor concert*, unless the concert is provided on the premises of a
licensed gaming establishment.
- (o) Beginning July 1, 2007, race events scheduled at a race track in this
State as a part of the *National Association for Stock Car Auto Racing*

1 *Nextel Cup Series*, or its successor racing series, and all races associated
2 therewith.

3 (p) Beginning July 1, 2007, a *baseball contest*, event or exhibition
4 conducted by professional minor league baseball players at a stadium in
5 this State.

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

10 N.R.S. § 368A.200(5) (emphasis added).

11 Because many of these exceptions/exemptions determine whether an entity or
12 individual is subject to the tax based upon the *content* of the live entertainment, it is clear that
13 the LET is a content-based tax and is subject to strict constitutional scrutiny. More
14 specifically, these exceptions/exemptions have been gerrymandered in such a fashion to
15 basically ensure that with the exception of casino entertainment (which was already subject to
16 tax pursuant to the prior casino entertainment tax), almost the only remaining live
17 entertainment that is subject to the tax is adult entertainment. If there is any doubt from a
18 facial reading of the Statute that it was meant to specifically tax live adult entertainment, any
19 such doubt is quickly eradicated by reviewing the legislative history, discussed *infra*, which
20 clearly demonstrates such facial targeting.

21 It is constitutionally impermissible to apply a tax on protected expression in such a
22 discriminatory, content-based manner. As the Supreme Court held in a case where a tax was
23 “not evenly applied to all magazines” and treated “some magazines less favorably than others”:
24 “not evenly applied to all magazines” and treated “some magazines less favorably than others”:

25 Indeed, this case involves a more disturbing use of selective
26 taxation than Minneapolis Star, because the basis on which
27 Arkansas differentiates between magazines is particularly
28 repugnant to First Amendment principles: *a magazine’s tax status depends entirely on its content*. Above all else, the First Amendment means the government has no power to restrict

1 *expression* because of its message, its ideas, its subject matter, or
2 its content. . . . Regulations which permit the Government to
3 discriminate on the basis of the content of the message cannot be
4 tolerated under the First Amendment.

5 Arkansas Writers Project, 481 U.S. at 229 (citations omitted, emphasis in original and
6 added).

7 The United States Supreme Court has further stated that “[e]xemptions from an
8 otherwise legitimate regulation of a medium of speech may be noteworthy for a reason quite
9 apart from the risk of view point and content discrimination: They may diminish the credibility
10 of the government’s rationale for restricting speech in the first place.” City of Ladue v.
11 Gilleo, 512 U.S. 43, 52 (1994). There, the Court declared as unconstitutional an ordinance
12 banning outdoor signs (as being impermissibly content-based) because the law included a
13 variety of exceptions of signs that were nevertheless permitted.¹⁰

14 The burden on the State of Nevada is thus to establish that a compelling governmental
15 interest is furthered “that cannot achieve without differential taxation.” Minneapolis Star, 460
16 U.S. at 581. More importantly, that governmental interest *cannot* be the simple “raising of
17 revenue.” As the Supreme Court as noted, that governmental interest “[s]tanding alone, cannot
18 justify the discriminatory tax on First Amendment protected activities.” Id. at 585-86. The
19 Court has noted that the “state could raise the revenue by *taxing businesses generally*,

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23 ¹⁰ See also Church of Lukumi v. Hialeah, 508 U.S. 520, 535-540 (1993) (Court found that
24 exemptions to three city ordinances banning the killing of animals rendered the laws to be
25 content-based, and therefore unconstitutional, as being directed at those practicing the Santeria
26 religion, and that the “pattern of exemptions parallels the pattern of narrow prohibitions. Each
27 contributes to the gerrymander”); and U.S. v. Eichman, 495 U.S. 310, 317-19 (1990) (Court
28 found the facially neutral Flag Protection Act content-based and therefore unconstitutional
because although it prohibited burning of the flag, it exempted the burning of a “worn or
soiled” flag as a means of disposal. The exception was an act “traditionally associated with
patriotic respect for the flag,” and demonstrated content targeting by preferring patriotic rather
than disrespectful acts upon a flag).

1 avoiding the censorial threat implicit in a tax that singles out” protected expression. Id. Here,
2 the State of Nevada simply cannot carry the burden of demonstrating that there is a compelling
3 governmental interest to differentially tax certain First Amendment protected live
4 entertainment. In fact, the *only* (impermissible) governmental interest involved here seems to
5 be the desire to foster by subsidy (by not taxing) certain forms of entertainment and to, at the
6 same time, inhibit the exercise of other modes of expression. This is unconstitutional.
7

8 In this case, the numerous exemptions reveal that beyond casino entertainment, the
9 LET is in fact targeted principally at adult entertainment facilities that are protected by the First
10 Amendment. The LET is therefore targeted to a “narrowly defined group of speakers” and is
11 content specific; it is subject to strict scrutiny; and it is invalid.
12

13 **d. The Legislative History Demonstrates the Targeting and**
14 **Content-Based Nature of the Live Entertainment Tax.**

15 The legislative history unequivocally bears out the discriminatory intent of the
16 legislature when it enacted the LET. A salient example of this is the “Minutes of the Meeting
17 of the Assembly Committee on Commerce and Labor” recorded during the 73rd Congressional
18 Session on May 16, 2005, attached hereto as Ex. 13.¹¹ This was the committee meeting where
19 it was debated whether to use the language “adult live entertainment” to better capture adult
20 clubs in the amended version or whether that would make the target of the LET *too obvious to*
21 *the courts:*
22
23
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25 ¹¹ The Plaintiffs duly recognize that this legislative history reflects debate on how the 2003
26 legislation should be modified, rather than on the original enactment of the 2003 legislation.
27 However, this does not detract from the fact that the history unequivocally demonstrates that
28 the 2003 legislation’s tax burden befell live adult entertainment in a greatly disproportionate
manner, and was meant to do so. Indeed, the discussion in 2005 indicates that the tax failed to
bring in the intended revenue because the 300-seat requirement, in action, excluded many of
the adult clubs that were *intended as a revenue source.*

1 **Chairwoman Buckley:**

2 *My biggest concern with the bill is its constitutionality. . . . I'm*
3 *concerned that if we just put ["live adult entertainment,"] that*
4 *might be held unconstitutional.* I wonder if a better approach
5 might be to pick out a few more things like the racetrack and
6 sporting events, but to delineate all those separate ones and leave it
7 like that. We could fix and refine the language to make sure we're
8 more careful and more able to describe things that might be caught
9 up *rather than put into our statute the phrase "adult*
10 *entertainment." which puts a big red flag on it for the courts.*
11 What are your thoughts on that?

12 **Senator Titus:**

13 At one time the brothels were included, so that would be broader.
14 You can make the argument that this is a special kind of business
15 that poses special kinds of social problems and therefore you can
16 attach them. It's worth doing, and if an elected court in the state
17 wants to challenge it, that's fine. None of the parts of the
18 Constitution are absolute and they're all subject to interpretation.
19 They interpreted the property tax we recently passed as maybe
20 constitutional, and we can see how flexible the Constitution is in
21 Nevada. I think it's worth the chance to put it in there.

22 ASSEMBLY COMMITTEE ON COMMERCE AND LABOR OF NEVADA, 73d Sess., p. 19 (May 16,
23 2005) (emphasis and clarification added), Ex. 13.

24 The Minutes also elucidate that the intent behind the tax was to further ratchet up the
25 tax burden on adult entertainment, even though adult entertainment was already paying the vast
26 majority of the existing non-casino tax:

27 **Senator Dina Titus, Clark County Senatorial District No. 7:**

28 The tax package from the 2003 Legislative Session included the
entertainment tax, which quickly proved a bookkeeping nightmare.
It also failed to generate the revenue we had anticipated *and it*
didn't adequately bring in a group some of us intended to be
covered, which are the striptease clubs that have proliferated,
primarily in southern Nevada.

* * *

It will do a better job of capturing adult live entertainment
because it eliminates that 300 seating requirement.

1 * * *

2 *Certainly the intent of the live entertainment tax was not to get*
3 *nudist colonies, but to get striptease clubs.*

4 * * *

5 **Chairwoman Buckley:**

6 I wonder if we could do it in a way that's a little broader but gets at
7 the problems so we could avoid losing the revenue. *We're getting*
8 *the most revenue from adult entertainment clubs, which is \$6*
9 *million dollars, the highest amount paid under the live*
10 *entertainment tax. The next one is race tracks at \$1.5 million¹²,*
11 *but everything else pales in comparison to how much they're*
12 *bringing in now, and I would hate to give them back their \$6*
13 *million.*

14 **Id.** at 17-19 (names bolded in original, emphasis added), Ex. 13.

15 This legislative history also explains that NASCAR racing and other sporting events
16 were exempted from the bill because they were believed to be "family oriented":

17 **Senator Dina Titus, Clark County Senatorial District No. 7:**

18 This eliminates seating requirements, which were problematic in
19 the original bill. *It eliminates sporting events, which are family*
20 *oriented.* We believe those are attended by local families, and
21 eliminating this would help to get a second NASCAR race, an all-
22 star basketball game, and a baseball team. . . .

23 * * *

24 **Senator Titus:**

25 I agree with that. *The 300-seat requirement has kept a lot of*
26 *those clubs from paying.* If you decide to amend this and do
27 something with it, be sure to keep that in mind because that's
28 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.

¹² In a time of needed tax revenues, it is, therefore, noteworthy that the *second highest source of revenue*, the racetrack, was then eviscerated by the "NASCAR Exemption" adopted in 2005 as part of the statutory revisions, discussed immediately below.

1 **Id.** (emphasis added)

2 The 300-person seating requirement was, in fact, lowered to a 200-person seating
3 requirement, even though adult entertainment was already paying four-times more in taxes than
4 the next contributor under the LET. N.R.S. § 368A.200(5)(d),(e). The next largest contributor
5 under the previous scheme was racetracks. But racetrack revenues are now eliminated via the
6 NASCAR exception and via the exception for all “[l]ive entertainment that is provided to the
7 public in the outdoor area. . . .” N.R.S. § 368A.200(5)(o), and (m). Consequently, in the
8 Committee’s own words, the taxes paid by any remaining providers of live entertainment that
9 the legislature forgot to exempt “*pale in comparison*” to the amounts paid by adult
10 entertainment establishments. ASSEMBLY COMMITTEE ON COMMERCE AND LABOR OF NEVADA,
11 73d Sess., p. 19 (May 16, 2005), Ex. 13 (emphasis added).

14 Hence, it is clear that this is a narrowly targeted *and* a content-based tax that applies to,
15 and indeed exempts, certain speech, and cannot pass constitutional muster. Therefore,
16 Plaintiffs have demonstrated that they have a substantial likelihood of success on the merits of
17 their claims.

19 e. The Limited Discovery Produced by Defendants
20 Demonstrates the Content-Based Nature of the Live
21 Entertainment Tax.

22 For almost two years now, the parties have been engaging in disputes regarding the
23 discovery to which Plaintiffs should be entitled, resulting in a Report and Recommendation
24 from the Discovery Commissioner. Plaintiffs objected to part of that ruling, which is currently
25 pending before this Court. Among other arguments, the Department claims that it cannot
26 specifically identify the businesses which are paying the LET, nor can it identify those
27 businesses which sought and/or were granted an exemption from paying the LET.
28

1 Nevertheless, the Department has produced charts (albeit with mathematical errors) that
2 set forth vague, general, categories of businesses and how much of the LET those general
3 categories pay. The most recent chart is found as Ex. 14. That chart shows that of businesses
4 which pay the 10% rate of the LET, "Gentlemen's Clubs,"¹³ *by far*, pay the majority of the tax.
5 For example, in fiscal year 2004, out of a total LET paid (by 30 different categories of business
6 listed) of \$3,286,777.60, Gentlemen's Clubs paid \$3,001,494.94, leaving the remaining
7 \$285,282.66 of LET paid divided up by the businesses in the other ill-defined and unidentified
8 29 categories (or *91.3%* of the tax). The amounts paid by the Gentlemen's Club category
9 increased after Chapter 368A was amended in 2005 in order to lower the seating capacity so as
10 to include more of the adult entertainment establishments, as evidenced by the legislative
11 history referenced above. For fiscal year 2005, Gentlemen's Clubs paid \$5,036,598.82 of the
12 total \$6,640,867.85 LET collected (75%); in fiscal year 2006, Gentlemen's Clubs paid
13 \$5,441,714.56 of the total \$6,905,297.84 LET collected (79%); in fiscal year 2007,
14 Gentlemen's Clubs paid \$6,890,235.73 of the total \$8,548,942.94 LET collected (80%); in
15 fiscal year 2008, Gentlemen's Clubs paid \$7,193,498.60 of the total \$8,722,556.13 LET
16 collected (82%); and in fiscal year 2009, Gentlemen's Clubs paid \$6,812,760.62 of the total
17 \$8,266,045.88 (82%). Ex. 14.
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24 ¹³ This is presumably the category under which Plaintiffs fall. However, the Department has
25 refused to define or identify specific businesses in vague categories such as "Drinking Place
26 (Alcoholic Beverages)," "Gift, Novelty and Souvenir Stores," "Independent Artists: Writers
27 and Performers," "Musical Groups and Artists," "Promoters of Performing Arts, Sports, and
28 Similar Events with Facilities," "Promoters of Performing Arts, Sports, and Similar Events
Without Facilities," and "Unclassified," that, while not "Gentlemen's Clubs," may nevertheless
provide limited "adult" (*i.e.*, non-"family oriented") entertainment, which is the clear target of
this tax. In fact, Ex. 14 demonstrates that, over time, the only other category to significantly
increase in taxes paid are the amorphous "Drinking Places (Alcoholic Beverages)."

1 Since the Department is refusing to disclose any more information, including how
2 many (and what types of) businesses requested and were granted exemptions from paying the
3 LET, it is hard to fully evaluate the extent to which adult entertainment is shouldering the
4 burden. However, just by reviewing the Department's own chart, it is clear that most of the
5 LET paid by businesses in the 10% category (which itself is comprised of 30 categories of
6 businesses) is paid by those in the Gentlemen's Club category, which ostensibly encompasses
7 the Plaintiffs and other adult entertainment facilities (*over 82%*). Given the legislative history
8 and the limited discovery disclosed by the Defendants to date, it is clear that the LET is
9 targeted to a narrowly defined group of taxpayers and is content-based.
10

11 **2. DEFENDANTS' CONDUCT HAS CAUSED, AND IF NOT**
12 **CHECKED WILL CONTINUE TO CAUSE, IRREPARABLE**
13 **HARM TO THE PLAINTIFFS AND TO OTHERS.**

14 The irreparable harm suffered, and potentially suffered, by the Plaintiffs comes from at
15 least five different areas.

16 First, involves the suppression of the profits of the Plaintiffs. As noted above,
17 Plaintiffs' activities are expression protected by the First Amendment. In regard to these
18 protections, it makes absolutely no difference that N.R.A. § 368A.200(5) limits the tax's
19 application to for-profit entertainment. "Those who make their living through exercise of First
20 Amendment rights are no less entitled to its protection than those whose advocacy or
21 promotion is not hitched to a profit motive." Cammarano v. U.S., 358 U.S. 498, 514 (1959).
22 In fact, protecting one's ability to turn a profit from First Amendment activity benefits free
23 expression, as can be readily cognized in the publication realm. See Pacific Gas and Elec. Co.
24 v. Public Utilities Com'n of California, 475 U.S. 1, 32, 106 (1986) ("...protection of an
25 author's profit incentive furthers rather than inhibits expression. . ."), citing Harper & Row
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1 Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 555-59 (1985). See also Simon &
2 Schuster, 502 U.S. 105 (1991) (Court invalidated law that required convicted criminals to
3 disgorge profits made from books written about their criminal activities).

4 However, through Chapter 368A, the exercise of these constitutional rights is
5 *conditioned upon* and burdened by the payment of a substantial fee in the form of a tax. If the
6 Plaintiffs are unable to pay the tax imposed by Chapter 368A, they cannot then engage in the
7 First Amendment activities encompassed by the regulations. In addition, if the Plaintiffs do
8 not pass on the tax to their customers, there is no question then that this tax directly reduces the
9 profits of the Plaintiffs, and for this reason alone irreparably injures the Plaintiffs.
10

11 Second, if the Plaintiffs pass this tax burden onto their customers, there is still the
12 incurrence of irreparable injury. Additional tax burdens would lead, if passed onto the
13 customers, to increases in the costs to people desiring to view such entertainment, which from
14 basic economic theory has the significant potential of reducing the customer base (the
15 customers themselves being imbued by First Amendment rights in order to be able to *view* such
16 entertainment) - - and therefore reduce the engagement in First Amendment protected activities
17 - - of those persons who have sufficient means to pay the increased fees in order to be able to
18 view such entertainment. This would reduce the engagement in these First Amendment
19 protected activities, and creates irreparable harm.
20

21 Moreover, if the tax is just paid out of the general operating budgets of the Plaintiffs'
22 establishments (without passing the costs directly onto customers), that money could otherwise
23 be used (if not to pay the invalid tax) to purchase, among other things, additional advertising
24 (an activity itself protected by the First Amendment), to remodel the facilities, and to expand
25 the physical size of such establishments; all matters that would have the tendency to *increase*
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1 the engagement in protected expression upon the premises of each of the named Plaintiffs. The
2 Live Entertainment Tax therefore, and without question, negatively impacts upon the
3 engagement in expressive activities.

4 This burden on First Amendment freedoms has caused, and unless enjoined will
5 continue to cause, irreparable injury to Plaintiffs and other providers of live entertainment.
6 “The loss of First Amendment freedoms, for even minimal periods of time, unquestionably
7 constitutes irreparable injury.” **Brown v. California Dept. Of Transp.**, 321 F.3d 1217, 1125-
8 126 (9th Cir. 2003), *quoting* **Elrod v. Burns**, 427 U.S. 347, 373 (1976) (plurality). Indeed,
9 First Amendment violations are widely and regularly used to justify the issuance of preliminary
10 injunctions. *See, e.g.*, **Pacific Frontier v. Pleasant Grove City**, 414 F.3d 1221, 1235 (10th
11 Cir. 2005); **Tucker v. City of Fairfield**, 398 F.3d 457, 464 (6th Cir. 2005); **Newsom ex rel.**
12 **Newsom v. Albemarle County School Bd.**, 354 F.3d 249, 261 (4th Cir. 2003); **Iowa Right to**
13 **Life Committee, Inc. v. Williams**, 187 F.3d 963, 970 (8th Cir. 1999).

14 Third, there is an even greater compelling reason that establishes why Plaintiffs satisfy
15 the “irreparable harm” component, and that is the inability of the plaintiffs to recover damages
16 for the injuries discussed above. Irreparable harm occurs when a damage award would be
17 insufficient to remedy the Plaintiffs’ injuries. **Hansen v. Eighth Judicial Dist. Court ex rel.**
18 **County of Clark**, 116 Nev. 650, 658, 6 P.3d 982 (2000). Here, according to the Defendants,
19 Plaintiffs *cannot* obtain a damage award for any injuries sustained to their businesses.

20 Plaintiffs first filed this action in Federal Court, but that suit was dismissed on the basis
21 of the Federal Anti-Injunction Act, 28 U.S.C. § 1341. In that action, the Defendants asserted
22 Eleventh Amendment immunity from damage suits, and the District Court agreed that the State
23 and the Defendants are in fact immune from such damage claims. Ex. 6, p. 6. Consequently,
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1 Plaintiffs are precluded from being awarded damages in order to fully compensate them for
2 their injuries.

3 Therefore, if this Court declines to enter preliminary injunctive relief and these
4 Plaintiffs are ultimately victorious on the merits in regard to the unconstitutionality Chapter
5 368A, they and other providers of live entertainment will have been deprived of their
6 fundamental constitutional rights for which a compensatory damage award can never make
7 them whole. More to the point, however, according to the Defendants, Plaintiffs are simply
8 *barred* from seeking any such compensatory damages.

10 Fourth, and irrespective of the *damages* discussed above, is the *potential inability of*
11 *the Plaintiffs to even recover the millions of dollars paid by Plaintiffs since 2004 in Live*
12 *Entertainment Taxes if this Court ultimately rules the Statute unconstitutional or finds that*
13 *the Plaintiffs are entitled to one of the statutory exemptions/exceptions.* During the first
14 hearing that occurred before the Commission on July 9, 2007, the Department, through legal
15 counsel (who is the *same attorney* representing the Defendants in both Cases 1 and 2), stated
16 that it was:
17
18

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

24 Transcript (Ex. 15), page 30, lines 8-14.

25 N.A.C. § 368A.170 (Ex. 16) regulates the “over-collection” of the subject taxes, which
26 is defined in part as “any amount collected as a tax on live entertainment that is exempt from
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1 taxation pursuant to subsection 5 of N.R.S. 368A.200.¹⁴ N.A.C. § 368A.170(1). The
2 regulation states that any over-collection “must, if possible, be refunded by the taxpayer to the
3 patron from whom it was collected.” N.A.C. § 368A.170(2). The taxpayer is required to “use
4 all practical methods to determine any amount to be refunded pursuant to subsection 2 and the
5 *name and address* of the person to whom the refund is to be made.” N.A.C. § 368A.170(3)(a)
6 (emphasis added). Astonishingly, in an unbelievable bout of Orwellian logic, the regulations
7 further dictate that if the taxpayer cannot “refund an over-collection,” it must “*pay the over-*
8 *collection to the department.*” N.A.C. § 368A.170(4) (emphasis added). Consequently, according
9 to the very language of the regulation, *if the State illegally collects a tax, the taxpayer is required upon*
10 *the determination of illegality to nevertheless pay the illegally collected tax over to the State of*
11 *Nevada!*

12
13
14 The initial Commission hearing was the first occasion that any of the Defendants raised
15 the applicability of N.A.C. § 368A.170.¹⁵ When the hearing continued on August 6, 2007,
16

17
18 ¹⁴ Subsection 5 of N.R.S. § 368A.200 states that the LET does not apply to, among other
19 things, “[i]ve entertainment that this state is prohibited from taxing under the Constitution,
20 laws or treaties of the United States or the Nevada Constitution.” N.R.S. § 368A.200(5)(a).
21 Consequently, if Plaintiffs’ arguments are correct that the LET violates both the federal and
state Constitutions, the exemption under N.R.S. § 368A.200(5)(a) applies and there has then
been an “over-collection” of the tax.

22 ¹⁵ It should be noted that the Defendants’ position before this Court is not the same that it took
23 in the federal courts. Defendants originally assured the federal courts that the Nevada state
24 court proceedings allowed for a full recovery of amounts paid under the LET. Then, while the
25 matter was pending before the Ninth Circuit, Plaintiffs’ appeal of the denial of their
26 administrative claims for refunds came before the Nevada Tax Commission. It was only then
27 that the Department took the position that the tax was not on Plaintiffs, but their customers.
28 Plaintiffs then moved the Ninth Circuit to supplement the record to reflect this development,
which was denied. Attached hereto as Ex. 17 (which was originally attached as Exhibit 8 to
Plaintiffs’ Opposition to Defendant’s first Motion to Dismiss in Case 1) is the Defendants’
“Answering Brief” filed before the Ninth Circuit. In this document, the Defendants contend
that so long as Plaintiffs have not passed the tax along to their customers (which Plaintiffs have
verified they have not), Plaintiffs would be entitled to a full refund of the LET tax paid. Ex. 17,

1 Bradley Shafer, counsel for the taxpayers and one of the attorneys for the Plaintiffs here,
2 addressed N.A.C. § 368A.170 and the Department's insistence that in order to obtain a refund,
3 a taxpayer has to identify each patron who paid an admission charge, or for food, drink or
4 merchandise, and demonstrate that the taxpayer knows where the patron lives or works in order
5 to "reimburse" the refund to that individual. He explained that:

6
7 [W]hat the Department would say is that if a customer buys Coca-Cola, for us to get a
8 refund of this tax, we have to get the name and address of every person buying a Coca-
9 Cola or a beer coming in the facility and I don't think any of you in your real life
10 experiences have ever had any time where you went to buy food and drink and had to
11 give your name and address, and that doesn't happen here.

12 Transcript (Ex. 18), page 10, lines 14-21.

13 In addition to the arguments regarding the taxpayers' inability to locate each patron
14 who paid an admission or who purchased food, drink or merchandise, the K-Kel Plaintiffs
15 further informed the Commission that the tax was paid not by the patrons but, rather, by the
16 clubs themselves. The K-Kel Plaintiffs introduced affidavits from four of the Plaintiffs which
17 established that "none of the facilities have raised their admission fees in order to recoup the
18 tax, the tax merely is deducted out of the general receipts of the business and it's the
19 businesses' money that we're trying to get back." Transcript (Ex. 18), page 10-11, lines 22-25
20 and 1. The four affidavits submitted are attached hereto as Ex. 19.

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

24
25 To the extent that the tax is applicable *it's to be collected from the patrons of*
26 *the gentlemen's clubs*, and in fact, there is to be an accounting or should have

27
28 pp. 14-15, 20. Nevertheless, Plaintiffs have the significant prospect of suffering irreparable
harm given that the Defendants *now* contend that Plaintiffs may not, indeed, be entitled to a tax
refund *even if they prevail in this action*.

1 been an accounting by the gentlemen's club six days after they indicated that
2 they were entitled to a refund.

3 I think that they may have some approach to that and it may lead to further
4 argument, so I think it's still an issue that is applicable and we'll have to
5 address.

6 Transcript (Ex. 18), page 9, lines 5-13 (emphasis added).

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

10 I know we've reserved time to argue this, but *the law does require that that*
11 *admission charge be collected from the patrons* and I believe it also requires
12 that if it's included in the ticket or included in the admission charge, then there
13 has to be some notification of that.

14 To the extent that it's not included as was stated here today, that it's just
15 being paid on behalf of the patrons, then I think *it's difficult to say that the*
16 *patrons aren't paying it even though they don't know that they are not. The*
17 *law requires that it's being collected from the patrons* and the appellants are
18 paying it on behalf of the patrons.

19 Transcript (Ex. 18), pages 74-75, lines 19-25, 1-6 (emphasis added).

20 Commissioner Turner then verified this position:

21 Counsel for the taxpayers, Mr. Shafer, argued that this is really a tax that's
22 being absorbed by the businesses he represents.

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

26 Transcript (Ex. 18), pages 92-93, lines 21-25, 1-2 (emphasis added).¹⁶

27 ¹⁶ In later commenting upon the bases for the ruling denying the claims for refunds,
28 Commissioner Turner, in adhering to his "pass-through" conceptualization of the tax, stated
that he would "find in addition that a refund to the taxpayers being the clients of Mr. Shafer at
this point in time would constitute *an unjust enrichment* at the same time." Transcript (Ex.
18), page 93, lines 6-8 (emphasis added). That unjust enrichment claim was obviously

1 Counsel for the Defendants expressed this same position before this very Court.
2 During the hearing held just on December 9, 2010, all three of the attorneys for the Defendants
3 articulated three different positions regarding the applicability of N.A.C. § 368A.170 to
4 Plaintiffs' ability to even recover a refund of the LET unconstitutionally paid to the state.
5 Transcript of Hearing on December 9, 2010, Ex. 20, pp. 30-46.
6

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

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

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

21 Transcript, Ex. 20, p. 34 (clarification added).

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

26 MR. POPE: I think one of the things that plaintiffs are going to have to
27 show is how they did handle that - - that issue. Did they include the tax
28 and did they have a sign on the wall or did they not?

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

predicated upon his belief that these Plaintiffs did not *pay* the tax and could not, then, equitably
recoup it.

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

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

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

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

11 Transcript, Ex. 20, pp. 35-36 (emphasis added).

12 Then, it was Mr. Doerr's turn to give this Court *his* interpretation of N.A.C. §
13 368A.170:

14 THE COURT: . . . You haven't taken a position on that one way or
15 another you're saying to me?

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

22 Transcript, Ex. 20, p. 38 (emphasis added).

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

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

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

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

4 MR. SHAFER: Your Honor - -

5 MR. DOERR: *It comes from the customer.*

6 MR. SHAFER: Your Honor - -

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

8 Transcript, Ex. 20, p. 42 (emphasis added).

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

12 Transcript, Ex. 20, p. 44.

13
14 If, indeed, the Defendants' position taken before the Tax Commission and this Court
15 (that Plaintiffs cannot obtain a refund without identifying and passing the refund along to the
16 specific patrons who Defendants contend paid the tax) carries the day, irreparable injury will
17 certainly exist apart from the injury to Plaintiffs' First Amendment freedoms since Plaintiffs
18 will never be able to recover the unconstitutionally collected tax.

19
20 Fifth, the regulation relied upon by the Defendants, itself, demonstrates irreparable
21 injury. Under their interpretation of the regulation, the Plaintiffs can only obtain a refund of an
22 unconstitutional tax if they were able to obtain and retain the *name and address* of every
23 patron who enters the facility and/or who purchases any form of food, beverage, or
24 merchandise. No entertainment venue could be expected to collect and maintain such records,
25 particularly in light of the fact that the Constitution recognizes the right to view, hear, and
26

1 engage in protected expression *anonymously*,¹⁷ and these privacy interests are particularly
2 relevant here where the Plaintiffs are a group of exotic dance facilities and where patrons may
3 then have a specific interest in maintaining their anonymity. Under these circumstances, the
4 disclosure requirements of N.A.C. § 368A.170, which the Defendants *insist* apply here,
5 themselves beget a constitutional violation (compelled disclosure of private information). The
6 prospect for irreparable harm is therefore clearly established.

8 3. **A PRELIMINARY INJUNCTION WILL NOT CAUSE**
9 **SUBSTANTIAL HARM TO THE DEFENDANTS OR TO**
10 **OTHERS, AND THE BALANCING OF HARDSHIPS CLEARLY**
11 **WEIGHS IN FAVOR OF GRANTING RELIEF.**

12 There is no dispute as to the place where First Amendment rights exist in the hierarchy
13 of fundamental constitutional protections. As the Supreme Court has noted, the freedoms as
14 enumerated in the First Amendment are the protections upon which all other constitutional
15 rights depend. *Palko v. Connecticut*, 302 U.S. 319, 326-27 (1937), *overruled on other*
16 *grounds by* *Benton v. Maryland*, 395 U.S. 784 (1969). *See also* *Ellwest Stereo Theater, Inc.*
17 *v. Boner*, 718 F. Supp. 1553, 1560-61 (M.D. Tenn. 1989) (“First Amendment’s paramount
18 position among all constitutional rights. . .”).

19 On the other hand, the potential harm to the Defendants is merely the inability to
20 enforce a Statute which, Plaintiffs assert, is at best constitutionally suspect. This interest
21 cannot outweigh the fundamental constitutional rights of the Plaintiffs and others associated
22 with these businesses, which are clearly at stake here. *See, e.g.*, *Books, Inc. v. Pottawatamie*

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¹⁷ *See, e.g.*, *Talley v. California*, 362 U.S. 60, 64-66 (1960); *Hynes v. Mayor and*
Council of Borough of Oradell, 425 U.S. 610, 628 (1976); *McIntyre v. Ohio Elections*
Comm., 514 U.S. 334, 341-344 (1995); *Connection Distributing Co. v. Reno*, 154 F.3d 281,
293 (6th Cir. 1998), *cert. denied*, 526 U.S. 1087 (1999); and *Deja Vu of Nashville, Inc. v.*
Metropolitan Government of Nashville and Davidson County, 274 F.3d 377, 394-395 (6th
Cir. 2001), *cert denied*, 535 U.S. 1073 (2002).

1 County, 978 F. Supp. 1247, 1256 (S.D. Iowa 1997) (balance of equities favors exercise of
2 constitutionally protected rights over undeclared interest of government in the operation of an
3 ordinance that is “a very probable violation of Supreme Court precedent”).

4 4. **THE PUBLIC INTEREST WILL BE SERVED BY THE**
5 **ISSUANCE OF AN INJUNCTION.**

6 It “is *always* in the public interest to prevent the violation of a party’s constitutional
7 rights.” Sammartano v. First Judicial District Court, 303 F.3d 959, 974 (9th Cir. 2002)
8 (addressing public interest prong) (emphasis added) (*quoting* G & V Lounge, Inc. v.
9 Michigan Liquor Control Com’n, 23 F.3d 1071, 1079 (6th Cir. 1994), *citing* Gannett Co.,
10 Inc. v. DePasquale, 443 U.S. 368, 383 (1979); and Planned Parenthood Ass’n. v. City of
11 Cincinnati, 822 F.2d 1390, 1400 (6th Cir. 1987)). Stated slightly differently, “[t]he public
12 simply has no interest in effectuating an unconstitutional law.” Sund v. City of Wichita Falls,
13 121 F. Supp.2d 530, 554 (N.D. Tex. 2000). *Accord* Valley v. Rapides Parish Sch. Bd., 118
14 F.3d 1047, 1056 (5th Cir. 1997); Dayton Area Visually Impaired Persons, Inc. v. Fisher, 70
15 F.3d 1474, 1490 (6th Cir. 1995); Hyde Park Partners v. Connolly, 839 F.2d 837, 854 (1st
16 Cir. 1988).

17 “Since it may be assumed that the Constitution is the ultimate expression of the public
18 interest,” Llewelyn v. Oakland County Pros., 402 F. Supp. 1379, 1393 (E.D. Mich. 1975), it
19 is safe to say then that the public interest would be served by the issuance of a preliminary
20 injunction here. Accordingly, all prongs of the test for issuing injunctive relief weigh in favor
21 of granting Plaintiffs’ request for the entry of a preliminary injunction to prohibit enforcement
22 of Chapter 368A.
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1 B. PLAINTIFFS HAVE A RIGHT TO THE REQUESTED INJUNCTIVE
2 RELIEF BECAUSE, AS A MATTER OF LAW, NO STATUTE CAN
3 DIVEST THE COURTS OF THIS STATE OF THEIR
4 CONSTITUTIONALLY-GRANTED AUTHORITY TO ISSUE WRITS
5 OF INJUNCTIONS.

6 Chapter 368A contains an anti-injunction provision (N.R.S. §368A.280(1)), which the
7 Defendants will raise as a bar to this Court providing the relief requested by way of this
8 motion. However, the anti-injunction provision in N.R.S. § 368A.280(1) violates the
9 separation of powers provision of the Nevada Constitution, and is therefore unenforceable.

10 The Supreme Court of Ohio recently faced a similar situation in City of Norwood v.
11 Horney, 853 N.E.2d 1115, 110 Ohio St.3d 353 (Ohio 2006). In Norwood, the court evaluated
12 the constitutionality of a statute that “prohibit[ed] a court from enjoining the taking and using
13 of property appropriated by the government . . . prior to appellate review of the taking.” Id. at
14 1122. The court ruled the statute to be “an unconstitutional encroachment of the judiciary’s
15 constitutional and inherent authority in violation of the separation-of-powers doctrine.” Id. at
16 1150.

17 The Norwood court identified the power of injunction to be an inherent power of the
18 courts under the state constitution. Id. at 1148-1149. The court next recognized the authority
19 to grant injunctive relief as judicial power that “resides exclusively in the judicial branch.” Id.
20 at 1148. It therefore concluded that the legislature’s attempt to limit the court’s inherent power
21 of injunction violated the separation-of-powers doctrine. Id. at 1150.

22 In doing so, the Ohio Supreme Court found the following statement of the Kentucky
23 Supreme Court to be particularly astute:

24 The control over this inherent judicial power, in this particular
25 instance the injunction, is exclusively within the constitutional
26 realm of the courts. *As such, it is not within the purview of the*
27 *legislature to grant or deny the power nor is it within the purview*
28

1 *of the legislature to shape or fashion circumstances under which*
2 *this inherently judicial power may be or may not be granted or*
3 *denied.*

4 ***Id.*** at 1149 (emphasis in original), *citing* **Smothers v. Lewis**, 672 S.W.2d 62, 64 (Ky. 1984).

5 This Court should likewise find the legislature's attempt to limit or fashion the
6 circumstances under which a court may exercise its injunctive power to be in violation of the
7 separation of powers mandated by Article 3, § 1, of the Constitution of the State of Nevada. In
8 Nevada, the power of injunction is not only an inherent judicial power, but it is an *explicit*
9 power of the courts directly conferred upon them by the Nevada Constitution. Article 6, § 6, of
10 the State Constitution vests the power to issue writs of injunction in the State's District Courts.

11 . . .The District Courts and the Judges thereof have the power to
12 issue Writs of . . . Injunction. . . , and all other Writs proper and
13 necessary to the complete exercise of the jurisdiction.

14 Chapter 368A attempts to divest the judiciary of its constitutionally granted power of
15 injunction. This provision is a patently unconstitutional violation of the separation of powers
16 set forth in Article 3, § 1, of the State Constitution, which provides:

17 The powers of the government of the State of Nevada shall be
18 divided into three separate departments,—the legislative,—the
19 Executive and the Judicial; and no persons charged with the
20 exercise of powers properly belonging to one of these departments
21 shall exercise any functions, appertaining to either of the others,
22 except in the cases expressly directed or permitted in this
23 constitution.

24 “It is fundamental to our system of government that the separate powers granted the
25 executive, legislative and judicial departments be exercised *without intrusion.*” **City of North**
26 **Las Vegas v. Daines**, 92 Nev. 292, 294, 550 P.2d 399 (1976), *citing* **Galloway v. Truesdell**,
27 83 Nev. 13, 422 P.2d 237 (1967) (emphasis added). This is the single most important principle
28 “declaring and guaranteeing the liberties of the people.” **Galloway**, 83 Nev. at 18. Statutes

1 which attempt to limit or destroy the powers of the courts must *fail*. **Goldberg v. The Eighth**
2 **Judicial District Court of the State of Nevada**, 93 Nev. 614, 616-17, 572 P.2d 521 (1977),
3 *citing* **Lindauer v. Allen**, 85 Nev. 430, 434, 456 P.2d 851 (1969).

4 Further, Plaintiffs' situation is one that has already been recognized to merit injunctive
5 relief. The Nevada Supreme Court has previously addressed this issue of enjoining the
6 collection of an impermissible tax. In **Penrose v. Whitacre**, 62 Nev. 239, 147 P.2d 887 (1944)
7 (hereinafter "**Penrose II**"), the court stated that an injunction to prevent the collection of taxes
8 would lie where "enforcement of the tax would lead to a multiplicity of suits, or *produce*
9 *irreparable injury*; or, if the property is real estate, throw a cloud upon the title of the
10 complainant, or there must be some allegation of fraud. . . ." **Id.** at 245 (emphasis added)
11 (*citing* **Wells, Fargo & Co. v. Dayton**, 11 Nev. 161, 166 (1876) (other citations omitted)). *See*
12 *also* **Comm'r of International Revenue v. Shapiro**, 424 U.S. 614, 627 (1976). The Plaintiffs
13 must also lack an adequate remedy at law. **Penrose v. Whitacre**, 61 Nev. 440, 132 P.2d 609,
14 617 (1942) (hereinafter "**Penrose I**").

15 Here, Plaintiffs will be able to meet the requirements under **Penrose II** because: (1)
16 enforcement of Chapter 368A will cause, and indeed has caused, Plaintiffs to suffer irreparable
17 injury; and (2) Plaintiffs lack an adequate remedy at law. These matters have been discussed in
18 great detail above, and will not be reiterated here. Further, the actual imposition of an
19 unconstitutional tax or fee can cause irreparable injury. *See* **Joelner v. Village of Washington**
20 **Park, Illinois**, 378 F.3d 613, 620, 628 (7th Cir. 2004) (Court found that if plaintiff "cannot
21 afford such a hefty fee, he would be forced to shut down his bookstore. Hence, there is a threat
22 that these allegedly unconstitutionally excessive fees could cause Joelner significant
23 irreparable harm").
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1 It is clear that Plaintiffs can be entitled to injunctive relief in this action under the
2 binding precedents of Penrose I and II. Because Chapter 368A attempts to divest this Court of
3 its constitutionally-given power of injunction, it is an unconstitutional abridgment of the
4 separation of powers doctrine contained in Article 3 § 1, of the Constitution of the State of
5 Nevada, and is therefore invalid.

6
7 **C. NO BOND SHOULD BE REQUIRED FOR THE ENTRY OF THE**
8 **REQUESTED PRELIMINARY INJUNCTION.**

9 N.R.C.P. § 65(c) requires the posting of a bond as a condition for the entry of a
10 preliminary injunction. Because constitutional rights are at issue here, however, no bond
11 should be required.

12 Numerous courts have recognized that when constitutional - - and in particular First
13 Amendment - - rights are at stake, bonding requirements are inappropriate.¹⁸ In addition,
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16 ¹⁸ See, e.g., First Puerto Rican Festival of New Jersey, Inc. v. City of Vineland, 108
17 F. Supp.2d 392, 396 (D. N.J. 1998) (court must consider whether the applicant seeks to enforce
18 a federal right and, if so, whether imposing the bond requirement would unduly interfere with
19 that right, with the court also stating that the “equities involved in Plaintiff’s attempt to
20 vindicate its First Amendment rights, and the threat that the protected speech may be quashed,
21 outweigh the city’s potential ability to recover the extraordinary costs” of plaintiffs engaging in
22 the conduct in question); Crowley v. Local No. 82, 679 F.2d 978, 1000 (1st Cir. 1982) (listing
23 cases and authorities establishing that “no bond is required in suits to enforce important federal
24 rights or ‘public interests’”), *reversed on other grounds*, 467 U.S. 526 (1984); Temple Univ. v.
25 White, 941 F.2d. 201, 220 (3rd Cir. 1991) (a district court should “consider the impact that a
26 bond requirement would have upon enforcement of [a federal right or ‘public interest’] in order
27 to prevent undue restriction of it”) (clarification added); and McCormack v. Twp. of Clinton,
28 872 F. Supp. 1320, 1328 (D. N.J. 1994) (bond waived when First Amendment rights were at
stake). See also Natural Resources Defense Council, Inc. v. Morton, 337 F. Supp. 167, 169
(D.C. D.C. 1971) (district court denied government’s request of a bond in the amount of
\$750,000.00 for the entry of a preliminary injunction that prevented leasing of the Outer
Continental Shelf, which was the estimated loss of revenue to the United States for a one
month period, with the court noting that it had examined other cases involving similar
situations and observed that “*only nominal bonds have been required*,” and that it “would be a
mistake to treat a revenue loss to the Government the same as pecuniary damage to a private
party”) (emphasis added); Planned Parenthood of Delaware v. Brady, 250 F. Supp.2d 405,
411 (D. Del. 2003) (bond waived when injunction was necessary “to address a constitutional

1 Plaintiffs have paid literally *millions of dollars in taxes* since 2004, and may not be able to
2 recover those *even if* the tax imposed by Chapter 368A is found to be unconstitutional. For
3 these reasons, not bond should be required.

4 **D. CONCLUSION**

5
6 Based upon the foregoing, Plaintiffs respectfully request that this Honorable Court
7 grant Plaintiffs' Renewed Motion for Preliminary Injunction and enjoin the Defendants, their
8 officers, employees, agents, and representatives, as well as all persons acting by, through, and
9 for them, from enforcing, applying, and implementing Title 32, Chapter 368A of the Nevada
10 Revised Statutes.

11
12 DATED this 14th day of February, 2011

13
14 **LAW OFFICES OF
WILLIAM H. BROWN, LTD.**

15
16 By /s/ William H. Brown

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25
26 defect. . ."); and Dr. John's, Inc. v. City of Sioux City, 305 F. Supp.2d 1022, 1043-44 (N.D.
27 Iowa 2004) (bond requirement for the issuance of a preliminary injunction on behalf of an
28 "adult entertainment business" waived because the city could not point to any evidence
supporting a contention that it would "suffer compensable economic 'secondary effects' if its
amended ordinances are improvidently enjoined," with the court further observing that
requiring a bond would be inappropriate "because the rights potentially impinged by the
government entity's actions are of such gravity that protection of those rights should not be
contingent upon an ability to pay").

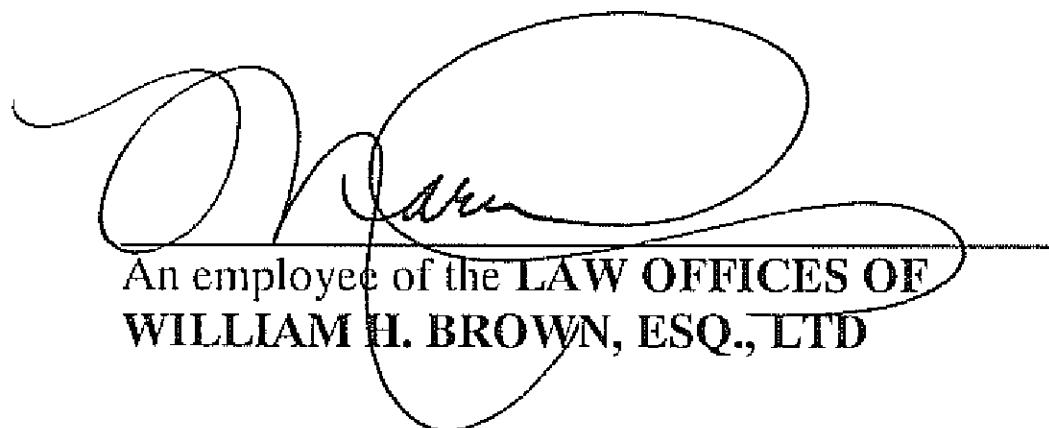
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CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of February, 2011, the foregoing **RENEWED MOTION FOR PRELIMINARY INJUNCTION ON ORDER SHORTENING TIME** was served on the party(ies) by faxing a copy and mailing of same in the United States mail, postage prepaid thereon, addressed as follows:

Catherine Cortez Masto
Attorney General
David J. Pope
Sr. Deputy Attorney General
Blake A. Doerr
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An employee of the **LAW OFFICES OF
WILLIAM H. BROWN, ESQ., LTD**

TABLE OF CONTENTS

INDEX OF EXHIBITS TO RENEWED MOTION FOR PRELIMINARY INJUNCTION

- Exhibit 1 A copy of the version of Chapter 368A adopted in 2003
- Exhibit 2 Assembly Bill No. 554
- Exhibit 3 Current codified version of Chapter 368A
- Exhibit 4 Texas Decision and Statute
- Exhibit 5 TN Attorney General Opinion
- Exhibit 6 United States District Court Order Dismissing Lawsuit
- Exhibit 7 United States Court of Appeals for the Ninth Circuit Memorandum Affirming Dismissal
- Exhibit 8 Redacted Sample Copy of Administrative Request for Refund
- Exhibit 9 Sample Copy of Department's Denial of Request for Refund
- Exhibit 10 Sample Copy of Department's Acknowledgment of Appeal
- Exhibit 11 Nevada Tax Commission's Order Denying Appeal
- Exhibit 12 Orders of Judge Togliatti Denying Defendants' Motion to Dismiss Without Prejudice/Order Denying Motion For Summary Judgment Without Prejudice
- Exhibit 13 Minutes of the Meeting of the Assembly Committee on Commerce and Labor recorded during the 73rd Congressional Session on May 16, 2005
- Exhibit 14 Chart of LET Collections Created by the Nevada Department of Taxation
- Exhibit 15 Excerpts of Transcript of Hearing Before the Nevada Tax Commission on July 9, 2007
- Exhibit 16 N.A.C. § 368A.170
- Exhibit 17 Excerpts of Defendants' (Appellees') Answering Brief to the United States Court of Appeals for the Ninth Circuit
- Exhibit 18 Excerpts of Transcript of Hearing Before the Nevada Tax Commission on August 6, 2007
- Exhibit 19 Affidavits of Representatives of Plaintiffs Produced Before the Tax Commission

Exhibit 20 Excerpts of Transcript of December 9, 2010, Hearing before Judge Togliatti

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

→368A.010. Definitions

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

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

→368A.020. "Admission charge" defined

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

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

→368A.030. "Board" defined

"Board" means the State Gaming Control Board.

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

→368A.040. "Business" defined

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

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

→368A.050. "Business entity" defined

1. "Business entity" includes:

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

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

2. The term does not include a governmental entity.

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

→ 368A.060. "Facility" defined

"Facility" means:

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

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

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

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

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

→ 368A.070. "Game" defined

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

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

→ 368A.080. "Licensed gaming establishment" defined

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

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

→ 368A.090. "Live entertainment" defined

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

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

→368A.100. "Slot machine" defined

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

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

→368A.110. "Taxpayer" defined

"Taxpayer" means:

1. If live entertainment that is taxable under this chapter is provided at a licensed gaming establishment, the person licensed to conduct gaming at that establishment.
2. Except as otherwise provided in subsection 3, if live entertainment that is taxable under this chapter is not provided at a licensed gaming establishment, the owner or operator of the facility where the live entertainment is provided.
3. If live entertainment that is taxable under this chapter is provided at a publicly owned facility or on public land, the person who collects the taxable receipts.

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

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

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

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

ADMINISTRATION

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

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

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

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

1. The Board shall:

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

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

2. The Department shall:

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

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

3. For the purposes of:

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

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

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

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

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

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

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

1. If:

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

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

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

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

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

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

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

(b) Preserve those records for:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IMPOSITION AND COLLECTION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

→ 368A.210. Taxpayer to hold taxes in separate account

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

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

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

1. Except as otherwise provided in this section:

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

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prescribed by the Board.

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

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

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

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

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

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

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

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

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

1. If a taxpayer:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

OVERPAYMENTS AND REFUNDS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

→ 368A.320. Standing to recover

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

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

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

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

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

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

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

→ 368A.340. Cancellation of illegal determination

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

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

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

MISCELLANEOUS PROVISIONS

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

1. A person shall not:

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

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

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

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

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

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

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

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

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

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

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

(Publication page references are not available for this document.)

NEVADA 2005 SESSION LAWS
REGULAR SESSION OF THE 73RD LEGISLATURE

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

Ch. 484

A.B. No. 554

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

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

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

<< NV ST 363B.030 >>

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

1. "Financial institution" has the meaning ascribed to it in NRS 363A.050.
2. "Indian tribe" includes any entity described in subsection 10 of NRS 612.055.
3. "Nonprofit organization" means a nonprofit religious, charitable, fraternal or other organization that qualifies as a tax-exempt organization pursuant to 26 U.S.C. § 501(c).
4. "Political subdivision" means any entity described in subsection 9 of NRS 612.055.

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

Sec. 3.

"Casual assemblage" includes, without limitation:

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

(Publication page references are not available for this document.)

guests; or

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

Sec. 4.

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

Sec. 5.

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

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

<< NV ST 368A.010 >>

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

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

<< NV ST 368A.020 >>

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

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

<< NV ST 368A.060 >>

1. "Facility" means:

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

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

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

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

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

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

(Publication page references are not available for this document.)

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

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

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

<< NV ST 368A.090 >>

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

2. The term:

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

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

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

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

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

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

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

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

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

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

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

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

(Publication page references are not available for this document.)

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

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

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

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

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

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

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

(I) Does not constitute a performance;

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

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

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

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

<< NV ST 368A.200 >>

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

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

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

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

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

(Publication page references are not available for this document.)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

<< NV ST 368A.220 >>

1. Except as otherwise provided in this section:

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

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

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

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

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

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

(Publication page references are not available for this document.)

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

1. Worth \$100 or less; and
2. Acquired free of charge at a convention, trade show or other public event.

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

<< NV ST 372.7263 >>

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

- (a) The sale of a vehicle to a nonresident to whom a special movement permit has been issued by the Department of Motor Vehicles pursuant to subsection 1 of NRS 482.3955;
- (b) The sale of farm machinery and equipment to a nonresident who submits proof to the vendor that the farm machinery and equipment will be delivered out of State not later than 15 days after the sale; and
- (c) The sale of a vessel to a nonresident who submits proof to the vendor that the vessel will be delivered out of State not later than 15 days after the sale.

2. As used in this section:

- (a) ~~"Agricultural use" has the meaning ascribed to it in NRS 361A.030.~~
- (b) ~~"Farm machinery and equipment" means a farm tractor, implement of husbandry, piece of equipment used for irrigation, or a part used in the repair or maintenance of farm machinery and equipment. The term does not include:~~
 - (1) A vehicle required to be registered pursuant to the provisions of chapter 482 or 706 of NRS; or
 - (2) Machinery or equipment only incidentally employed for ~~the agricultural use of real property.~~
- (c) **agricultural purposes.**
- (b) "Farm tractor" means a motor vehicle designed and used primarily for drawing an implement of husbandry.
- (c) ~~(c)~~ "Implement of husbandry" means a vehicle that is designed, adapted or used for agricultural purposes, including, without limitation, a plow, machine for mowing, hay baler, combine, piece of equipment used to stack hay, till, harvest, handle agricultural commodities or apply fertilizers, or other heavy, movable equipment designed, adapted or used for agricultural purposes.

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

<< NV ST 372.7263 >>

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

- (a) 1. The sale of a vehicle to a nonresident to whom a special movement permit has been issued by the Department of Motor Vehicles pursuant to subsection 1 of NRS 482.3955;
- (b) 2. The sale of farm machinery and equipment , as defined in section 30 of this act, to a nonresident who sub-

(Publication page references are not available for this document.)

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

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

2. As used in this section:

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

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

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

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

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

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

Sec. 16.

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

1. Worth \$100 or less; and

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

Sec. 17.

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

2. As used in this section:

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

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

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

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

(Publication page references are not available for this document.)

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

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

<< NV ST 374.030 >>

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

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

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

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

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

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

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

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

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

(a) Cash discounts allowed and taken on sales.

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

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

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

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

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

(Publication page references are not available for this document.)

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

<< NV ST 374.070 >>

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

- (a) The cost of the property sold.
- (b) The cost of the materials used, labor or service cost, interest charged, losses, or any other expenses.
- (c) The cost of transportation of the property before its purchase.

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

- (a) Any services that are a part of the sale.
- (b) Any amount for which credit is given to the purchaser by the seller.

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

- (a) Cash discounts allowed and taken on sales.
- (b) The amount charged for property returned by customers when the entire amount charged therefor is refunded in cash or credit, except that this exclusion does not apply in any instance when the customer, in order to obtain the refund, is required to purchase other property at a price greater than the amount charged for the property that is returned.
- (c) The amount charged for labor or services rendered in installing or applying the property sold.
- (d) The amount of any tax, not including any manufacturers' or importers' excise tax, imposed by the United States upon or with respect to retail sales, whether imposed upon the retailer or the consumer.
- (e) The amount of any tax imposed by the State of Nevada upon or with respect to the storage, use or other consumption of tangible personal property purchased from any retailer.
- (f) The amount of any allowance against the selling price given by a retailer for the value of a used ~~vehicle or~~ vessel which is taken in trade on the purchase of another ~~vehicle or~~ vessel.

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

<< NV ST 375.090 >>

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

- 1. A mere change in identity, form or place of organization, such as a transfer between a corporation and its parent corporation, a subsidiary or an affiliated corporation if the affiliated corporation has identical common ownership.
- 2. A transfer of title to the United States, any territory or state or any agency, department, instrumentality or political subdivision thereof.
- 3. A transfer of title recognizing the true status of ownership of the real property.
- 4. A transfer of title without consideration from one joint tenant or tenant in common to one or more remaining joint

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tenants or tenants in common.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

<< NV ST 374.265 >>

(Publication page references are not available for this document.)

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

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

<< NV ST 374.286 >>

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

2. As used in this section:

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

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

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

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

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

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

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

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

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

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

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

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

2. As used in this section:

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

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

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

(Publication page references are not available for this document.)

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

(e) **agricultural purposes.**

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

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

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

<< NV ST 374.7273 >>

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

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

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

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

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

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

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

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

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

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

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

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

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

(a) The cost of the property sold.

(Publication page references are not available for this document.)

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

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

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

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

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

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

(a) Cash discounts allowed and taken on sales.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(Publication page references are not available for this document.)

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

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

Sec. 28.

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

Sec. 29.

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

Sec. 30.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- (a) The cost of the property sold.
- (b) The cost of materials used, labor or service cost, interest charged, losses, or any other expenses.
- (c) The cost of transportation of the property prior to before its purchase.

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

- (a) Any services that are a part of the sale.
- (b) Any amount for which credit is given to the purchaser by the seller.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(a) Cash discounts allowed and taken on sales.

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

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

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

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

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

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

Sec. 31.

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

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

Yes (BOX) No (BOX)

Sec. 32.

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

(Explanation of Question)

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

Sec. 33.

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

Sec. 34.

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

Sec. 35.

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

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

Sec. 36.

1. NRS 368A.130 and 368A.210 are hereby repealed.
2. NRS 374.107 is hereby repealed.
3. Sections 58 and 59 of Chapter 400, Statutes of Nevada 2003, at page 2371, are hereby repealed.

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

2. Section 22 of this act:

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

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

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

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

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

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

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

Approved by the Governor June 17, 2005.

NV LEGIS 484 (2005)

END OF DOCUMENT

West's Nevada Revised Statutes Annotated Currentness
Title 32. Revenue and Taxation
→ Chapter 368A. Tax on Live Entertainment
General Provisions

368A.010. Definitions

As used in this chapter, unless the context otherwise requires, the words and terms defined in NRS 368A.020 to 368A.115, inclusive, have the meanings ascribed to them in those sections.

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

368A.020. "Admission charge" defined

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

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

368A.030. "Board" defined

"Board" means the State Gaming Control Board.

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

368A.040. "Business" defined

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

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

368A.050. "Business entity" defined

1. "Business entity" includes:

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

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

2. The term does not include a governmental entity.

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

368A.053. "Casual assemblage" defined

"Casual assemblage" includes, without limitation:

1. Participants in conventions, business meetings or tournaments governed by chapter 463 of NRS, and their guests; or
2. Persons celebrating a friend's or family member's wedding, birthday, anniversary, graduation, religious ceremony or similar occasion that is generally recognized as customary for celebration.

368A.055. "Commission" defined

"Commission" means the Nevada Gaming Commission.

368A.060. "Facility" defined

1. "Facility" means:

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

- (1) An establishment that is not a licensed gaming establishment; or
- (2) A licensed gaming establishment that is licensed for less than 51 slot machines, less than [six] 6 games, or any combination of slot machines and games within those respective limits.

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

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

- (a) Less than 51 slot machines, less than 6 games, or any combination of slot machines and games within those respective limits, any area or premises where the live entertainment is provided and for which consideration is collected, from one or more patrons, for the right or privilege of entering that area or those premises, even if additional consideration is collected for the right or privilege of entering a smaller venue within that area or those premises; or
- (b) At least 51 slot machines or at least 6 games, any designated area on the premises of the licensed gaming establishment within which the live entertainment is provided.

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

368A.070. "Game" defined

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

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

368A.080. "Licensed gaming establishment" defined

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

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

368A.090. "Live entertainment" defined

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

2. The term:

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

- (1) Music or vocals provided by one or more professional or amateur musicians or vocalists;
- (2) Dancing performed by one or more professional or amateur dancers or performers;
- (3) Acting or drama provided by one or more professional or amateur actors or players;
- (4) Acrobatics or stunts provided by one or more professional or amateur acrobats, performers or stunt persons;
- (5) Animal stunts or performances induced by one or more animal handlers or trainers, except as otherwise provided in subparagraph (7) of paragraph (b);
- (6) Athletic or sporting contests, events or exhibitions provided by one or more professional or amateur athletes or sportsmen;
- (7) Comedy or magic provided by one or more professional or amateur comedians, magicians, illusionists, entertainers or performers;
- (8) A show or production involving any combination of the activities described in subparagraphs (1) to (7), inclusive; and
- (9) A performance involving one or more of the activities described in this paragraph by a disc jockey who presents recorded music. For the purposes of this subsection, a disc jockey shall not be deemed to have engaged in a performance involving one or more of the activities described in this paragraph if the disc jockey generally limits his interaction with patrons to introducing the recorded music, making announcements of general interest to patrons, and explaining, encouraging or directing participatory activities between patrons.

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

- (1) Instrumental or vocal music, which may or may not be supplemented with commentary by the musicians, in a restaurant, lounge or similar area if such music does not routinely rise to the volume that interferes with casual conversation and if such music would not generally cause patrons to watch as well as listen;
- (2) Occasional performances by employees whose primary job function is that of preparing, selling or serving food, refreshments or beverages to patrons, if such performances are not advertised as entertainment to the public;
- (3) Performances by performers of any type if the performance occurs in a licensed gaming establishment other than a licensed gaming establishment that is licensed for less than 51 slot machines, less than 6 games, or any combination of slot machines and games within those respective limits, as long as the performers stroll continuously throughout the facility;

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

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

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

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

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

(I) Does not constitute a performance;

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

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

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

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

368A.097. "Shopping mall" defined

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

368A.100. "Slot machine" defined

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

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

368A.110. "Taxpayer" defined

"Taxpayer" means:

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

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

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

who collects the taxable receipts.

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

368A.115. "Trade show" defined

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

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

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

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

Administration

368A.130. Repealed

368A.140. Duties of Board, Commission and Department; applicability of chapters 360 and 463 of NRS

1. The Board shall collect the tax imposed by this chapter from taxpayers who are licensed gaming establishments. The Commission shall adopt such regulations as are necessary to carry out the provisions of this subsection. The regulations must be adopted in accordance with the provisions of chapter 233B of NRS and must be codified in the Nevada Administrative Code.

2. The Department shall:

- (a) Collect the tax imposed by this chapter from all other taxpayers; and
- (b) Adopt such regulations as are necessary to carry out the provisions of paragraph (a).

3. For the purposes of:

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

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

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

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

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

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

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

1. If:

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

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

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

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

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

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

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

(b) Preserve those records for:

(1) At least 5 years if the taxpayer is a licensed gaming establishment or until any litigation or prosecution pursuant to this chapter is finally determined, whichever is longer; or

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

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

2. The Commission and the Department may adopt regulations pursuant to NRS 368A.140 specifying the types of records

which must be kept to determine the amount of the liability of a taxpayer for the tax imposed by this chapter.

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

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

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

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

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

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

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

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

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

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

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

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

- (a) Testimony by a member or employee of the Board or the Department and production of records, files and information on behalf of the Board or the Department or a taxpayer in any action or proceeding pursuant to the provisions of this chapter, if that testimony or the records, files or information, or the facts shown thereby, are directly involved in the action or proceeding.
- (b) Delivery to a taxpayer or his authorized representative of a copy of any report or other document filed by the taxpayer pursuant to this chapter.
- (c) Publication of statistics so classified as to prevent the identification of a particular person or document.
- (d) Exchanges of information with the Internal Revenue Service in accordance with compacts made and provided for in such cases.
- (e) Disclosure in confidence to the Governor or his agent in the exercise of the Governor's general supervisory powers, or to any person authorized to audit the accounts of the Board or the Department in pursuance of an audit, or to the Attorney General or other legal representative of the State in connection with an action or proceeding pursuant to this chapter, or to any agency of this or any other state charged with the administration or enforcement of laws relating to taxation.

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

Imposition and Collection

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

1. Except as otherwise provided in this section, there is hereby imposed an excise tax on admission to any facility in this State where live entertainment is provided. If the live entertainment is provided at a facility with a maximum occupancy of:
 - (a) Less than 7,500, the rate of the tax is 10 percent of the admission charge to the facility plus 10 percent of any amounts paid for food, refreshments and merchandise purchased at the facility.
 - (b) At least 7,500, the rate of the tax is 5 percent of the admission charge to the facility.
2. Amounts paid for:
 - (a) Admission charges collected and retained by a nonprofit religious, charitable, fraternal or other organization that qualifies as a tax-exempt organization pursuant to 26 U.S.C. § 501(c), or by a nonprofit corporation organized or existing under the provisions of chapter 82 of NRS, are not taxable pursuant to this section.
 - (b) Gratuities directly or indirectly remitted to persons employed at a facility where live entertainment is provided or for service charges, including those imposed in connection with the use of credit cards or debit cards, which are collected and retained by persons other than the taxpayer are not taxable pursuant to this section.
3. A business entity that collects any amount that is taxable pursuant to subsection 1 is liable for the tax imposed, but is entitled to collect reimbursement from any person paying that amount.
4. Any ticket for live entertainment must state whether the tax imposed by this section is included in the price of the ticket. If

the ticket does not include such a statement, the taxpayer shall pay the tax based on the face amount of the ticket.

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

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

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

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

(d) Live entertainment that is not provided at a licensed gaming establishment if the facility in which the live entertainment is provided has a maximum occupancy of less than 200 persons.

(e) Live entertainment that is provided at a licensed gaming establishment that is licensed for less than 51 slot machines, less than [six] 6 games, or any combination of slot machines and games within those respective limits, if the facility in which the live entertainment is provided has a maximum occupancy of less than 200 persons.

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

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

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

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

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

(k) Food and product demonstrations provided at a shopping mall, a craft show or an establishment that sells grocery products, housewares, hardware or other supplies for the home.

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

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

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

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

- (n) An outdoor concert, unless the concert is provided on the premises of a licensed gaming establishment.
- (o) Beginning July 1, 2007, race events scheduled at a race track in this State as a part of the National Association for Stock Car Auto Racing Nextel Cup Series, or its successor racing series, and all races associated therewith.
- (p) Live entertainment provided in a restaurant which is incidental to any other activities conducted in the restaurant or which only serves as ambience so long as there is no charge to the patrons for that entertainment.
6. The Commission may adopt regulations establishing a procedure whereby a taxpayer that is a licensed gaming establishment may request an exemption from the tax pursuant to paragraph (p) of subsection 5. The regulations must require the taxpayer to seek an administrative ruling from the Chairman of the Board, provide a procedure for appealing that ruling to the Commission and further describe the forms of incidental or ambient entertainment exempted pursuant to that paragraph.
7. As used in this section, "maximum occupancy" means, in the following order of priority:
- (a) The maximum occupancy of the facility in which live entertainment is provided, as determined by the State Fire Marshal or the local governmental agency that has the authority to determine the maximum occupancy of the facility;
- (b) If such a maximum occupancy has not been determined, the maximum occupancy of the facility designated in any permit required to be obtained in order to provide the live entertainment; or
- (c) If such a permit does not designate the maximum occupancy of the facility, the actual seating capacity of the facility in which the live entertainment is provided.

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

368A.210. Repealed

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

1. Except as otherwise provided in this section:
- (a) Each taxpayer who is a licensed gaming establishment shall file with the Board, on or before the 24th day of each month, a report showing the amount of all taxable receipts for the preceding month or the month in which the taxable events occurred. The report must be in a form prescribed by the Board.
- (b) All other taxpayers shall file with the Department, on or before the last day of each month, a report showing the amount of all taxable receipts for the preceding month. The report must be in a form prescribed by the Department.
2. The Board or the Department, if it deems it necessary to ensure payment to or facilitate the collection by the State of the tax imposed by NRS 368A.200, may require reports to be filed not later than 10 days after the end of each calendar quarter.
3. Each report required to be filed by this section must be accompanied by the amount of the tax that is due for the period covered by the report.
4. The Board and the Department shall deposit all taxes, interest and penalties it receives pursuant to this chapter in the State Treasury for credit to the State General Fund.

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

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

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

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

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

1. If a taxpayer:

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

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

he is entitled to receive a credit for the amount of tax paid on account of that uncollected amount. The credit may be used against the amount of tax that the taxpayer is subsequently required to pay pursuant to this chapter.

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

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

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

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

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

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

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

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

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

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

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

Overpayments and Refunds

368A.250. Certification of excess amount collected: credit and refund

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

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

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

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

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

- (1) The Board, if the taxpayer is a licensed gaming establishment; or
- (2) The Department, if the taxpayer is not a licensed gaming establishment.

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

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

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

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

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

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

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

1. Except as otherwise provided in this section and NRS 360.320, interest must be paid upon any overpayment of any amount of the tax imposed by this chapter in accordance with the provisions of NRS 368A.140.
2. If the overpayment is paid to the Department, the interest must be paid:
 - (a) In the case of a refund, to the last day of the calendar month following the date upon which the person making the overpayment, if he has not already filed a claim, is notified by the Department that a claim may be filed or the date upon which the claim is certified to the State Board of Examiners, whichever is earlier.
 - (b) In the case of a credit, to the same date as that to which interest is computed on the tax or amount against which the credit is applied.
3. If the Board or the Department determines that any overpayment has been made intentionally or by reason of carelessness, the Board or the Department shall not allow any interest on the overpayment.

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

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

1. No injunction, writ of mandate or other legal or equitable process may issue in any suit, action or proceeding in any court against this state or against any officer of the State to prevent or enjoin the collection under this chapter of the tax imposed by this chapter or any amount of tax, penalty or interest required to be collected.
2. No suit or proceeding may be maintained in any court for the recovery of any amount alleged to have been erroneously or illegally determined or collected unless a claim for refund or credit has been filed.

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

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

1. Within 90 days after a final decision upon a claim filed pursuant to this chapter is rendered by:
 - (a) The Commission, the claimant may bring an action against the Board on the grounds set forth in the claim.
 - (b) The Nevada Tax Commission, the claimant may bring an action against the Department on the grounds set forth in the claim.
2. An action brought pursuant to subsection 1 must be brought in a court of competent jurisdiction in Carson City, the county of this State where the claimant resides or maintains his principal place of business or a county in which any relevant proceedings were conducted by the Board or the Department, for the recovery of the whole or any part of the amount with respect to which the claim has been disallowed.
3. Failure to bring an action within the time specified constitutes a waiver of any demand against the State on account of

alleged overpayments.

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

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

1. If the Board fails to mail notice of action on a claim within 6 months after the claim is filed, the claimant may consider the claim disallowed and file an appeal with the Commission within 30 days after the last day of the 6- month period.
2. If the Department fails to mail notice of action on a claim within 6 months after the claim is filed, the claimant may consider the claim disallowed and file an appeal with the Nevada Tax Commission within 30 days after the last day of the 6-month period.
3. If the claimant is aggrieved by the decision of:
 - (a) The Commission rendered on appeal, the claimant may, within 90 days after the decision is rendered, bring an action against the Board on the grounds set forth in the claim for the recovery of the whole or any part of the amount claimed as an overpayment.
 - (b) The Nevada Tax Commission rendered on appeal, the claimant may, within 90 days after the decision is rendered, bring an action against the Department on the grounds set forth in the claim for the recovery of the whole or any part of the amount claimed as an overpayment.
4. If judgment is rendered for the plaintiff, the amount of the judgment must first be credited towards any tax due from the plaintiff.
5. The balance of the judgment must be refunded to the plaintiff.

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

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

In any judgment, interest must be allowed at the rate of 6 percent per annum upon the amount found to have been illegally collected from the date of payment of the amount to the date of allowance of credit on account of the judgment, or to a date preceding the date of the refund warrant by not more than 30 days. The date must be determined by the Board or the Department.

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

368A.320. Standing to recover

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

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

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

1. The Board or the Department may recover a refund or any part thereof which is erroneously made and any credit or part thereof which is erroneously allowed in an action brought in a court of competent jurisdiction in Carson City or Clark County in the name of the State of Nevada.
2. The action must be tried in Carson City or Clark County unless the court, with the consent of the Attorney General, orders a change of place of trial.
3. The Attorney General shall prosecute the action, and the provisions of NRS, the Nevada Rules of Civil Procedure and the Nevada Rules of Appellate Procedure relating to service of summons, pleadings, proofs, trials and appeals are applicable to the proceedings.

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

368A.340. Cancellation of illegal determination

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

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

Miscellaneous Provisions**368A.350. Prohibited acts: penalty**

1. A person shall not:
 - (a) Make, cause to be made or permit to be made any false or fraudulent return or declaration or false statement in any report or declaration, with intent to defraud the State or to evade payment of the tax or any part of the tax imposed by this chapter.
 - (b) Make, cause to be made or permit to be made any false entry in books, records or accounts with intent to defraud the State or to evade the payment of the tax or any part of the tax imposed by this chapter.
 - (c) Keep, cause to be kept or permit to be kept more than one set of books, records or accounts with intent to defraud the State or to evade the payment of the tax or any part of the tax imposed by this chapter.
2. Any person who violates the provisions of subsection 1 is guilty of a gross misdemeanor.

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

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

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

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

368A.370. Remedies of State are cumulative

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

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

Current through the 2005 73rd Regular Session and the 22nd Special Session of the Nevada Legislature
END OF DOCUMENT

EXHIBIT 4

287 S.W.3d 852
(Cite as: 287 S.W.3d 852)



Court of Appeals of Texas,
Austin.

Susan COMBS, Comptroller of Public Accounts of
the State of Texas, and Greg Abbott, Attorney General
of the State of Texas, Appellants

v.

**TEXAS ENTERTAINMENT ASSOCIATION,
INC. and Karpod, Inc.,** Appellees.

No. 03-08-00213-CV.
June 5, 2009.

Background: Sexually oriented business and an association representing the interests of sexually oriented businesses brought action for declaratory and injunctive relief, challenging constitutionality of tax imposed on businesses that offer live, nude entertainment in the presence of alcohol. The 345th Judicial District Court, Travis County, Scott H. Jenkins, J., found tax unconstitutional under the First Amendment and enjoined the Comptroller of Public Accounts from collecting or assessing the tax. Comptroller and Attorney General appealed.

Holdings: The Court of Appeals, Diane M. Henson, J., held that:

- (1) tax was based on the content of expressive conduct, and thus was subject to strict scrutiny;
- (2) association was not precluded on the basis of sovereign immunity from bringing declaratory action challenging constitutionality of tax; and
- (3) request for declaratory judgment was not a redundant remedy, even though tax code permitted taxpayers to seek a return of taxes paid under protest and an injunction prohibiting the assessment or collection of a tax.

Affirmed.

J. Woodfin Jones, C.J., concurred and filed opinion.

David Puryear, J., dissented and filed opinion.

West Headnotes

[1] Constitutional Law 92 ↻1559

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(A) In General

92XVIII(A)3 Particular Issues and Applications in General

92k1559 k. Offensive, Vulgar, Abusive, or Insulting Speech. Most Cited Cases

The fact that constitutionally protected speech may be offensive to some does not justify its suppression; in fact, it is in those instances where protected speech grates most unpleasantly against the sensibilities that judicial vigilance must be at its height. (Per Diane M. Henson, J., with one justice concurring in judgment.) U.S.C.A. Const. Amend. 1.

[2] Constitutional Law 92 ↻1517

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(A) In General

92XVIII(A)1 In General

92k1516 Content-Based Regulations or Restrictions

92k1517 k. In General. Most Cited Cases

Constitutional Law 92 ↻1518

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(A) In General

92XVIII(A)1 In General

92k1516 Content-Based Regulations or Restrictions

92k1518 k. Strict or Exacting Scrutiny; Compelling Interest Test. Most Cited Cases

Content-based restrictions on speech are presumptively invalid and subject to strict scrutiny. (Per Diane M. Henson, J., with one justice concurring in judgment.) U.S.C.A. Const. Amend. 1.

287 S.W.3d 852
(Cite as: 287 S.W.3d 852)

[3] Constitutional Law 92 ↪1053

92 Constitutional Law
92VII Constitutional Rights in General
92VII(A) In General
92k1053 k. Strict or Heightened Scrutiny;
Compelling Interest. Most Cited Cases

In order to withstand strict scrutiny, a statute must be narrowly tailored to promote a compelling government interest. (Per Diane M. Henson, J., with one justice concurring in judgment.)

[4] Constitutional Law 92 ↪1512

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)1 In General
92k1511 Content-Neutral Regulations or Restrictions
92k1512 k. In General. Most Cited Cases

Constitutional Law 92 ↪1514

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)1 In General
92k1511 Content-Neutral Regulations or Restrictions
92k1514 k. Narrow Tailoring Requirement; Relationship to Governmental Interest. Most Cited Cases

A content-neutral restriction on speech withstands intermediate scrutiny if the conduct itself may constitutionally be regulated, if the regulation is narrowly drawn to further a substantial governmental interest, and if the interest is unrelated to the suppression of free speech. (Per Diane M. Henson, J., with one justice concurring in judgment.) U.S.C.A. Const. Amend. 1.

[5] Constitutional Law 92 ↪1512

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)1 In General
92k1511 Content-Neutral Regulations or Restrictions
92k1512 k. In General. Most Cited Cases

Constitutional Law 92 ↪1513

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)1 In General
92k1511 Content-Neutral Regulations or Restrictions
92k1513 k. Governmental Disagreement with Message Conveyed. Most Cited Cases

Constitutional Law 92 ↪1517

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)1 In General
92k1516 Content-Based Regulations or Restrictions
92k1517 k. In General. Most Cited Cases

As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content-based, for purposes of analysis under the First Amendment, while laws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are in most instances content-neutral; the principal inquiry in determining content neutrality is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. (Per Diane M. Henson, J., with one justice concurring in judgment.) U.S.C.A. Const. Amend. 1.

[6] Constitutional Law 92 ↪1517

92 Constitutional Law

287 S.W.3d 852
(Cite as: 287 S.W.3d 852)

92XVIII Freedom of Speech, Expression, and Press

92XVIII(A) In General

92XVIII(A)1 In General

92k1516 Content-Based Regulations or Restrictions

92k1517 k. In General. Most Cited Cases

Rules are generally considered content-based, for purposes of analysis under the First Amendment, when the regulating party must examine the speech to determine if the restriction applies. (Per Diane M. Henson, J., with one justice concurring in judgment.) U.S.C.A. Const.Amend. 1.

[7] Constitutional Law 92 ↪ 2201

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(Y) Sexual Expression

92k2201 k. Nude Dancing in General. Most Cited Cases

While nude dancing falls only within the outer ambit of the First Amendment's protection, it is nevertheless protected as expressive conduct. (Per Diane M. Henson, J., with one justice concurring in judgment.) U.S.C.A. Const.Amend. 1.

[8] Constitutional Law 92 ↪ 1572

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(A) In General

92XVIII(A)3 Particular Issues and Applications in General

92k1572 k. Taxation. Most Cited Cases

A tax based on the content of speech does not become more constitutional under the First Amendment because it is a small tax. (Per Diane M. Henson, J., with one justice concurring in judgment.) U.S.C.A. Const.Amend. 1.

[9] Constitutional Law 92 ↪ 1572

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(A) In General

92XVIII(A)3 Particular Issues and Applications in General

92k1572 k. Taxation. Most Cited Cases

Differential taxation of First Amendment speakers is constitutionally suspect when it threatens to suppress the expression of particular ideas or viewpoints. (Per Diane M. Henson, J., with one justice concurring in judgment.) U.S.C.A. Const.Amend. 1.

[10] Constitutional Law 92 ↪ 1572

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(A) In General

92XVIII(A)3 Particular Issues and Applications in General

92k1572 k. Taxation. Most Cited Cases

A tax is constitutionally suspect under the First Amendment if it targets a small group of speakers; the fear is censorship of particular ideas or viewpoints. (Per Diane M. Henson, J., with one justice concurring in judgment.) U.S.C.A. Const.Amend. 1.

[11] Constitutional Law 92 ↪ 1572

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(A) In General

92XVIII(A)3 Particular Issues and Applications in General

92k1572 k. Taxation. Most Cited Cases

A tax will trigger heightened scrutiny under the First Amendment if it discriminates on the basis of the content of taxpayer speech. (Per Diane M. Henson, J., with one justice concurring in judgment.) U.S.C.A. Const.Amend. 1.

[12] Constitutional Law 92 ↪ 1572

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

287 S.W.3d 852
(Cite as: 287 S.W.3d 852)

92XVIII(A) In General
92XVIII(A)3 Particular Issues and Applications in General
92k1572 k. Taxation. Most Cited Cases

A selective taxation scheme in which an entity's tax status depends entirely on the content of its speech is particularly repugnant to First Amendment principles. (Per Diane M. Henson, J., with one justice concurring in judgment.) U.S.C.A. Const.Amend. 1.

[13] Constitutional Law 92 ↪ 1572

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)3 Particular Issues and Applications in General
92k1572 k. Taxation. Most Cited Cases

Differential taxation based on content is subject to strict scrutiny under the First Amendment. (Per Diane M. Henson, J., with one justice concurring in judgment.) U.S.C.A. Const.Amend. 1.

[14] Constitutional Law 92 ↪ 1572

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)3 Particular Issues and Applications in General
92k1572 k. Taxation. Most Cited Cases

A taxing statute is content-based, for purposes of analysis under the First Amendment, if it singles out income derived from expressive activity for a burden the State places on no other income, and it is directed only at works with a specified content. (Per Diane M. Henson, J., with one justice concurring in judgment.) U.S.C.A. Const.Amend. 1.

[15] Constitutional Law 92 ↪ 1572

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General

92XVIII(A)3 Particular Issues and Applications in General
92k1572 k. Taxation. Most Cited Cases

Where taxing authorities must necessarily examine the content of the message that is conveyed, such official scrutiny of the content of publications as the basis for imposing a tax is entirely incompatible with the First Amendment. (Per Diane M. Henson, J., with one justice concurring in judgment.) U.S.C.A. Const.Amend. 1.

[16] Constitutional Law 92 ↪ 2239

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(Y) Sexual Expression
92k2236 Intoxicating Liquors
92k2239 k. Nudity in General. Most Cited Cases

Tax imposed on businesses offering live, nude entertainment in the presence of alcohol was based on the content of expressive conduct, and thus was subject to strict scrutiny under the First Amendment, even though tax was directed at reducing the secondary effects of sexually oriented businesses, and a sexually oriented business owner could avoid the tax by choosing not to allow the consumption of alcohol on the premises; thus, in light of concession by Comptroller of Public Accounts and the Attorney General that tax could not survive strict scrutiny, tax was unconstitutional under the First Amendment. (Per Diane M. Henson, J., with one justice concurring in judgment.) U.S.C.A. Const.Amend. 1; V.T.C.A., Bus. & C. §§ 47.051-47.056.

[17] Constitutional Law 92 ↪ 2213

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(Y) Sexual Expression
92k2203 Sexually Oriented Businesses; Adult Businesses or Entertainment
92k2213 k. Secondary Effects. Most Cited Cases

The intermediate scrutiny applied to zoning reg-

287 S.W.3d 852
(Cite as: 287 S.W.3d 852)

ulations aimed at decreasing secondary effects of sexually oriented businesses does not apply to differential taxation statutes, and thus an intent to reduce secondary effects does not preclude the proper application of strict scrutiny to a content-based tax on expressive conduct. (Per Diane M. Henson, J., with one justice concurring in judgment.) U.S.C.A. Const.Amend. 1.

[18] Constitutional Law 92 ↪ 1613

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(C) Trade or Business
92k1613 k. Intoxicating Liquors. Most Cited Cases

Intoxicating Liquors 223 ↪ 5.1

223 Intoxicating Liquors
223I Power to Control Traffic
223k5 States
223k5.1 k. In General. Most Cited Cases

A state's regulatory power over the sale and use of alcoholic beverages under the Twenty-first Amendment cannot be used to shield the suppression of speech from First Amendment scrutiny. (Per Diane M. Henson, J., with one justice concurring in judgment.) U.S.C.A. Const.Amend. 1, 21.

[19] Constitutional Law 92 ↪ 1572

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)3 Particular Issues and Applications in General
92k1572 k. Taxation. Most Cited Cases

The power to ban speech pursuant to a government's police power does not presuppose the power to impose a tax disincentive on such speech. (Per Diane M. Henson, J., with one justice concurring in judgment.) U.S.C.A. Const.Amend. 1.

[20] Constitutional Law 92 ↪ 1058

92 Constitutional Law
92VII Constitutional Rights in General
92VII(A) In General
92k1058 k. Denial of Benefits as Constitutional Violation. Most Cited Cases

Even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely, including those that demand the surrender of a constitutional right. (Per Diane M. Henson, J., with one justice concurring in judgment.)

[21] Constitutional Law 92 ↪ 2239

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(Y) Sexual Expression
92k2236 Intoxicating Liquors
92k2239 k. Nudity in General. Most Cited Cases

Intoxicating Liquors 223 ↪ 16

223 Intoxicating Liquors
223II Constitutionality of Acts and Ordinances
223k16 k. Taxation. Most Cited Cases

Even if considered content neutral for First Amendment purposes, tax imposed on businesses that offer live, nude entertainment in the presence of alcohol could not survive intermediate scrutiny because it was not narrowly tailored to further a substantial governmental interest; majority of proceeds resulting from the tax were allocated to purposes bearing no relation to the negative secondary effects the State claimed it was seeking to correct. (Per Diane M. Henson, J., with one justice concurring in judgment.) U.S.C.A. Const.Amend. 1; V.T.C.A., Bus. & C. §§ 47.051-47.056.

[22] Constitutional Law 92 ↪ 1505

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)1 In General

287 S.W.3d 852
(Cite as: 287 S.W.3d 852)

92k1505 k. Narrow Tailoring. Most Cited Cases

In determining whether a restriction on speech is narrowly tailored, for purposes of intermediate scrutiny under the First Amendment, the validity of the regulation depends on the relation it bears to the overall problem the government seeks to correct. (Per Diane M. Henson, J., with one justice concurring in judgment.) U.S.C.A. Const.Amend. 1.

[23] Declaratory Judgment 118A ↪44

118A Declaratory Judgment
118AI Nature and Grounds in General
118AI(C) Other Remedies
118Ak44 k. Statutory Remedy. Most Cited Cases

While the tax code does provide a remedy for taxpayers seeking to challenge the legality of a tax, such a challenge may also be brought in a suit for declaratory relief under the Texas Uniform Declaratory Judgments Act (UDJA). V.T.C.A., Tax Code §§ 112.052, 112.101; V.T.C.A., Civil Practice & Remedies Code § 37.001 et seq.

[24] States 360 ↪191.9(2)

360 States
360VI Actions
360k191 Liability and Consent of State to Be Sued in General
360k191.9 Particular Actions
360k191.9(2) k. Declaratory Judgment.
Most Cited Cases

Declaratory-judgment actions against state officials challenging the constitutionality of a statute do not implicate the sovereign-immunity doctrine because they are not considered suits against the State. V.T.C.A., Civil Practice & Remedies Code § 37.001 et seq.

[25] Costs 102 ↪194.40

102 Costs
102VIII Attorney Fees
102k194.24 Particular Actions or Proceedings
102k194.40 k. Declaratory Judgment. Most

Cited Cases

Declaratory Judgment 118A ↪44

118A Declaratory Judgment
118AI Nature and Grounds in General
118AI(C) Other Remedies
118Ak44 k. Statutory Remedy. Most Cited Cases

Sexually oriented business's request for declaratory judgment regarding constitutionality of tax imposed on businesses that offer live, nude entertainment in the presence of alcohol was not a redundant remedy, and thus award of attorney fees to business under Uniform Declaratory Judgments Act (UDJA) was not improper, even though tax code permitted taxpayers to seek a return of taxes paid under protest and an injunction prohibiting the assessment or collection of a tax; at the time of trial, business had not paid the tax under protest or filed a written protest, because the first tax payments were not yet due, and at the time the UDJA claim was filed, business had a constitutional right to a declaratory judgment regarding its tax liability. V.T.C.A., Tax Code §§ 112.052, 112.053, 112.101; V.T.C.A., Civil Practice & Remedies Code § 37.001 et seq.

[26] Declaratory Judgment 118A ↪44

118A Declaratory Judgment
118AI Nature and Grounds in General
118AI(C) Other Remedies
118Ak44 k. Statutory Remedy. Most Cited Cases

If a party requests a declaration under the Uniform Declaratory Judgments Act (UDJA) that goes beyond its request under the tax code for a return of taxes paid under protest and an injunction prohibiting the assessment or collection of the tax, the UDJA claim is not considered a redundant remedy. V.T.C.A., Tax Code §§ 112.052, 112.101; V.T.C.A., Civil Practice & Remedies Code § 37.001 et seq.

West Codenotes
Held Unconstitutional V.T.C.A., Bus. & C. §§ 47.051, 47.052, 47.053, 47.054, 47.055, 47.0551, 47.056.
***856** James C. Ho (argued), Danica L. Milios, James C. Todd, Christine Monzingo, for Susan Combs,

287 S.W.3d 852
(Cite as: 287 S.W.3d 852)

Comptroller of Public Accounts of the State of Texas, and Greg Abbott, Attorney General of the State of Texas.

Craig T. Enoch (argued), G. Stewart Whitehead, Peter A. Nolan, Elliot Clark, Randall D. Chapman, Douglas M. Becker, Antoinette D. "Toni" Hunter, L. Monique Gonzalez, for Texas Entertainment Association, Inc. and Karpod, Inc.

Before Chief Justice JONES, Justices PURYEAR and HENSON.

OPINION

DIANE M. HENSON, Justice.

The Comptroller of Public Accounts and the Attorney General of the State of Texas^{FN1} appeal the trial court's judgment in a suit for declaratory and injunctive relief brought by Texas Entertainment Association, Inc. ("TEA"), and Karpod, Inc. The trial court's judgment declared subchapter B of chapter 47 of the business and commerce code unconstitutional and permanently enjoined the Comptroller from assessing or collecting the tax imposed by that subchapter.^{FN2} See Tex. Bus. & Com.Code Ann. §§ 47.051-.056 (West Supp.2008). Because we hold that subchapter B violates the First Amendment to the United States Constitution, we affirm the trial court's judgment.^{FN3} See U.S. Const. amend. I.

^{FN1}. Because the appellants' interests are aligned, we will refer to them collectively as "the Comptroller."

^{FN2}. For purposes related to TEA and Karpod's state constitutional claims, the parties dispute whether the assessment at issue in this case is properly considered a tax or a fee. We will adopt the language of the trial court's order, which refers to the assessment as a tax. However, because we need not reach the state constitutional claims in this appeal, we express no opinion on whether the assessment imposed by subchapter B is properly considered a tax or a fee.

^{FN3}. After oral argument was heard in this case, both sides requested leave to file post-submission briefs. Those motions are hereby granted.

BACKGROUND

In 2007, the Texas Legislature enacted chapter 47, subchapter B, of the business and commerce code, which imposes a tax "on a sexually oriented business in an amount equal to \$5 for each entry by each customer admitted to the business." Tex. Bus. & Com.Code Ann. § 47.052(a). The statute further defines a sexually oriented business ("SOB") as:

a nightclub, bar, restaurant, or similar commercial enterprise that:

(A) provides for an audience of two or more individuals live nude entertainment or live nude performances; and

*857 (B) authorizes on-premises consumption of alcoholic beverages, regardless of whether the consumption of alcoholic beverages is under a license or permit issued under the Alcoholic Beverage Code.

Id. § 47.051(2). As a result, the tax applies only to businesses that permit alcohol consumption in the presence of live, nude entertainment. "Nude" is defined as "entirely unclothed" or "unclothed in a manner that leaves uncovered or visible through less than fully opaque clothing any portion of the breasts below the top of the areola of the breasts, if the person is female, or any portion of the genitals or buttocks." Id. § 47.051(1). A business subject to the tax is not required to impose the tax on its customers, but may use its discretion in determining how it will derive the money required to pay the tax. Id. § 47.052(c). The legislature allocated the first \$25 million in revenue received from the SOB tax to the State's sexual assault program fund and the remaining revenue to the Texas health opportunity pool to fund health insurance for low-income Texans. Id. §§ 47.054-.055. The SOB tax went into effect on January 1, 2008.^{FN4}

^{FN4}. During the 2007 session, the legislature also repealed chapter 47 of the business and commerce code, effective April 1, 2009, as part of a nonsubstantive statutory revision program. See Act of May 15, 2007, 80th Leg., R.S., ch. 885, § 2.47(a)(1), 2007 Tex. Gen. Laws 1905, 2082. Subchapter B of chapter 47 was enacted without reference to this repeal.

287 S.W.3d 852
(Cite as: 287 S.W.3d 852)

In response to the enactment of subchapter B, Karpod, a sexually oriented business, and TEA, an association representing the interests of sexually oriented businesses in Texas, filed suit for declaratory and injunctive relief against the Comptroller, asserting that the tax violated the state and federal constitutions. After a bench trial, the trial court issued a declaratory judgment that the statute violated the First Amendment to the United States Constitution, permanently enjoined the Comptroller from collecting or assessing the tax, and awarded attorneys' fees in favor of TEA and Karpod.^{FN5} This appeal followed.

FN5. In light of its finding that the statute is unconstitutional under the First Amendment, the trial court declined to reach TEA and Karpod's state constitutional claims.

DISCUSSION

On appeal, the Comptroller argues (1) that the SOB tax does not violate the First Amendment, (2) that the SOB tax does not violate the Texas Constitution, (3) that sovereign immunity bars suit by TEA, and (4) that the trial court erred in awarding attorneys' fees.

The First Amendment

[1] We note at the outset that “the fact that protected speech may be offensive to some does not justify its suppression.” *Carey v. Population Servs. Int'l*, 431 U.S. 678, 701, 97 S.Ct. 2010, 52 L.Ed.2d 675 (1977). In fact, “it is in those instances where protected speech grates most unpleasantly against the sensibilities that judicial vigilance must be at its height.” *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 87, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976) (plurality opinion) (Stewart, J., dissenting).

[2][3][4] In conducting our First Amendment analysis, we must first determine whether the SOB tax is subject to strict or intermediate scrutiny. Content-based restrictions on speech are presumptively invalid and subject to strict scrutiny. *See, e.g., City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 434, 122 S.Ct. 1728, 152 L.Ed.2d 670 (2002) (plurality opinion). In order to withstand strict scrutiny, a statute must be narrowly tailored*858 to promote a compelling government interest. *See, e.g., United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813, 120 S.Ct. 1878, 146 L.Ed.2d 865 (2000). The

Comptroller concedes that the SOB tax cannot survive a strict scrutiny analysis, arguing instead that the tax is content-neutral and therefore subject to intermediate scrutiny. A content-neutral restriction on speech withstands intermediate scrutiny “if the conduct itself may constitutionally be regulated, if the regulation is narrowly drawn to further a substantial governmental interest, and if the interest is unrelated to the suppression of free speech.” *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 294, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984) (citing *United States v. O'Brien*, 391 U.S. 367, 376, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968)).

[5][6] “As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content-based,” while “laws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are in most instances content-neutral.” *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 643, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994). The principal inquiry in determining content neutrality “is whether the government has adopted a regulation of speech because of disagreement with the message it conveys.” *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989). Rules are generally considered content-based when the regulating party must examine the speech to determine if the restriction applies. *See, e.g., Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134, 112 S.Ct. 2395, 120 L.Ed.2d 101 (1992); *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 230, 107 S.Ct. 1722, 95 L.Ed.2d 209 (1987); *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 383, 104 S.Ct. 3106, 82 L.Ed.2d 278 (1984).

[7] While nude dancing “falls only within the outer ambit of the First Amendment's protection,” it is nevertheless protected as expressive conduct. *City of Erie v. Pap's A.M.*, 529 U.S. 277, 289, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000) (plurality opinion). In arguing that the SOB tax is subject to intermediate scrutiny, the Comptroller points to cases in which the U.S. Supreme Court has applied intermediate scrutiny to zoning restrictions aimed at the secondary effects of businesses offering adult entertainment. *See Alameda Books*, 535 U.S. at 434, 122 S.Ct. 1728 (plurality opinion) (zoning ordinance prohibiting more than one “adult entertainment business” in single building); *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48,

287 S.W.3d 852
(Cite as: 287 S.W.3d 852)

106 S.Ct. 925, 89 L.Ed.2d 29 (1986) (zoning ordinance restricting location of adult movie theaters); Young, 427 U.S. at 71-72, 96 S.Ct. 2440 (plurality opinion) (same).

[8] Unlike the restrictions at issue in Alameda Books, Renton, and Young, the SOB tax is not a zoning restriction, but a tax on businesses that offer live, nude entertainment in the presence of alcohol.^{FN6} The U.S. Supreme Court has suggested that zoning restrictions directed to secondary effects of speech are inherently different from other types of restrictions on speech. See Alameda Books, 535 U.S. at 449, 122 S.Ct. 1728 (plurality opinion) *859 (Kennedy, J., concurring)^{FN7} (“[Z]oning regulations do not automatically raise the specter of impermissible content discrimination ... because they have a prima facie legitimate purpose: to limit the negative externalities of land use.... [T]hese sorts of ordinances are more like a zoning restriction on slaughterhouses and less like a tax on unpopular newspapers.”) (emphasis added); Young, 427 U.S. at 62, 73 n. 35, 96 S.Ct. 2440 (plurality opinion) (stating that the zoning ordinance’s restrictions are so minimal that “the market for this commodity is essentially unrestrained” and that “[t]he situation would be quite different if the ordinance had the effect of suppressing, or greatly restricting access to, lawful speech”). Because zoning ordinances are distinguishable from other restrictions on speech, we do not find the First Amendment analyses applied in zoning cases to be particularly relevant to the present case. See Alameda Books, 535 U.S. at 445, 122 S.Ct. 1728 (plurality opinion) (Kennedy, J., concurring) (stating that city could regulate secondary effects of adult entertainment businesses with zoning ordinance, but could not suppress the speech itself by, “for example, imposing a content-based fee or tax”).

^{FN6}. While the Comptroller characterizes the SOB tax as a “modest fee” of five dollars per customer, “the level of the fee is irrelevant. A tax based on the content of speech does not become more constitutional because it is a small tax.” Forsyth County v. Nationalist Movement, 505 U.S. 123, 136, 112 S.Ct. 2395, 120 L.Ed.2d 101 (1992).

^{FN7}. Because Justice Kennedy concurred in the judgment of the Court on the narrowest grounds, his concurrence represents the Court’s holding in Alameda Books. See

Marks v. United States, 430 U.S. 188, 194, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977) (“When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.”) (internal quotation marks and citation omitted).

Furthermore, while the Supreme Court has held that bans on public nudity should be reviewed with intermediate scrutiny as content-neutral restrictions, the public-nudity bans at issue in those cases did not single out a specific class of First Amendment speakers, as the SOB tax does. See Pap’s A.M., 529 U.S. at 290, 120 S.Ct. 1382 (plurality opinion) (“By its terms, the ordinance regulates conduct alone. It does not target nudity that contains an erotic message; rather, it bans all public nudity, regardless of whether that nudity is accompanied by expressive activity.”); Barnes v. Glen Theatre, Inc., 501 U.S. 560, 566, 571, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991) (plurality opinion) (“Indiana, of course, has not banned nude dancing as such, but has proscribed public nudity across the board.... Public nudity is the evil the State seeks to prevent, whether or not it is combined with expressive activity.”).

[9][10][11] Having found the cases involving zoning restrictions and total nudity bans inapplicable to the present case, we now turn to the body of law addressing differential taxation of First Amendment speakers. The SOB tax targets a small group of taxpayers engaged in expression protected by the First Amendment, even if only marginally so. See Barnes, 501 U.S. at 566, 111 S.Ct. 2456 (plurality opinion). A tax imposed on a small group of First Amendment speakers, particularly a group conveying a message that the taxing body might consider undesirable, carries a greater risk of suppressing speech than a zoning ordinance because “the power to tax involves the power to destroy.” McCulloch v. Maryland, 4 Wheat. 316, 17 U.S. 316, 431, 4 L.Ed. 579 (1819). As the Supreme Court stated in Leathers v. Medlock:

[D]ifferential taxation of First Amendment speakers is constitutionally suspect when it threatens to suppress the expression of particular ideas or viewpoints.... A tax is also suspect if it *860 targets a small group of speakers. Again, the fear is censor-

287 S.W.3d 852
(Cite as: 287 S.W.3d 852)

ship of particular ideas or viewpoints. Finally, for reasons that are obvious, a tax will trigger heightened scrutiny under the First Amendment if it discriminates on the basis of the content of taxpayer speech.

499 U.S. 439, 447, 111 S.Ct. 1438, 113 L.Ed.2d 494 (1991) (citations omitted). “A power to tax differentially, as opposed to a power to tax generally, gives a government a powerful weapon against the taxpayer selected.” Minneapolis Star & Tribune Co. v. Minnesota Comm’r of Revenue, 460 U.S. 575, 585, 103 S.Ct. 1365, 75 L.Ed.2d 295 (1983).

[12][13][14][15] A selective taxation scheme in which an entity’s tax status depends entirely on the content of its speech is “particularly repugnant to First Amendment principles.” Arkansas Writers’ Project, 481 U.S. at 229, 107 S.Ct. 1722. As a result, differential taxation based on content is subject to strict scrutiny. *Id.* at 231. A taxing statute is content-based if it “singles out income derived from expressive activity for a burden the State places on no other income, and it is directed only at works with a specified content.” Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 116, 112 S.Ct. 501, 116 L.Ed.2d 476 (1991). Where taxing authorities must necessarily examine the content of the message that is conveyed, “[s]uch official scrutiny of the content of publications as the basis for imposing a tax is entirely incompatible” with the First Amendment. Arkansas Writers’ Project, 481 U.S. at 230, 107 S.Ct. 1722.

[16] Testimony at trial revealed that in order to determine whether the SOB tax should be assessed against a particular taxpayer, representatives from the Comptroller’s office would be required to examine the content of the expressive conduct. For example, Steven White, a program specialist in the Comptroller’s tax policy division, testified that if a play involving nudity was held at a bar or other establishment that serves alcohol, the owner of the establishment would not be subject to the SOB tax because “the main ingredient of the performance is not necessarily that of live nude entertainment.” White also testified that a comedy show involving nudity at a venue where alcohol is sold would not trigger the SOB tax, because “the essence of that performance is not necessarily one of live nude entertainment.” White further explained that a bar hosting a “wet t-shirt contest” or a bar at

which bartenders periodically perform dance routines and become nude as defined by the statute would be subject to the tax. Similarly, Emma Fuentes, an auditor in the Comptroller’s office testified, “Using my own judgment, I would look at the taxpayer we’re auditing. If it’s like a theater that puts on plays and concerts I would think that maybe this fee was not appropriate for them ... [b]ecause the whole essence of the transaction to me would be for somebody to go see a play and not so much a sexually oriented business.” These examples reveal that the SOB tax is not imposed in all incidents where live nude entertainment occurs in the presence of alcohol, but only in those situations in which the taxing authority—the Comptroller—determines, after examining the content of the expression, that it represents the “essence” of live nude entertainment. This type of differential taxation based on content is precisely the type of restriction warranting strict scrutiny in Arkansas Writers’ Project, Minneapolis Star, and Simon & Schuster.

[17] The bulk of the testimony at trial focused on the Comptroller’s argument that the SOB tax is aimed at reducing the secondary effects of sexually oriented businesses.*861 However, a tax on speech is not necessarily content-neutral simply because it is aimed at secondary effects. See Forsyth County, 505 U.S. at 134, 112 S.Ct. 2395. While intermediate scrutiny is applied to zoning regulations aimed at decreasing secondary effects, zoning regulations are distinguishable from differential taxation statutes, as previously discussed. See Alameda Books, 535 U.S. at 449, 122 S.Ct. 1728 (plurality opinion) (Kennedy, J., concurring) (stating that designation of zoning restrictions on adult entertainment businesses as “content-neutral” is legal fiction used because “[t]he zoning context provides a built-in legitimate rationale, which rebuts the usual presumption that content-based restrictions are unconstitutional”). In light of this distinction, evidence that the SOB tax is aimed at reducing secondary effects of sexually oriented businesses does not preclude the proper application of strict scrutiny in this case.

[18] The Comptroller also argues that the State has the power to categorically ban nude dancing or the sale of alcohol in the presence of nude dancing, and therefore the SOB tax must be constitutionally permissible because it is less restrictive than a total ban. First, the Supreme Court cases relied upon by the Comptroller for the proposition that the State may ban

287 S.W.3d 852
(Cite as: 287 S.W.3d 852)

nude dancing altogether refer, as previously discussed, to content-neutral bans on nudity in general, rather than specific prohibitions on nude dancing. See Pap's A.M., 529 U.S. at 290, 120 S.Ct. 1382 (plurality opinion); Barnes, 501 U.S. at 566, 571, 111 S.Ct. 2456 (plurality opinion). Second, with regard to the power to ban alcohol in the presence of nude dancing, the Supreme Court held in 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 516, 116 S.Ct. 1495, 134 L.Ed.2d 711 (1996), that “the Twenty-first Amendment does not qualify the constitutional prohibition against laws abridging the freedom of speech embodied in the First Amendment.” In other words, a state’s regulatory power over the sale and use of alcoholic beverages under the Twenty-first Amendment cannot be used to shield the suppression of speech from constitutional scrutiny. See id.^{FN8}

FN8. We note that the Court’s holding in 44 Liquormart did not foreclose the possibility of a state using its inherent police power to place restrictions on the sale of alcohol in the presence of nude dancing. See 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 516, 116 S.Ct. 1495, 134 L.Ed.2d 711 (1996). However, such use of a state’s police power must satisfy First Amendment scrutiny. See Young v. American Mini Theatres, Inc., 427 U.S. 50, 80, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976) (plurality opinion) (Powell, J., concurring) (stating that “no aspect of the police power enjoys immunity from searching constitutional scrutiny”).

[19] Furthermore, we disagree with the Comptroller’s *a fortiori* argument that if a government may, in the interest of public safety, ban alcohol in the presence of nude dancing, it may also impose a tax on establishments that provide alcohol in the presence of nude dancing. The reason this argument fails is best addressed by the following analogy posited by the U.S. Supreme Court:

[T]he situation becomes the same as if California law forbade shouting fire in a crowded theater, but granted dispensations to those willing to contribute \$100 to the state treasury. While a ban on shouting fire can be a core exercise of the State’s police power to protect the public safety, and can thus meet even our stringent standards for regulation of speech, adding the unrelated condition alters the

purpose to one which, while it may be legitimate, is inadequate to sustain the ban. Therefore, even though, in *862 a sense, requiring a \$100 tax contribution in order to shout fire is a lesser restriction on speech than an outright ban, it would not pass constitutional muster.

Nollan v. California Coastal Comm’n, 483 U.S. 825, 837, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987). As this hypothetical suggests, the power to ban speech pursuant to a government’s police power does not presuppose the power to impose a financial disincentive on such speech. This reasoning is even more applicable in the present case because the act of shouting fire in a crowded theater, unlike nude dancing, is not subject to First Amendment protection at all. See Schenck v. United States, 249 U.S. 47, 52, 39 S.Ct. 247, 63 L.Ed. 470 (1919).

[20] The Supreme Court has held that while a government has the power to regulate the use and sale of alcohol, it “may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially his interest in freedom of speech.” 44 Liquormart, 517 U.S. at 513, 116 S.Ct. 1495 (internal quotation marks and citation omitted). “[I]f the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to ‘produce a result which [it] could not command directly.’” Perry v. Sindermann, 408 U.S. 593, 597, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972) (quoting Speiser v. Randall, 357 U.S. 513, 526, 78 S.Ct. 1332, 2 L.Ed.2d 1460 (1958)). This is precisely what the State seeks to do in the present case. By conditioning the ability to sell alcohol on the forfeiture of a First Amendment right, the State attempts to produce a result—the imposition of a content-based tax on speech—which it could not command directly.^{FN9}

FN9. The fact that there is no constitutional right to provide alcohol in the presence of nude dancing is immaterial because “even though a person has no ‘right’ to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely,” including those that demand the surrender of a constitutional right. Perry v.

287 S.W.3d 852
(Cite as: 287 S.W.3d 852)

Sindermann, 408 U.S. 593, 597, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972).

Furthermore, we disagree with the Comptroller's characterization of the SOB tax as an alcohol regulation, rather than a tax on speech. While it is true that a sexually oriented business owner may avoid the tax by choosing not to allow the consumption of alcohol on the premises, this aspect of the SOB tax is insufficient to transform a content-based tax into a content-neutral alcohol regulation. In reviewing the plain language, context, and legislative history of the relevant statutory provisions, we are not convinced that "the statute's predominant purpose is with regulating the service of alcohol," as was the case in Illusions-Dallas Private Club, Inc. v. Steen, 482 F.3d 299, 309 (5th Cir.2007), in which the Fifth Circuit applied intermediate scrutiny to a provision of the Texas Alcoholic Beverage Code prohibiting sexually oriented businesses from obtaining private club permits from the Texas Alcoholic Beverage Commission (TABC) to serve alcohol in dry counties. See Tex. Alco. Bev.Code Ann. § 32.03(k) (West 2007). In Illusions, the Fifth Circuit held that the statute at issue was "part of a 'web' of alcohol regulations," which are unrelated to the suppression of speech, and emphasized the statutory context of the prohibition within the alcoholic beverage code, where it appears alongside other provisions allowing TABC to regulate the sale of alcohol. 482 F.3d at 309; see also id. at 308 (concluding "that § 32.03(k) is *863 subject to intermediate scrutiny because its predominant purpose, as exhibited by its plain text and its place within the Texas Alcoholic Beverage Code, is unrelated to the suppression of speech").

The SOB tax, on the other hand, is not part of a "web" of alcohol regulations imposed by the alcoholic beverage code, but appears in chapter 47 of the business and commerce code, which governs sexually oriented businesses. The SOB tax is remitted to the Comptroller, see Tex. Bus. & Com.Code Ann. § 47.053, and, unlike the statutory provision at issue in Illusions, does not involve the regulatory oversight of TABC.^{FN10} The original version of the SOB tax proposed in the legislature and passed by the House of Representatives made no mention of alcohol at all. See Tex. H.B. 1751, 80th Leg., R.S. (2007) (as passed by House, May 9, 2007). The bill was later amended in the Senate to restrict the pool of taxpayers to those sexually oriented businesses that allowed alcohol on

the premises. See S.J. of Tex., 80th Leg., R.S. 3043 (2007). As TEA and Karpod point out in their briefs, this change mirrored a similar amendment originally proposed in the House, see H.J. of Tex., 80th Leg., R.S. 3573 (2007), after a hearing before the House Ways and Means Committee, in which there was some discussion regarding the additional audit burden that the SOB tax would impose on the Comptroller's office, the convenience of "joining forces" with TABC for audit purposes, and the logistical difficulties in auditing sexually oriented businesses that are not regulated by TABC.^{FN11} See Hearing on Tex. H.B. 1751 Before the House Comm. on Ways & Means, 80th Leg., R.S. 39-42 (March 14, 2007). Beyond this discussion regarding the efficiency and convenience of combining the audit resources of TABC and the Comptroller's office, the legislative history of subchapter B of chapter 47 of the business and commerce code includes no references to the regulation of alcohol.

^{FN10}. TABC is authorized to "exercise all powers, duties, and functions conferred by" the alcoholic beverage code, and "shall inspect, supervise, and regulate every phase of the business of manufacturing, importing, exporting, transporting, storing, selling, advertising, labeling, and distributing alcoholic beverages, and the possession of alcoholic beverages for the purpose of sale or otherwise." Tex. Alco. Bev.Code Ann. § 5.31 (West 2007).

We note also that chapter 183 of the tax code, which imposes a tax on gross receipts derived from the sale of "mixed beverages," includes a "conflict of rules" provision to govern conflicts between regulations issued by TABC and those issued by the Comptroller in the collection of the tax. See Tex. Tax Code Ann. § 183.052 (West 2008). No similar provision appears in the SOB tax statute, suggesting that the legislature did not contemplate the exercise of TABC's regulatory authority in connection with the SOB tax.

^{FN11}. During the hearing, a representative from the Comptroller's office testified that the SOB tax would create "an additional audit burden" and stated that "these particular

287 S.W.3d 852
(Cite as: 287 S.W.3d 852)

establishments are regulated by the TABC and they are subject to audit already by the TABC,” so “[h]opefully we can join forces with the TABC.” When asked, “Is the bill specifically tied to those entities that are selling liquor? If it is not, how are you going to [audit] the entities that don’t sell liquor?” the Comptroller’s representative answered, “Well, I believe we would be on our own on that case.”

Reviewing the SOB tax provisions in their statutory context, we conclude that, unlike the provision at issue in *Illusions*, the predominant purpose of the SOB tax is not to regulate the service of alcohol. See 482 F.3d at 309, 310 n. 7 (concluding that statute has predominant purpose of regulating alcohol and is therefore content-neutral because “the text of the statute and its statutory context” suggest that it “is more in the nature of a typical alcohol regulation” and less in the nature of a law suppressing speech). Despite the limitation of *864 the SOB tax burden to businesses that allow the consumption of alcohol, the SOB tax remains a content-based differential tax burden on protected speech, and is subject to strict scrutiny. See, e.g., *Arkansas Writers’ Project*, 481 U.S. at 230, 107 S.Ct. 1722 (stating that such tax burdens are “entirely incompatible” with First Amendment).

[21][22] The Comptroller concedes that the SOB tax cannot withstand strict scrutiny. As the trial court stated in its judgment, “Defendants failed to and conceded that they cannot meet their burden to show that [the tax] is necessary to serve a compelling state interest and narrowly tailored for that purpose.” In light of the Comptroller’s concession and our determination that the SOB tax is a content-based tax subject to strict scrutiny, we hold that the SOB tax is unconstitutional under the First Amendment.^{FN12} The Comptroller’s first issue is overruled. Having found the SOB tax unconstitutional under the First Amendment, we need not reach the Comptroller’s second issue regarding Karpod and TEA’s state constitutional claims.

FN12. Even if we were to consider the SOB tax to be content-neutral, it would fail constitutional muster under the intermediate-scrutiny standard because it is not narrowly tailored to further a substantial governmental interest. See *Clark v. Community*

for Creative Non-Violence, 468 U.S. 288, 294, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984) (citing *United States v. O’Brien*, 391 U.S. 367, 376, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968)). In determining whether a restriction on speech is narrowly tailored, “the validity of the regulation depends on the relation it bears to the overall problem the government seeks to correct.” *Ward v. Rock Against Racism*, 491 U.S. 781, 801, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989). In the present case, the majority of the proceeds resulting from the SOB tax are allocated for a purpose that, while laudable, bears no relation to the overall problem that the State claims it is seeking to correct—the negative secondary effects of nude dancing when combined with alcohol. While the first \$25 million in revenue per biennium is allocated to the sexual assault program fund, the remainder—and the vast majority of the revenue—is dedicated to providing health insurance to low-income individuals. See *Tex. Bus. & Com. Code Ann.* §§ 47.054-.055 (West Supp.2008). The Comptroller presented no evidence at trial of a link between a lack of health insurance and nude dancing where alcohol is consumed. Because the State has imposed a tax on protected speech and allocated only a fraction of the proceeds to combat secondary effects, there is “an inadequate nexus between the regulation and the interest sought to be served.” *Clark*, 468 U.S. at 299 n. 8, 104 S.Ct. 3065; see also *Ward*, 491 U.S. at 799, 109 S.Ct. 2746 (“Government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals.”).

Sovereign Immunity

In its third issue on appeal, the Comptroller argues that TEA, as an organization that is not subject to the SOB tax, is barred from bringing suit on the basis of sovereign immunity. See *State v. Holland*, 221 S.W.3d 639, 643 (Tex.2007) (“Absent an express waiver of its sovereign immunity, the State is generally immune from suit.”). The Comptroller asserts that TEA cannot take advantage of the waiver of sovereign immunity found in the tax-protest provisions of the tax code because these provisions apply only to taxpayers. See *Tex. Tax Code Ann.* §§ 112.052, .101 (West 2008); see also *Rylander v. Bandag Licensing Corp.*,

287 S.W.3d 852
(Cite as: 287 S.W.3d 852)

18 S.W.3d 296, 302 (Tex.App.-Austin 2000, pet. denied) (“The Tax Code provides a statutory remedy for taxpayers who contend a tax is unlawful or may not legally be demanded.”).

[23][24] While the tax code does provide a remedy for taxpayers seeking to challenge the legality of a tax, such a challenge may also be brought in a suit for declaratory relief under the Texas Uniform Declaratory Judgments Act (UDJA), *865 Tex. Civ. Prac. & Rem.Code Ann. §§ 37.001-.011 (West 2008), as TEA has done in the present case. See Bandag Licensing, 18 S.W.3d at 303. This Court has held that “[a] suit seeking a declaratory judgment that a state agent is acting pursuant to an unconstitutional law is not an action against the State barred by sovereign immunity.” Rylander v. Caldwell, 23 S.W.3d 132, 136 (Tex.App.-Austin 2000, no pet.).^{FN13} Declaratory-judgment actions against state officials challenging the constitutionality of a statute “do not implicate the sovereign-immunity doctrine” because they are not considered “suits against the State.” Texas Natural Res. Conservation Com’n v. IT-Davy, 74 S.W.3d 849, 855 (Tex.2002). Because the present case falls within this category of cases for which the sovereign-immunity doctrine does not apply, we hold that TEA is not barred from bringing suit.^{FN14} The Comptroller’s third issue on appeal is overruled.

FN13. The Comptroller argues that Caldwell contradicts the Texas Supreme Court’s decision in W.D. Haden Co. v. Dodgen, 158 Tex. 74, 308 S.W.2d 838 (1958). However, in Dodgen, the court expressly distinguished between suits “to compel performance of or to enforce rights arising out of a contract with a state agency,” which are considered suits against the State for purposes of sovereign immunity, and suits seeking a determination of a person’s rights when state officials act outside their lawful authority, which are not considered suits against the State for sovereign-immunity purposes. 308 S.W.2d at 840. This Court’s holding in Caldwell is consistent with this distinction.

FN14. On appeal, the Comptroller does not contest TEA’s associational standing to bring suit. See Hunt v. Washington State Apple Adver. Comm’n, 432 U.S. 333, 343, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977) (requirements

for associational standing).

Attorneys’ Fees

[25] In its fourth issue on appeal, the Comptroller argues that Karpod is not entitled to attorneys’ fees under the UDJA because its UDJA claim is redundant to the legal remedy provided by the tax-protest provisions of the tax code. See Tex. Tax Code Ann. §§ 112.052, .101. The Comptroller contends that Karpod improperly brought its UDJA claim solely as a vehicle to obtain attorneys’ fees. See Texas State Bd. of Plumbing Exam’rs v. Associated Plumbing-Heating-Cooling Contractors of Tex., Inc., 31 S.W.3d 750, 753 (Tex.App.-Austin 2000, pet. dismissed by agr.) (“It is an abuse of discretion ... to award attorney’s fees under the UDJA when the statute is relied upon solely as a vehicle to recover attorney’s fees.”).

[26] Chapter 112 of the tax code allows taxpayers to seek a return of taxes paid under protest, see Tex. Tax Code Ann. § 112.052, and an injunction prohibiting the assessment or collection of a tax, see id. § 112.101.^{FN15} If a party requests a declaration under the UDJA that goes beyond its request pursuant to the tax code, the UDJA claim is not considered a redundant remedy. See Strayhorn v. Raytheon E-Systems, Inc., 101 S.W.3d 558, 572 (Tex.App.-Austin 2003, pet. denied) (distinguishing between taxpayer that “requested a statutory interpretation that went beyond its request for a tax refund,” for which UDJA claim would not be redundant, and taxpayer seeking declaration that denial of refund claim was unlawful, for which UDJA claim would be redundant). In addition, the issues to be determined in a tax-protest suit “are limited to those arising from the reasons expressed in the *866 written protest as originally filed.” Tex. Tax Code Ann. § 112.053(b) (West 2008). At the time of trial, Karpod had not paid the SOB tax under protest or filed a written protest as contemplated by section 112.053 because the first SOB tax payments were not yet due.^{FN16} Therefore, when Karpod’s UDJA claim was filed, the constitutionality of the SOB tax was not yet a “reason[] expressed in the written protest” that could be raised in a tax-protest suit.^{FN17} Id. The Texas Supreme Court has held that taxpayers have a constitutional right to obtain judicial review of tax liability by means of a prepayment declaratory action. See R Commc’ns, Inc. v. Sharp, 875 S.W.2d 314, 317-18 (Tex.1994) (holding tax code provision prohibiting declaratory actions and requiring taxpayers to seek relief through protest suit to be unconstitutional); see

287 S.W.3d 852
(Cite as: 287 S.W.3d 852)

also Bandag Licensing, 18 S.W.3d at 305 (tax code provision prohibiting award of attorneys' fees in declaratory-judgment action is "an unconstitutional barrier to access to the courts"). At the time Karpod's UDJA claim was filed, it had a constitutional right to a declaratory judgment regarding its tax liability and such a declaration was not redundant to any remedy available under the tax code. As a result, the trial court did not abuse its discretion in awarding attorneys' fees under the UDJA. The Comptroller's fourth issue is overruled.

FN15. Chapter 112 also allows taxpayers to bring a refund suit, see Tex. Tax Code Ann. § 112.151 (West 2008), which is distinct from a tax-protest suit, see id. § 112.052 (West 2008). Karpod did not seek a refund under section 112.151.

FN16. The trial court's judgment declaring the tax unconstitutional was issued on March 28, 2008, and the order awarding attorneys' fees was issued April 11, 2008. Karpod did not pay the tax under protest or file its written protest letter until April 21, 2008, the date that the first SOB tax payments became due.

FN17. TEA, for that matter, had no access to a tax-protest suit at any time during this litigation because it is not a taxpayer for SOB tax purposes. As a result, TEA's claim under the UDJA is not a redundant remedy preventing an award of attorneys' fees.

CONCLUSION

We affirm the trial court's judgment declaring that subchapter B of chapter 47 of the business and commerce code is unconstitutional and permanently enjoining assessment and collection of the tax.

Concurring Opinion by Chief Justice JONES.
Dissenting Opinion by Justice PURYEAR.

CONCURRING OPINION

J. WOODFIN JONES, Chief Justice.

Although I agree that strict scrutiny is the appropriate standard to apply in this case and concur in the decision to affirm the trial court's judgment, I write separately to address the issue raised by the parties concerning the use and relevance of post-enactment evidence in determining the statute's predominant purpose.

Our First Amendment analysis proceeds in three parts. See City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 434, 122 S.Ct. 1728, 152 L.Ed.2d 670 (2002) (plurality op.) (citing City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 46, 47-49, 51-54, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986)). The first question, whether the challenged law imposes a complete ban or is instead a "time, place, and inanner" regulation, see id., is not in contention here, as the parties agree that the fee or tax at issue is the latter. The second question in the analysis is whether the restriction is content-neutral or content-based, see id.; the answer to this question determines what level of scrutiny should be applied, see City of Erie v. Pap's A.M., 529 U.S. 277, 278, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000) (plurality op.). A content-based*867 regulation is considered presumptively invalid and is subject to strict scrutiny. Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 115, 118, 112 S.Ct. 501, 116 L.Ed.2d 476 (1991); Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 230-31, 107 S.Ct. 1722, 95 L.Ed.2d 209 (1987). Government regulation of speech or other expressive activity is content-neutral and subject only to intermediate scrutiny if it is adopted not "because of disagreement with the message it conveys," but for reasons unrelated to the content of the speech. Hill v. Colorado, 530 U.S. 703, 720, 120 S.Ct. 2480, 147 L.Ed.2d 597 (2000) (citing Ward v. Rock Against Racism, 491 U.S. 781, 791, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989)). Even in cases when a regulation has an incidental effect on some speakers or messages but not others, however, it will be deemed content-neutral and reviewed under intermediate scrutiny if its predominant purpose was aimed at perceived harmful secondary effects of the speech, rather than at its content. Alameda Books, 535 U.S. at 434, 122 S.Ct. 1728; City of Renton, 475 U.S. at 48-49, 106 S.Ct. 925. After determining the level of scrutiny, the third part of the analysis involves applying the appropriate constitutional standard to decide whether the regulation is narrowly tailored to promote a compelling governmental interest (strict scrutiny), see Arkansas Writers' Project, 481 U.S. at 231, 107 S.Ct. 1722, or narrowly drawn to further a substantial governmental interest unrelated to the suppression of free speech (intermediate scrutiny), see Turner Broad. Sys. v. Federal Comm'n's Comm'n., 512 U.S. 622, 662, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994).

287 S.W.3d 852
(Cite as: 287 S.W.3d 852)

I agree with Justice Henson that, in the present case, the level-of-scrutiny inquiry (*i.e.*, “question two”) can properly be decided by considering the plain text of the statute at issue and its statutory context. *See, e.g., Illusions-Dallas Private Club, Inc. v. Steen*, 482 F.3d 299, 310 (5th Cir.2007) (holding that statute’s predominant purpose could be determined by considering text and statutory context). In addition to those factors, I believe it is also appropriate at this stage of the inquiry to look beyond whether the statute is content-based or content-neutral on its face and consider evidence regarding whether the statute’s predominant purpose was to regulate speech or to address secondary effects. *See City of Renton*, 475 U.S. at 48-49, 106 S.Ct. 925. To the extent that Justice Henson’s opinion suggests that secondary-effects analysis is or should be confined strictly to cases involving zoning regulations, I do not adopt that view. Given that, in determining the content neutrality of any statute under the First Amendment, “[t]he government’s purpose is the controlling consideration,” *Ward*, 491 U.S. at 791, 109 S.Ct. 2746, it would be unwise to ignore evidence regarding whether the government’s actual purpose was to combat negative secondary effects. Accordingly, I see no reason to analyze and decide cases in which protected speech is regulated through imposition of a tax any differently from cases in which it is regulated by a zoning restriction or other means.

As the Eleventh Circuit has observed, while the Supreme Court has stated that zoning ordinances and public-nudity ordinances should be reviewed under distinct standards, “the Court also has sometimes collapsed the two categories into a single, overarching category of regulatory action targeting the negative ‘secondary effects’ of non-obscene adult entertainment and drawn conclusions about this single category.” *Peek-A-Boo Lounge of Bradenton, Inc. v. Manatee City*, 337 F.3d 1251, 1255 (11th Cir.2003). “Additionally, the Court has occasionally borrowed specific doctrines*868 developed in one category of case to apply to the other.” *Id.* at 1255-56 (citing *Alameda Books*, 535 U.S. at 434, 122 S.Ct. 1728 (plurality op.) (relying on Court’s holding in *Pap’s A.M.*, a case involving public-nudity ordinance, to explicate evidentiary showing necessary to sustain adult-entertainment zoning ordinance); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 583-84, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991) (Souter, J., concurring) (relying on evidentiary standard described in *Renton*, a zoning case, to explicate evidentiary showing neces-

sary to sustain public-nudity ordinance)).^{FN1} Therefore, I would hold that the *Renton* test may be applied here and that question two of that test may be decided by considering evidence relevant to the issue of whether the legislature’s predominant purpose in enacting the statute was to address secondary effects.

FN1. *See also City of Erie v. Pap’s A.M.*, 529 U.S. 277, 281-82, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000) (plurality op.) (applying *Renton*’s secondary-effects doctrine to justify non-zoning restrictions); *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989) (citing *Renton* for proposition that “[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” in non-zoning context). The federal courts of appeals have followed suit. *See, e.g., Fantasy Ranch Inc. v. City of Arlington*, 459 F.3d 546, 556 (5th Cir.2006) (holding that city ordinance requiring sexually oriented businesses to enforce proximity provisions between nude dancers and patrons was content-neutral because “the ordinance’s predominate concern is for secondary effects”); *Dream Palace v. County of Maricopa*, 384 F.3d 990, 1013 (9th Cir.2004) (equating second question of *Renton* test to determination of whether statute was designed to combat secondary effects of adult entertainment industry); *G.M. Enters., Inc. v. Town of St. Joseph*, 350 F.3d 631, 637 (7th Cir.2003) (focusing level-of-scrutiny inquiry solely on whether ordinances targeted secondary effects of sexually oriented businesses and opting not to decide whether ordinances were content-based or content-neutral).

In the present case, the trial court made several written fact findings relating to the absence of evidence that the statute’s predominant purpose was to combat secondary effects of combining nude dancing and alcohol:

The author of HB 1751, State Representative Ellen Cohen, testified before the House Ways & Means Committee that she claimed no link between sexual assault and the businesses responsible for the fees to

287 S.W.3d 852
(Cite as: 287 S.W.3d 852)

be paid.

The House Research Organization's Bill Analysis claimed no link between sexual assault and the business responsible for the fees to be paid.

There is no evidence that the Legislature actually considered or saw any studies claiming a link between sexual assault and the sexually oriented businesses that are responsible for the SOB Tax.

Victoria Camp's testimony indicated that materials supporting the existence of such links were made available to certain legislators, but no evidence showed that any legislator had actually considered or even seen those materials.

There is no evidence that studies about sexually oriented businesses were created, consulted, or reviewed by the Legislature prior to enacting HB 1751.

The State does not challenge those findings in this appeal. The trial court also made the following conclusion of law:

If reliance by the Legislature on some pre-enactment evidence of links between secondary effects and protected speech is a constitutional requirement (as is suggested, not expressly held, by Supreme Court case law), the SOB Tax must be held unconstitutional because no evidence indicating that the Legislature*869 actually considered any evidence of such links was presented at trial.

The State argues that, in making the foregoing findings and conclusion, the trial court created a "false distinction" between pre- and post-enactment evidence, which led it to determine that the State's "evidence of a link between the combination of alcohol and nude dancing and sexual assault" was insufficient. Relying on Justice Souter's concurring opinion in *Barnes* and two Fifth Circuit decisions, see *Fantasy Ranch*, 459 F.3d at 560; *N.W. Enters. Inc. v. City of Houston*, 352 F.3d 162, 175 (5th Cir.2003), the State argues that the Supreme Court has never required the government to produce "pre-enactment evidence" of legislative purpose in order to meet its burden of showing that a statute is content-neutral. The State's reliance on these cases is inapposite.

While Justice Souter did urge that "the appropriate focus is not an empirical enquiry into the actual intent of the enacting legislature, but rather the existence or not of a current governmental interest in the service of which the challenged application of the statute may be constitutional," see *id.* at 582, 111 S.Ct. 2456, his comments were made in the context of a discussion of question three of the *Renton* analysis-whether the government satisfied the intermediate-scrutiny standard by producing sufficient evidence of a link between the challenged regulation and the asserted interest in combating secondary effects. Likewise, the statements in the cited Fifth Circuit cases regarding the use of post-enactment evidence were made in the context of question-three discussions.^{FN2} But inquiring into whether a statute's purpose was to address secondary effects is wholly distinct from inquiring into whether the statute can be justified on the basis that it actually furthers an important or substantial governmental interest in combating negative secondary effects; the former determines the level of scrutiny to be applied, while the latter determines whether the statute passes constitutional muster under the applicable standard. Although I agree that post-enactment evidence may be considered in answering question three, and is often essential to that inquiry, it is far from clear that post-enactment evidence-even evidence directly relevant to purpose-may properly be considered in answering question two. See, e.g., *Illusions*, 482 F.3d at 310 n. 7 (declining to address question of whether district court erred in relying on state's post-enactment assertion of secondary-effects purpose as basis for applying intermediate scrutiny, having decided that statute was content-neutral based on its plain text and statutory context); *White River Amusement Pub, Inc. v. Town of Hartford*, 481 F.3d 163, 171-72 (2d Cir.2007) (concluding that *Renton* permits consideration only of pre-enactment evidence at question-two stage); *Dream Palace*, 384 F.3d at 1013-14 (same); *Peek-A-Boo Lounge*, 337 F.3d at 1268 & n. 16 (same); *SOB, Inc. v. County of Benton*, 317 F.3d 856, 862 (8th Cir.2003) (same); *D.H.L. Assocs., Inc. v. O'Gorman*, 199 F.3d 50, 57-58 (1st Cir.1999) (same); *Z.J. Gifts D-2, L.L.C. v. City of Aurora*, 136 F.3d 683, 690 (10th Cir.1998) (same).

FN2. See *Fantasy Ranch*, 459 F.3d at 560-61 (discussing post-enactment evidence in determining whether ordinance furthered important or substantial government interest); *N.W. Enters. Inc. v. City of Houston*, 352

287 S.W.3d 852
(Cite as: 287 S.W.3d 852)

F.3d 162, 175 (5th Cir.2003) (holding same and noting that question-two stage is not appropriate point to require legislature “to show evidence of negative secondary effects and of the new regulations’ efficacy” because “[d]isputes over the effectiveness of the proposed regulations are properly reserved for the final prong of the *Renton* analysis”).

Irrespective of whether courts may properly consider post-enactment evidence *870 of purpose in answering question two, however, all of the State’s post-enactment evidence in this case was relevant to the issue of whether the statute can be justified (question three), not its purpose (question two). As the trial court explained in its detailed findings of fact, the record in this case does not contain evidence—either pre- or post-enactment—that the legislature’s predominant purpose in enacting the statute was to combat perceived negative secondary effects of combining alcohol and nude dancing. Thus, the State’s argument that the trial court created a false distinction between pre- and post-enactment evidence is unavailing, because no evidence was produced showing that the legislature’s purpose was aimed at secondary effects.

In sum, I agree with Justice Henson that the text and context of the statute show that it is a content-based restriction. Therefore, in the absence of any evidence that the legislature’s predominant purpose was to address secondary effects, the statute may not be deemed content-neutral and must be reviewed under strict scrutiny, *see City of Renton, 475 U.S. at 48-49, 106 S.Ct. 925*, which the State has conceded it cannot meet.

I join the “Sovereign Immunity” and “Attorneys’ Fees” sections of Justice Henson’s opinion.

DISSENTING OPINION

DAVID PURYEAR, Justice.

Because I believe that the statutory scheme at issue in this case should have been reviewed using intermediate scrutiny rather than strict scrutiny and because I believe that the statute does not violate the First Amendment, I respectfully dissent from the result reached by the majority.

As mentioned in Justice Henson’s opinion, section 47.052 of the business and commerce code provides as

follows: “A fee is imposed on a sexually oriented business in an amount equal to \$5 for each entry by each customer admitted to the business.” Tex. Bus. & Com.Code Ann. § 47.052(a) (West Supp.2008) (emphasis added). The code defines “sexually oriented business” as follows:

a nightclub, bar, restaurant, or similar commercial enterprise that:

(A) provides for an audience of two or more individuals live nude entertainment or live nude performances; and

(B) authorizes on-premises consumption of alcoholic beverages, regardless of whether the consumption of alcoholic beverages is under a license or permit issued under the Alcoholic Beverage Code.

Id. § 47.051(2) (West Supp.2008); *see also id.* § 47.051(1) (West Supp.2008) (defining “nude”). Accordingly, the code imposes a fee on businesses that provide nude erotic entertainment and permit the consumption of alcohol on the their premises. By requiring all the conditions to be satisfied before a fee may be imposed, the code necessarily exempts establishments that provide erotic entertainment but do not allow for the consumption of alcohol or that allow alcohol consumption but do not allow their erotic entertainers to perform fully nude. The code also requires that a large portion of the fee collected be given to the State’s sexual assault program fund. *Id.* § 47.054 (West Supp.2008).

First Amendment

The statute in question, by its terms, does not specifically impose restrictions on the type of erotic entertainment performers may engage in or that patrons may observe. In other words, the statute does not address the expressive nature of the entertainment at issue. Instead, the statute affects the ability of businesses to combine*871 the entertainment and the consumption of alcohol. Although no specific limits on expression are imposed, the statute still has First Amendment implications because it affects the manner in which businesses may provide erotic expression. *See Illusions-Dallas Private Club, Inc. v. Steen, 482 F.3d 299, 307 (5th Cir.2007)*. In light of this, I would analyze the constitutionality of the statute by employing traditional First Amendment jurispru-

287 S.W.3d 852
(Cite as: 287 S.W.3d 852)

dence; however, I would note that while this type of regulation does have First Amendment implications, live erotic entertainment “falls only within the outer ambit of the *First Amendment's* protection.” *City of Erie v. Pap's A.M.*, 529 U.S. 277, 289, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000); see also *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 584, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991) (Souter J., concurring) (distinguishing between societal interest in protecting erotic expression and greater interest in protecting “untrammeled political debate”); *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932, 95 S.Ct. 2561, 45 L.Ed.2d 648 (1975) (explaining that nude dancing at bars “involves only the barest minimum of protected expression”); *Ben's Bar, Inc. v. Village of Somerset*, 316 F.3d 702, 707 (7th Cir.2003) (noting that nude dancing is only given diminished protection under First Amendment); see also *Fantasy Ranch Inc. v. City of Arlington*, 459 F.3d 546, 554 (5th Cir.2006) (explaining that although live erotic entertainment is protected by First Amendment, governments can regulate it).^{FN1}

^{FN1}. In her opinion, Justice Henson agrees that the type of expressive conduct at issue in this case only barely falls within the protections of the First Amendment. However, rather than concluding that the conduct's placement on the edge of protected speech subjects the behavior to less constitutional protection, she confusingly concludes that the type of expressive conduct at issue in this case warrants the highest judicial scrutiny, presumably higher than that afforded to behaviors more truly expressive in nature, to prevent unfair suppression.

Alcohol Prohibitions for Sexually Oriented Businesses

As a preliminary matter, I would note that a state may, in an effort to combat secondary effects associated with sexually oriented businesses, entirely prohibit the consumption of alcohol within sexually oriented businesses. See *Ben's Bar*, 316 F.3d at 706, 728 (7th Cir.2003) (upholding constitutionality of ordinance that prohibited consumption of alcohol within sexually oriented businesses); see also *181 South Inc. v. Fischer*, 454 F.3d 228, 233-34 (3d Cir.2006) (concluding that regulation prohibiting erotic expression at locations licensed to sell alcohol did not violate First Amendment). If a state may completely prohibit the consumption of alcohol within

sexually oriented businesses, it seems logical to assume that a state may also impose less exacting alcohol restrictions on sexually oriented businesses provided that the restriction is also designed to combat negative secondary effects. Cf. *Pap's A.M.*, 529 U.S. at 301, 120 S.Ct. 1382 (upholding city ordinance that imposed restriction that was less onerous than complete ban on erotic dancing and noting that there may be more than one method for government to choose to address serious problems associated with sexually oriented businesses).

The statute at issue in this case imposes a fee on establishments providing erotic entertainment and allowing their customers to consume alcohol. There can be little doubt that a fee is less restrictive than an absolute ban,^{FN2} and as discussed *872 more thoroughly later, the statute was designed to address potential negative secondary effects arising from the pairing of erotic entertainment and alcohol consumption by providing revenue for the State's sexual assault program fund. See *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 511, 116 S.Ct. 1495, 134 L.Ed.2d 711 (1996) (stating proposition that greater governmental powers include lesser ones); cf. *New York State Liquor Auth. v. Bellanca*, 452 U.S. 714, 717, 101 S.Ct. 2599, 69 L.Ed.2d 357 (1981) (explaining that state's ability to ban sale of alcohol entirely encompasses lesser power to ban sale of alcohol at certain locations).^{FN3} I can find no compelling distinction between statutes designed to curb potential negative secondary effects by prohibiting, in their entirety, the pairing of alcohol consumption and erotic entertainment and statutes designed to curb unwanted secondary effects by imposing a fee on establishments allowing the two activities that would render the later unconstitutional but the former constitutional. Consequently, I fail to see how the majority can conclude that the statute at issue violates the First Amendment.

^{FN2}. Regardless of the amount of the fee, the imposition of a fee for engaging in certain activities is less restrictive than banning the activity in its entirety because individuals have the option of engaging in the activity by paying the fee. Although businesses may challenge the amount of the fee as being excessive, those arguments are fundamentally different than challenging the State's authority to impose the fee at all.

287 S.W.3d 852
(Cite as: 287 S.W.3d 852)

FN3. Justice Henson tries to dismiss the State's "greater power includes the lesser power" by relying on a hypothetical described in *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987). In that case, the Supreme Court noted that a state could prohibit people from shouting the word "fire" in crowded theaters without violating the First Amendment because the prohibition would fall within a state's power to protect the public safety. *Id.* at 837, 107 S.Ct. 3141. However, the Court also theorized that a state could not adopt the ban but also allow individuals to violate the ban if they chose to contribute \$100 to the state treasury. *Id.* The Court noted that the second situation would amount to a lesser restriction than a total ban but also concluded that the addition to the ban would be unrelated to the purpose of protecting the public safety and would, in fact, alter the purpose of the ban. *Id.* In effect, the Court reasoned that the imposition of the fee was improper because imposing the fee would not further the state's interest in encouraging public safety. In other words, the Court determined that "the condition substituted for the prohibition [would] utterly fail[] to further the end advanced as the justification for the prohibition." *Id.*

The fee at issue in this case is unlike the one described above because the fee in this case is designed to further the same interest that a total ban on erotic entertainment and alcohol consumption would accomplish: minimizing potential negative secondary effects resulting from the consumption of alcohol and the viewing of erotic entertainment. Accordingly, the fee at issue in this case is actually more similar to the other hypothetical described in *Nollan*, in which the Court theorized that because a state could refuse to issue a building permit in order to protect public's interest in a beach, the State could also legitimately grant the permit but impose limitations designed to protect the public's interest in that property. *Id.* at 836-37, 107 S.Ct. 3141.

Intermediate Scrutiny Applies

Once it has been determined that a statute regulates activity protected by the First Amendment, courts must then determine what level of scrutiny to employ when reviewing the statute. As a preliminary matter, I would note that courts often apply intermediate scrutiny to governmental regulations of sexually oriented businesses. See *Fantasy Ranch*, 459 F.3d at 555 (5th Cir.2006) (listing various instances in which courts have applied intermediate scrutiny); see also *729, Inc. v. Kenton County Fiscal Court*, 515 F.3d 485, 504 (6th Cir.2008) (explaining that regulations pertaining to sexually oriented businesses are reviewed under intermediate rather than strict scrutiny due to "the peculiar *873 'secondary effects' associated with adult businesses"). When determining whether to apply intermediate or strict scrutiny, courts look to the purpose of the regulation at issue. *Illusions*, 482 F.3d at 308. If the statute "is intended to suppress expressions contained in erotic dancing, then it is subject to strict scrutiny," but if the statute "has a purpose unrelated to the suppression of speech, then it is subject to intermediate scrutiny." *Id.*

Although the statute at issue in this case mentions "live nude entertainment" and "live nude performances," the statute imposes no direct limitation on the type of expression that may be exhibited through erotic entertainment. Cf. *id.* at 309 (explaining that fact that statute "references content" does not necessarily mean that statute is "intended to suppress speech, even without a legislative record to suggest a purpose unrelated to speech"). Moreover, it only imposes a fee if a sexually oriented business decides to pair erotic entertainment with the consumption of alcohol. In other words, a business may avoid any imposition of the fee described in the statute by not allowing its customers to consume alcohol. See *id.* (noting that fact that sexually oriented business could remove itself from reach of regulation by not allowing alcohol consumption weighs in favor of determination that regulation should be reviewed under intermediate scrutiny). Accordingly, the statute seems concerned with the regulation of alcohol or the regulation of the pairing of alcohol and erotic entertainment rather than the suppression of any specific erotic expression. Cf. *Ben's Bar*, 316 F.3d at 726 (explaining that regulation prohibiting consumption of alcohol within sexually oriented business was "not a restriction on erotic expression, but a prohibition of nonexpressive conduct (i.e., serving and consuming alcohol) during the presentation of expressive conduct").

287 S.W.3d 852
(Cite as: 287 S.W.3d 852)

For these reasons, I believe that the statute has a purpose unrelated to the suppression of expression and is, therefore, subject to intermediate scrutiny. Cf. Sammy's of Mobile Ltd. v. City of Mobile, 140 F.3d 993, 996 (11th Cir.1998) (noting that ordinances prohibiting sale or consumption of alcohol at sexually oriented business are content-neutral and should be analyzed under intermediate scrutiny).

This conclusion is also supported by the fact that courts have reviewed regulations pertaining to sexually oriented businesses and imposing more significant restrictions under intermediate scrutiny. For example, courts have employed intermediate scrutiny when reviewing regulations limiting the locations in which sexually oriented businesses may operate. See, e.g., City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 440, 122 S.Ct. 1728, 152 L.Ed.2d 670 (2002) (plurality opinion) (applying intermediate scrutiny to ordinance that prohibited more than one sexually oriented business per building and did not contain a provision exempting preexisting businesses); Renton v. Playtime Theatres, Inc., 475 U.S. 41, 49, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986) (utilizing intermediate-scrutiny test when reviewing regulation limiting the locations in which adult movie theaters may operate).

In addition, courts have also employed intermediate scrutiny when reviewing limitations placed on actual erotic expression. See, e.g., Fantasy Ranch, 459 F.3d at 557 (applying intermediate scrutiny to ordinance imposing proximity limitations, which required performers to be six feet away from customers or to be separated from their customers by wall); Hang-On, Inc. v. City of Arlington, 65 F.3d 1248, 1254-55 (5th Cir.1995) (applying intermediate scrutiny when reviewing statute prohibiting contact between erotic entertainers*874 and customers). Furthermore, the Supreme Court has applied intermediate scrutiny when reviewing the constitutionality of an ordinance prohibiting public nudity, which had the effect of requiring erotic entertainers to wear minimal attire. Pap's A.M., 529 U.S. at 296-302, 120 S.Ct. 1382.

Finally, courts have employed intermediate scrutiny to review complete bans on the consumption of alcohol within sexually oriented businesses. See Ben's Bar, 316 F.3d at 722. Similarly, intermediate scrutiny has been applied to a statute that completely prohi-

bited the issuance or renewal of alcohol permits for sexually oriented businesses located inside dry political subdivisions. Illusions, 482 F.3d at 303, 307, 310; see Tex. Alco. Bev.Code Ann. § 32.03(k) (West 2007); see also Tex. Elec.Code Ann. § 501.021 (West Supp.2008) (allowing voters to determine whether to allow sale of alcohol within political subdivision).

The statute at issue in this case does not require sexually oriented businesses to move from their current locations, imposes no direct limitation on the type of erotic expression entertainers may provide, and does not completely ban the consumption of alcohol within a sexually oriented business. Rather, the statute imposes a fee on a sexually oriented business only if it chooses to allow the consumption of alcohol on its premises. Nothing in the cases relied upon by either of the other two justices convinces me that a more exacting standard should be employed to review a statute that has a more modest impact on First Amendment expression than the regulations described above.

The Statute Survives Intermediate Scrutiny

Having determined that the statute in question in this case should be reviewed under intermediate scrutiny, I would then determine whether the statute may be upheld under that level of scrutiny. In the context at issue in this case, a regulation satisfies intermediate scrutiny if it was issued "pursuant to a legitimate governmental power"; "does not completely prohibit adult entertainment"; "is aimed not at the suppression of expression, but rather at combating negative secondary effects"; and "is designed to" further a "substantial governmental interest and the restriction on expressive conduct is no greater than is essential in furtherance of that interest." Illusions, 482 F.3d at 311.

There is no dispute that the legislature has the authority to regulate both alcohol consumption and sexually oriented businesses. Cf. Ben's Bar, 316 F.3d at 722 (explaining that regulation of alcohol consumption falls within state's police powers). In addition, as described earlier, the statute in question does not completely ban erotic entertainment. Cf. California v. LaRue, 409 U.S. 109, 118-19, 93 S.Ct. 390, 34 L.Ed.2d 342 (1972) (upholding constitutionality of regulation that prohibited certain types of erotic expression in bars and noting that state did not ban the expression entirely, but merely prohibited it in establishments that allow for the consumption of alcohol). Consequently, the first two elements are met.

287 S.W.3d 852
(Cite as: 287 S.W.3d 852)

Regarding the third element, as described previously, nothing in the statute directly addresses any aspect of erotic expression; rather, the statute addresses the pairing of erotic expression with the consumption of alcohol. Moreover, rather than prohibiting any particular act of expression, the statute simply imposes a fee on establishments that desire to allow the consumption of alcohol on their premises and that provide erotic entertainment.

Furthermore, the statute attempts to address some of the potentially negative secondary effects from the pairing of alcohol*875 and erotic expression by using a portion of the total fees collected to provide revenue for the State's sexual assault program fund. Additionally, the legislative history for the statute demonstrates that the purpose of the statute was to provide funding for programs alleviating the impact of secondary effects. See Senate Research Ctr., Bill Analysis, Tex. H.B. 1751, 80th Leg., R.S. (2007) (stating that fee will be used to fund "programs that relate to sexual assault prevention, intervention, and research"); House Research Org., Bill Analysis, Tex. H.B. 1751, 80th Leg., R.S. (2007) (listing various sexual assault programs that money raised by fee could be used for). Although the effect of the fee on potential secondary effects may be more attenuated than a complete ban on alcohol consumption within businesses providing erotic entertainment would be, a state must be given a reasonable opportunity to experiment with solutions to serious problems affecting its populace. See Pap's A.M., 529 U.S. at 301, 120 S.Ct. 1382.

In light of the preceding, I would conclude that the statute is aimed at combating negative secondary effects and is not aimed at the suppression of expression. Cf. Fantasy Ranch, 459 F.3d at 557 (concluding that intermediate scrutiny was appropriate because the ordinance was "predominately targeted to the prevention of secondary effects, not to the suppression of symbolic expression"). For the reasons that follow, I would also conclude that the fourth element is satisfied.

To satisfy the "substantial interest" requirement of the final element, the State must present some evidence demonstrating a connection "between the combination of alcohol [consumption] and erotic dancing and negative secondary effects." Illusions, 482 F.3d at 312-13; see Fantasy Ranch, 459 F.3d at

561 (requiring only that regulation be supported by evidence that could reasonably be viewed as relevant to effects in question). However, the burden on the State is very light, Illusions, 482 F.3d at 312, and the State is not required to prove that its regulation is the only way to combat potential negative secondary effects, see Alameda Books, 535 U.S. at 437, 122 S.Ct. 1728.

The link between sexually oriented businesses and negative secondary effects has been discussed in various cases, Pap's A.M., 529 U.S. at 300, 120 S.Ct. 1382 (noting that crime and other safety issues are caused by "presence of nude dancing establishments"), and courts have also identified a state's interest in combating these effects as a substantial interest, see, e.g., Barnes, 501 U.S. at 583, 111 S.Ct. 2456 (Souter, J., concurring) (concluding that states have substantial interest in preventing negative secondary effects associated with sexually oriented businesses). In fact, the Supreme Court has reasoned that governments are not required to obtain new evidence regarding negative secondary effects when passing new regulations for sexually oriented businesses and may instead rely on evidence previously discovered, including evidence summarized in prior cases. Pap's A.M., 529 U.S. at 296-97, 120 S.Ct. 1382. In addition, the legislature has specifically identified a link between sexually oriented businesses and negative secondary effects. In particular, the legislature has determined that it is appropriate to impose regulations on sexually oriented businesses that are not imposed on other businesses because "sexually oriented businesses may be detrimental to the public health, safety, and welfare by contributing to ... the growth of criminal activity." Tex. Loc. Gov't Code Ann. § 243.001(a) (West 2005).

Although the link between sexually oriented businesses and negative secondary *876 effects has been previously established, evidence was also presented at trial suggesting a link between sexually oriented businesses and the types of behavior that the sexual assault fund is designed to combat. See Barnes, 501 U.S. at 582, 111 S.Ct. 2456 (Souter J., concurring) (explaining that when determining whether statute is constitutional, courts should focus on whether there is current governmental interest and not on whether interest was thoroughly articulated when regulation was issued); Fantasy Ranch, 459 F.3d at 560 (stating that governments may justify enactment of regulation

287 S.W.3d 852
(Cite as: 287 S.W.3d 852)

with evidence presented at trial). In fact, the district court found that the State “presented persuasive trial evidence supporting a possible link between the business activity subject to the tax and the secondary effects addressed by the sexual assault program fund.” Specifically, expert testimony was introduced stating that viewing erotic entertainment while consuming alcohol increases the likelihood that sexually assaultive behaviors might ensue. Moreover, various expert witnesses also stated that it was reasonable for legislators to conclude that there is a causal link between viewing erotic entertainment while consuming alcohol and sexually assaultive behavior.

For these reasons, I would conclude that the State has a substantial interest in combating negative secondary effects and that the statute at issue furthers that interest. *See Illusions*, 482 F.3d at 312 (explaining that courts must determine whether substantial interest exists and whether regulation facilitates that interest).

Regarding the restrictive component of the final element, as mentioned previously, the statute at issue imposes no affirmative ban on any expressive conduct. Instead, the statute imposes a fee on establishments providing erotic entertainment that also allow their patrons to consume alcohol. Nothing prohibits businesses from continuing to provide erotic entertainment and allow patrons to consume alcohol provided that the businesses pay the fee. Alternatively, businesses may continue to provide erotic entertainment without paying the fee if they stop allowing their customers to consume alcohol or if they require their performers to wear minimal clothing. *See Pap's A.M.*, 529 U.S. at 301, 120 S.Ct. 1382 (commenting that requiring performers to wear minimal clothing has *de minimus* impact on erotic expression).

Given that the statute does not directly target any type of expressive conduct, that the statute provides multiple avenues in which businesses may continue providing erotic entertainment, and that courts have upheld other regulations actually limiting the type of erotic expression that may be conveyed, *see id.* at 284, 301, 120 S.Ct. 1382 (upholding ordinance requiring dancers to wear minimal attire while engaged in erotic entertainment); *Hang On*, 65 F.3d at 1256-57 (stating that ordinance prohibiting contact between customers and erotic performer did not burden protected expression more than is essential to “interest in preventing prostitution, drug dealing, and assault”), I

would conclude that the statute's restriction on expressive conduct is no greater than is essential.

Having determined that all four prongs of intermediate scrutiny were satisfied, I would hold that section 47.052 of the business and commerce code does not violate the First Amendment of the federal constitution.^{FN4}

FN4. Because the district court concluded that the statute violated the First Amendment, it made no determination regarding the Association's other attacks on the statute. Having found that the statute does not violate the First Amendment, I would reverse the judgment of the district court and remand the case for consideration of the other issues raised in the case.

Tex.App.-Austin,2009.
Combs v. Texas Entertainment Ass'n, Inc.
287 S.W.3d 852

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Vernon's Texas Statutes and Codes Annotated Currentness
Business and Commerce Code (Refs & Annos)
Title 4. Miscellaneous Commercial Provisions (Refs & Annos)
Chapter 47. Sexually Oriented Businesses (Refs & Annos)
Subchapter B. Fee Imposed on Certain Sexually Oriented Businesses
→ § 47.051. Definitions

In this subchapter:

(1) "Nude" means:

(A) entirely unclothed; or

(B) clothed in a manner that leaves uncovered or visible through less than fully opaque clothing any portion of the breasts below the top of the areola of the breasts, if the person is female, or any portion of the genitals or buttocks.

(2) "Sexually oriented business" means a nightclub, bar, restaurant, or similar commercial enterprise that:

(A) provides for an audience of two or more individuals live nude entertainment or live nude performances; and

(B) authorizes on-premises consumption of alcoholic beverages, regardless of whether the consumption of alcoholic beverages is under a license or permit issued under the Alcoholic Beverage Code.

§ 47.052. Fee Based on Admissions; Records

(a) A fee is imposed on a sexually oriented business in an amount equal to \$5 for each entry by each customer admitted to the business.

(b) A sexually oriented business shall record daily in the manner required by the comptroller the number of customers admitted to the business. The business shall maintain the records for the period required by the comptroller and make the records available for inspection and audit on request by the comptroller.

(c) This section does not require a sexually oriented business to impose a fee on a customer of the business. A business has discretion to determine the manner in which the business derives the money required to pay the fee imposed under this section.

§ 47.053. Remission of Fee; Submission of Reports

Each quarter, a sexually oriented business shall:

(1) remit the fee imposed by Section 47.052 to the comptroller in the manner prescribed by the comptroller;

and

(2) file a report with the comptroller in the manner and containing the information required by the comptroller.

§ 47.054. Allocation of Certain Revenue for Sexual Assault Programs

The comptroller shall deposit the first \$25 million received from the fee imposed under this subchapter in a state fiscal biennium to the credit of the sexual assault program fund.

§ 47.055. Allocation of Additional Revenue

(a) The comptroller shall deposit all amounts received from the fee imposed under this subchapter after the first \$25 million in a state fiscal biennium in the Texas health opportunity pool established under Subchapter N, Chapter 531, Government Code. Money deposited in the pool under this section may be used only to provide health benefits coverage premium payment assistance to low-income persons through a premium payment assistance program developed under that subchapter.

(b) This section takes effect only if Senate Bill No. 10, Acts of the 80th Legislature, Regular Session, 2007, becomes law and the Texas health opportunity pool is established under that Act. If that Act does not become law, or that Act becomes law but the pool is not established, this section has no effect, and the revenue is deposited as provided by Section 47.0551.

§ 47.0551. Allocation of Additional Revenue

(a) The comptroller shall deposit all amounts received from the fee imposed under this subchapter after the first \$25 million in a state fiscal biennium to the credit of the premium payment assistance account. The premium payment assistance account is an account in the general revenue fund that may be appropriated to the Health and Human Services Commission only to provide health benefits coverage premium payment assistance to low-income persons through a program developed by the commission.

(b) This section takes effect only if Senate Bill No. 10, Acts of the 80th Legislature, Regular Session, 2007, does not become law, or that Act becomes law, but the Texas health opportunity pool is not established under that Act. If that Act becomes law and the pool is established, this section has no effect, and the revenue is deposited as provided by Section 47.055.

§ 47.056. Administration, Collection, and Enforcement

The provisions of Subtitle B, Title 2, Tax Code, apply to the administration, payment, collection, and enforcement of the fee imposed by this chapter.

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EXHIBIT 5

STATE OF TENNESSEE
OFFICE OF THE
ATTORNEY GENERAL
PO BOX 20207
NASHVILLE, TENNESSEE 37202

April 2, 2008

Opinion No. 08-78

Legality of Privilege Tax On Entry of Customers into Adult-Oriented Establishments

QUESTION

Is proposed legislation, House Bill 2676, which would impose a state privilege tax only on adult-oriented establishments for each entry by a customer, defensible in court?

OPINION

The proposed state privilege tax to be imposed only on adult-oriented establishments for each entry by a customer would likely be held unconstitutional.

ANALYSIS

The opinion of this Office has been requested as to the legality of proposed legislation, House Bill 2676, which would amend the Adult-Oriented Establishment Act, Tenn. Code Ann. § 7-51-1401, *et seq.*, to impose a “five dollar (\$5.00) [state] privilege tax . . . for each entry by each customer admitted to adult cabarets or adult[-]oriented establishments.” HB 2676, Section 2(a). “Such tax shall be in addition to all other taxes imposed on any such customer.” *Id.* The businesses would be required to record daily the number of customers admitted and remit the tax quarterly to the adult-oriented establishment boards¹ for their respective counties. *Id.*, Sections 2(b) and 3(a). The incidence of the tax would be on the adult-oriented establishment, not the customer, since the businesses would not be required to impose the tax directly on the customers, but would have discretion to determine the manner in which each business derives the money required to pay the tax. *Id.*, Section 2(c). The county adult-oriented establishment boards would remit the tax proceeds to the Treasurer for deposit into a special account created in the State General Fund. *Id.*, Sections 3(b) and 5. “Moneys from such account shall be appropriated solely for the purpose of making grants to public and private agencies for the victims of sexual abuse and victims of domestic violence.” *Id.*, Section 5. These grants would be administered by the Division of Resource Development and Support in the Department of Finance and Administration. *Id.*

¹ Typically a county does not have an adult-oriented establishment board unless it has voted, pursuant to Tenn. Code Ann. § 7-51-1120, to make the separate Tennessee Adult-Oriented Establishment Registration Act, Tenn. Code Ann. § 7-51-1101, *et seq.*, operative in that county. The Registration Act is effective in a particular county only “upon the contingency of a two-thirds (2/3) vote of the county legislative body. By contrast, the Adult-Oriented Establishment Act, Tenn. Code Ann. § 7-51-1401, *et seq.*, applies in all counties.

Courts recognize that non-obscene adult-oriented entertainment falls marginally within the scope of free speech protection. The United States Supreme Court has explained:

[E]ven though we recognize that the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value, it is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammelled political debate that inspired Voltaire's immortal comment.²

Young v. American Mini Theaters, Inc., 427 U.S. 50, 70-71, 96 S.Ct. 2440, 2452 (1976), *rehearing denied* (subjecting the commercial exploitation of sexually-oriented material to zoning requirements found to be a constitutionally valid time, place or manner regulation under the First Amendment). Further, as noted, in *City of Erie, et al. v. Pap's A.M. d/b/a Kandyland*, 529 U.S. 277, 289, 120 S. Ct. 1382 (2000)(plurality opinion),

Being "in a state of nudity" is not an inherently expressive condition. . . . [H]owever, nude dancing of the type at issue here is expressive conduct, although we think it falls within the outer ambit of the First Amendment's protection.

Traditionally, a governmental regulation of adult-oriented entertainment (which is intended to address generally recognized deleterious secondary effects) is analyzed under intermediate scrutiny to ensure it does not unduly impair the exercise of First Amendment rights. "[R]egulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny," one which was first enunciated as a four-step test in *United States v. O'Brien*, 391 U.S. 367, 377, 88 S.Ct. 1673 (1968). To withstand constitutional scrutiny, then, (1) the [Act or] Ordinance must have been enacted within [the government's] constitutional power; (2) the [Act or] Ordinance must further a substantial governmental interest; (3) the interest must be unrelated to the suppression of speech³; and (4) the [Act or] Ordinance may pose only an "incidental burden on First Amendment freedoms that is no greater than is essential to further the government interest." *Richland Bookmart, Inc. v. Nichols*, 137 F.3d 435, 440 (6th Cir.1998)(upheld constitutionality of Tennessee's Adult-Oriented Establishment Act, Tenn. Code Ann. § 7-51-1401, *et seq.*) (citing *O'Brien*, 391 U.S. at 377, 88 S.Ct. 1673); see *Deja Vu of Nashville v. Metropolitan Gov't of Nashville and Davidson County, Tenn.* 274 F.3d 377, 391-92 (6th Cir. 2001)(applied intermediate scrutiny test in addressing

²Voltaire, referring to a suggestion that the violent overthrow of tyranny might be legitimate, said: "I disapprove of what you say, but I will defend to the death your right to say it."

³The Sixth Circuit recognizes that ordinances aimed at regulating adult entertainment businesses may constitute content-based regulations, but that "a distinction may be drawn between adult [businesses] and other kinds of [businesses] without violating the government's paramount obligation of neutrality" when the government seeks to regulate only the secondary effects of erotic speech, and not the speech itself. *Richland Bookmart, Inc. v. Nichols*, 137 F.3d 435, 440 (6th Cir.1998).

constitutionality of Nashville adult-oriented establishment licensing ordinance).⁴

“[A]n ordinance requiring a person to pay a license or permit fee before he can engage in a constitutionally protected activity does not violate the Constitution so long as the purpose of charging the fee is limited to defraying expenses incurred in furtherance of a legitimate state activity. [Such a fee is not excessive, even if it is more than nominal, so long as it is] reasonably related to the expenses incident to the administration of the ordinance.” *Northeast Ohio Coalition for the Homeless v. City of Cleveland*, 105 F.3d 1107, 1109-10 (6th Cir.1997); *quoted in Deja Vu of Nashville*, 274 F.3d at 395-96. The license and permit fees in Tennessee’s Adult-Oriented Establishment Registration Act, at Tenn. Code Ann. § 7- 51-1118, have been found reasonably related to the cost of administering and enforcing that law and were deemed constitutionally valid.⁵

The proposed state privilege tax that is the subject of this Opinion, however, differs from these constitutionally valid license fees associated with otherwise valid regulations intended to address deleterious secondary effects generally recognized as associated with adult-oriented establishments. The United States Supreme Court has stated that “[i]t could hardly be denied that a tax laid specifically on the exercise of [First Amendment] freedoms would be unconstitutional.” *Murdock v. Commonwealth of Pennsylvania*, 319 U.S. 105, 108, 63 S. Ct. 870 (1943); *see also Northeast Ohio Coalition for the Homeless v. City of Cleveland*, 105 F.3d 1107, 1109 (6th Cir. 1997) (“It is equally clear that while the government may not tax the exercise of constitutionally protected activities, it may restrict the exercise of such activities by ‘reasonable time, place, and manner regulations’”). In *Murdock*, an ordinance which required a religious group to pay a flat license fee as a condition to conducting its distribution activities was struck down as unconstitutional because the flat license fee was essentially “a flat tax imposed on the exercise of a privilege granted by the ‘Bill of Rights.’” 319 U.S. at 113, 63 S. Ct. at 875. “A state may not impose a charge for the enjoyment of a right granted by the Federal Constitution.” *Id.* The flat license tax in *Murdock* was

⁴ *See also City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 122 S.Ct. 1728 (2002)(O’Connor, J.) (applied the intermediate scrutiny test to address validity of a City of Los Angeles zoning provision prohibiting two adult uses per authorized location); *City of Erie v. Pap’s A.M.*, 529 U.S. 277, 289-302, 120 S. Ct. 1382, 1391-98 (2000) (O’Connor, J., with three justices joining, and two justices concurring in the judgment) (applied the *O’Brien* intermediate scrutiny test for constitutional validity when upholding a City of Erie Public Indecency Ordinance, which had the effect of requiring exotic dancers to wear pasties and g-strings); *Barnes v. Glen Theater, Inc.*, 501 U.S. 560, 111 S.Ct. 2456 (1991) (plurality); 501 U.S. at 582, 111 S.Ct. at 2468 (Souter, J., concurring) (applied the *O’Brien* intermediate scrutiny test in rejecting a challenge to the constitutionality of Indiana’s public indecency statute, which had the effect of requiring dancers at adult-oriented entertainment establishments to wear pasties and a g-string),

⁵ *See Angela Kaye Belew, et al. v. Giles County Adult-Oriented Establishment Board, et al.*, No. 1-01-0139 (M.D. Tenn. Sept. 30, 2005); *Paul Friedman, et al. v. Giles County Adult-Oriented Establishment Board, et al.*, No. 1-00-0065 (M.D. Tenn., Sept. 29, 2005) (Judge Higgins) (upheld state Registration Act in substantial part); *Herbert L. Odle, d/b/a Sports Club, Inc., et al. v. Decatur County, Tennessee, et al.*, No. 02-1278 (W.D. Tenn., Oct. 14, 2003) (Judge Todd) (Order granting Defendants’ Motion for Summary Judgment), *aff’d in part*, 421 F. 3d 386, 387-92 (6th Cir.2005) (upheld constitutionality of state Registration Act, while striking local ordinance).

fixed in amount and was unrelated to defraying the expenses of policing the activities in question. *Id.*, 319 U.S. at 113-14, 63 S.Ct. at 875. Noting that “regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment,” the United States Supreme Court has rejected the justification of raising revenue for police services, which is “undoubtedly . . . an important government responsibility,” as a justification for a content-based permit fee. *Forsyth County, Georgia v. The Nationalist Movement*, 505 U.S. 123, 135-36, 112 S. Ct. 2395, 2404 (1992). Moreover, “[a] tax based on the content of speech does not become more constitutional because it is a small tax.” *Id.*, 505 U.S. at 136, 112 S.Ct. at 2405.

Notably, the First Amendment would not prohibit subjecting the patrons of these establishments to generally applicable taxes without creating constitutional problems. See generally *Minneapolis Star and Tribune Company v. Minnesota Commissioner of Revenue*, 460 U.S. 575, 581, 103 S. Ct. 1365, 1369 (1983). For example, while the State may tax newspapers, magazines, and books, it may not differentiate among them based on their content. *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 107 S.Ct. 1722 (1987); see also *Leathers v. Medlock*, 499 U.S. 439, 447-48, 111 S.Ct. 1438, 1443-44 (1991) (“a tax will trigger heightened scrutiny under the First Amendment if it discriminates on the basis of the content of taxpayer speech . . . [in light of] the danger of censorship”). Thus, the State could not impose a tax only on books containing sexually-oriented content. Similarly, while the State may tax all places of amusement, it may not tax only venues that feature adult-oriented entertainment, such as erotic dancing.

In the present case, the privilege tax would apply only to patrons of adult-oriented establishments and is not a generally applicable tax, such as a state or local sales tax. The proposed legislation would not create a fee to be utilized for defraying the cost of administering the Adult-Oriented Establishment Act. Instead it would impose a tax limited to the exercise of First Amendment rights and based on the content of the expression. In light of the foregoing authorities, it is our opinion that a court would find this state privilege tax imposed only on adult-oriented establishments for the entry of each customer to be unconstitutional.

ROBERT E. COOPER, JR.
Attorney General and Reporter

CHARLES L. LEWIS
Deputy Attorney General

Page 5

STEVEN A. HART
Special Counsel

Requested by:

The Honorable Mike Turner
State Representative
37 Legislative Plaza
Nashville, TN 37243-0151

EXHIBIT 6

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**UNITED STATES DISTRICT COURT
DISTRICT 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 GENTLEMAN'S CLUB;)
OLUMPUS GARDEN, INC. d/b/a OLYMPIC)
GARDEN; SHAC, L.L.C. d/b/a SAPPHIRE;)
THE POWER COMPANY, INC., d/b/a CRAZY)
HORSE TOO GENTLEMEN'S CLUB;)
D. WESTWOOD, INC. d/b/a TREASURES;)
and D.I FOOD AND BEVERAGE OF)
LAS VEGAS, L.L.C., d/b/a SCORES,)

2:06-cv-0480-RLH-RJJ

Plaintiff(s),

vs.

ORDER
(Motion to Dismiss-#12)

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

Defendant(s).

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

The Motion will be granted.

BACKGROUND

This suit arises from a statute enacted by the Nevada State legislature, 20th Special Session, in 2003, which, *inter alia*, replaced the casino entertainment tax with a tax on all live

1 entertainment. The provisions of the live entertainment tax were placed in Chapter 368A of the
2 Nevada Revised Statutes (“NRS”) and were further amended by the Nevada State Legislature in
3 2005.¹

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

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

16 STANDARD OF REVIEW

17 Rule 8 (Fed. R. Civ. P.) requires every complaint to contain “a short and plain
18 statement of the grounds upon which the court’s jurisdiction depends.” Local Rule LR 8-1
19 requires that, “The first allegation of any complaint . . . shall state the statutory or other basis of
20 claimed federal jurisdiction and the facts in support thereof. Federal courts are courts of *limited*
21 *jurisdiction*. They have no inherent or general subject matter jurisdiction. They can adjudicate
22 only those cases which the Constitution and Congress authorize. These are usually only those

23
24 ¹
25 The Live Entertainment Tax applies to certain gaming and non-gaming facilities. NRS
26 368A.060 AND 368A200. The Department of Taxation administers the tax with respect to entities
without gaming licenses. The Gaming Commission administers the tax with regard to gaming
licensees.

1 which involve a federal question, the United States is a party or where there is diversity of
2 citizenship and certain criteria are met. *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375 (1994).
3 The Plaintiffs bear the burden of proof by a preponderance of evidence that federal subject-matter
4 jurisdiction exists. *Mortensen v. First Federal Sav. and Loan Ass'n*, 549 F.2d 884, 891 (3rd Cir.
5 1977).

6 Rule 12(b)(6) of the Federal Rules of Civil Procedure provides that a court may
7 dismiss a complaint for “failure to state a claim upon which relief can be granted.” “[A] complaint
8 should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff
9 can prove no set of facts in support of his claim which would entitle him to relief.” *Conley v.*
10 *Gibson*, 355 U.S. 41, 45-46 (1957); see also *Yamaguchi v. U.S. Dept. of the Air Force*, 109 F.3d
11 1475, 1481 (9th Cir. 1997). All factual allegations set forth in the complaint “are taken as true and
12 construed in the light most favorable to [p]laintiffs.” *Epstein v. Washington Energy Co.*, 83 F.3d
13 1136, 1140 (9th Cir. 1999). Dismissal is appropriate “only if it is clear that no relief could be
14 granted under any set of facts that could be proven consistent with the allegations.” *Hishon v.*
15 *King & Spalding*, 467 U.S. 69, 73 (1984); see also *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802,
16 810 (9th Cir. 1988).

17 DISCUSSION

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

22 Drawing a clear distinction between tax credits (over which the district courts have
23 jurisdiction) and actions seeking to avoid payment of taxes or to otherwise interfere with state tax
24 collection, *Hibbs* took great pains to reaffirm a long line of its decisions which denied jurisdiction
25 to U.S. district courts in cases where the purpose of the suit was to avoid the payment of taxes—
26 usually on constitutional grounds—or seek a refund for taxes already paid. See e.g., *Rosewell v.*

1 *LaSalle National Bank*, 451 U.S. 1011 (1981) (two-year delay of tax refund was still a plain,
2 speedy and efficient remedy to preclude federal district court jurisdiction under Tax Injunction
3 Act); *Fair Assessment in real Estate Association, Inc. V. McNary*, 454 U.S. 100 (1981) (comity
4 and TIA barred taxpayers' suit for damages under §1983); *California v. Grace Brethren Church*,
5 457 U.S. 393 (1982) (TIA prohibits federal district court from enjoining or declaring unconstitu-
6 tional state tax laws where plain, speedy and efficient remedy available); *National Private Truck*
7 *Council, Inc. v. Oklahoma Tax Comm'n*, 515 U.S. 582 (1995) (district court cannot enjoin,
8 suspend or restrain the assessment or collection of taxes under State law, where plain, speedy and
9 efficient remedy may be had in State courts).

10 The Ninth Circuit likewise has held that the Tax Injunction Act barred federal court
11 consideration of a complaint involving the constitutionality of California Proposition 13. *Marvin*
12 *F. Poer and Company, v. Counties of Alameda*, 725 F.2d 1234 (1984). In that case, the Circuit
13 Court stated that, "federal courts have generally dismissed cases in which plaintiffs have sought
14 both injunctive or declaratory relief and a refund or damages." *Citing Bland v. McHann*, 463 F.2d
15 21 (5th Cir. 1972, *cert. denied*, 410 U.S. 966); *City of Burbank v. State of Nevada*, 548 F.2d 708
16 (9th Cir. 1981); and *Dillon v. State of Montana*, 634 F.2d 463 (9th Cir. 1980).

17 The *Hibbs* Court went to significant lengths to explain that it responds to State
18 governments' need to assess and collect taxes as expeditiously as possible with a minimum of
19 preenforcement judicial interference and the legal right that the disputed taxes be determined in a
20 suit for refund. 542 U.S. at 103. The Court also noted that two of the purposes of the Act was to
21 eliminate disparities between large out-of-state corporations and in-state taxpayers in what their
22 remedies should be; and, to stop taxpayers, with the aid of a federal injunction, from withholding
23 large sums thereby disrupting state government finances. *Id.* at 104. The Tax Injunction Act was
24 "shaped by state and federal provisions barring anticipatory actions by taxpayers to stop the tax
25 collector from initiating collection proceedings," training "its attention on taxpayers who sought to
26 avoid paying their tax bill by pursuing a challenge route other than the one specified by the taxing

1 authority.” *Id.* at 104-105. The Court noted that “federal-court relief would have operated to
2 reduce the flow of state tax revenue,” and acknowledged that “the principal purpose of the TIA
3 was to ‘limit drastically’ federal-court interference with ‘the collection of [state] taxes.’” *Id.* at
4 105-106.

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

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

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

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

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

23 Second, the language of the statute does not, as Plaintiffs suggest, preclude judicial
24 recourse in the State court. It merely prevents a preemptive strike, that is an action to enjoin the
25 collection of the taxes. It does not prevent a judicial challenge either to the collection of the tax or
26 the constitutionality of the statute authorizing the tax. Indeed, the Nevada Supreme Court, in a

1 case involving a statute which precluded any suit whatever unless an administrative claim had
2 been filed, held that notwithstanding the statute, the California corporation could bring the suit to
3 challenge the tax. *State v. Scotsman Mfg. Co. Inc.*, 109 Nev. 252, 849)2d 317 (1993). This
4 decision strongly suggests that declaratory relief is available in State court notwithstanding NRS
5 368A.280(1).

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

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

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

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

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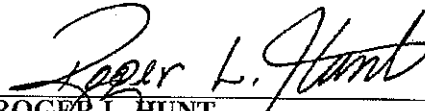
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IT IS THEREFORE ORDERED that Motion to Dismiss Amended Complaint
(#12) is GRANTED.

Dated: July 25, 2006.



ROGER L. HUNT
United States District Judge

EXHIBIT 7

FILED

MAY 20 2008

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DEJA VU SHOWGIRLS OF LAS
VEGAS, L.L.C., dba Deja Vu Showgirls;
et al.,

Plaintiffs - Appellants,

v.

NEVADA DEPARTMENT OF
TAXATION; et al.,

Defendants - Appellees.

No. 06-16634

D.C. No. CV-06-00480-RLH

MEMORANDUM*

Appeal from the United States District Court
for the District of Nevada
Roger L. Hunt, District Judge, Presiding

Submitted May 15, 2008**
San Francisco, California

Before: O'SCANNLAIN and HAWKINS, Circuit Judges, and SELNA***, District
Judge.

* This disposition is not appropriate for publication and is not precedent
except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without
oral argument. *See* Fed. R. App. P. 34(a)(2).

*** The Honorable James V. Selna, United States District Judge for the
Central District of California, sitting by designation.

Deja Vu appeals from the district court's judgement which dismissed a 42 U.S.C. § 1983 challenge to Nevada's Live Entertainment Tax, on the grounds that the Tax Injunction Act, 28 U.S.C. § 1341 ("The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."), deprived it of jurisdiction.

Deja Vu has failed to establish that there is any defect in the Nevada court and administrative system which deprives it of "a plain, speedy and efficient remedy" to challenge Nevada's Live Entertainment Tax. *See Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503 (1981). Therefore, the district court did not have jurisdiction.

Under the circumstances, we need not reach the state sovereign immunity issue.

AFFIRMED.

EXHIBIT 8

GHANEM  SULLIVAN
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Diana L. Sullivan
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February 27, 2007

VIA FACSIMILE (775) 684-2020
AND OVERNIGHT COURIER

Nevada Department of Taxation
Attn: Michelle Jacobs
1550 College Parkway
Carson City, Nevada 89706

Re: *Claim for Refund – Nevada Tax on Live Entertainment*
Taxpayer: K-Kel, Inc.
Tax Period: January 2004

Dear Ms. Jacobs:

Please be advised that the undersigned represents K-Kel, Inc. ("Taxpayer"), and this correspondence should be considered as the Taxpayer's formal claim for refund pursuant to N.R.S. § 368A.260 regarding taxes paid under the State of Nevada's Tax on Live Entertainment (N.R.S. §§ 368A.010 *et seq.*, and sometimes referred to herein as "Chapter 368A"). This letter is being sent pursuant to directions from Deputy Attorney General Dennis Belcourt, who is representing the State and the applicable agencies in pending legal actions concerning the Tax on Live Entertainment.

Pursuant hereto, the Taxpayer hereby demands a refund of any and all Live Entertainment Taxes paid for the reporting period of January 2004, together with the statutory interest provided for by N.R.S. § 368A.270.

According to our records, the Taxpayer paid a total of [REDACTED] and \$7100 Dollars (\$ [REDACTED]) via check # [REDACTED] for this reporting period, and demand is hereby made for full refund of that amount.

This claim for refund is made on two grounds. First, the Nevada Tax on Live Entertainment is unconstitutional. Second, the Taxpayer is exempt from paying this tax pursuant to the provisions of N.R.S. § 368A.200(5)(a). These matters are discussed in detail below.

I. Nevada's Live Entertainment Tax is a Facially Unconstitutional Direct Tax on the Exercise of Constitutional Freedoms.

Chapter 368A imposes a direct tax specifically upon "live entertainment." And, "live entertainment" is protected expression under the First Amendment. *See, e.g., Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 65-66, 101 S.Ct. 2176, 68 L.Ed.2d 671 (1981) ("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. . .") (emphasis added); *Winters v. New York*, 333 U.S. 507, 510, 68 S.Ct. 665, 92 L.Ed.2d 840 (1948) (mere entertainment, in-and-of itself, is considered protected expression under the First Amendment); *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932, 95 S.Ct. 2561, 45 L.Ed.2d 648 (1975) (nude dancing); *Ward v. Rock Against Racism*, 491 U.S. 781, 790,

109 S.Ct. 2746, 105 L.Ed.2d 661 (1989) (rock music) and Zacchini v. Scripts-Howard Broadcasting Co., 433 U.S. 562, 578, 97 S.Ct. 2849, 53 L.Ed.2d 965 (1977) (human cannonball performance) (“...entertainment itself can be important news.”). See also Virginia v. Black, 538 U.S. 343, 358, 123 S.Ct. 1536, 155 L.Ed.2d 535 (2003) (“the First Amendment affords protection to symbolic or expressive conduct as well as actual speech”). Consequently, Chapter 368A imposes a tax *directly and specifically* upon activity protected by the First Amendment.¹

Moreover, the Taxpayer asserts that the Nevada Tax on Live Entertainment is facially unconstitutional.² Accordingly, the claims of this Taxpayer can be grounded – in the first instance – on the fact that the tax at issue applies *generally* to “live entertainment.”³ But there is far more that demonstrates the invalidity of Chapter 368A.

While the statute is a selective tax only upon protected expression – and at that only upon one form of entertainment (applying only to that which is “live”) – it does not even tax that particular mode of expression in a unified and even fashion. This is because a wide variety of “live entertainment” is specifically and statutorily exempted from the scope of tax. The exemptions as contained in N.R.S. § 368A.200(5), include but are not limited to the following:

§ Any boxing contest or exhibition governed by the provisions of Chapter 467 of the Nevada Revised Statutes (c)

§ Live entertainment in a non-gaming facility with a maximum seating capacity of less than 200 (d)

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

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

§ Live entertainment provided in the common area of a shopping mall (j)

¹ Because the Federal Constitution represents the “floor” level of protections that can be afforded under the State Constitution (see S.O.C., Inc. v. Mirage Casino-Hotel, 117 Nev. 403, 414 (2004)), Chapter 368A also imposes a direct tax upon expression protected under Article I, § 7, of the Nevada Constitution.

² The burden on protected activity here is, indeed, far-reaching, and includes music, vocals, dancing, acting, drama, and comedy. N.R.S. § 368A.090.

³ Nevertheless, the particular expression presented by the Taxpayer also receives constitutional protections. The Taxpayer presents exotic dancing at its establishment, which is a form of expression that falls within the scope of the liberties afforded by the First Amendment. See, e.g., Barnes v. Glen Theatre, Inc., 501 U.S. 560, 565, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991) (nude dancing receives protections under the Constitution); City of Erie v. Pap’s A.M., 529 U.S. 277, 289, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000) (same). See also 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 from official regulation”).

§ Live entertainment that is incidental to an amusement ride, emotion simulator or similar digital, electronic mechanical or electromechanical attraction (l)

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

§ An outdoor concert (n)

§ Race events at a racetrack in the state is part of the NASCAR Nextel Cup Series, or its successor racing series, and all races associated therewith (o)

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

Those are not, however, all of the exemptions. The definition of "live entertainment" under N.R.S. § 368A.090(b) excludes, among other things:

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

§ Performances at certain licensed gaming establishments where the "performers stroll continuously throughout the facility" (3)

§ Performances in certain areas of certain licensed gaming establishments "which enhance the theme of the establishment or attract patrons to the areas of the performances, as long as any seating provided in the immediate area of the performers is limited to seating at slot machines or gaming tables" (4)

§ Entertainment provided by patrons. (6)

And, of course, even the amount of the tax is not consistently assessed against those forms of entertainment that do not fall within one of the numerous exceptions. There is a higher rate of tax assessed against those establishments with a seating capacity of less than 7,500 persons, than applies to facilities with seating capacities over that number. N.R.S. § 368A.200(1). For all of these reasons, Chapter 368A clearly represents a *differential* tax upon expressive activities.

With these various factors in mind, the unconstitutionality of Chapter 368A is preordained by established Supreme Court precedent. In Minneapolis Star v. Minnesota Comm'r of Rev., 460 U.S. 575, 103 S.Ct. 1365, 75 L.Ed.2d 295 (1983), the High Court was asked to consider the constitutionality of a "use tax" levied against paper and ink used by newspapers. Noting the "[d]ifferential taxation of the press," the Court commented that it could not "countenance such treatment unless the State asserts a counterbalancing interest of *compelling importance* that it cannot achieve without differential taxation." *Id.* at 586 (emphasis added). Then, in Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 231, 107 S.Ct. 1722, 95 L.Ed.2d 209 (1987), the Court, in invalidating a discriminatory tax upon certain magazines, observed that "...the State

must show that its regulation is *necessary to serve a compelling State interest* and is *narrowly drawn* to achieve that end." (Emphasis added). And, under strict scrutiny, narrow tailoring requires that the government choose the least restrictive (of First Amendment expression) means possible to effectuate the governmental interest involved.⁴

Most importantly, is the simple fact that such differential taxes upon First Amendment activities are "*presumed unconstitutional*." Minneapolis Star, 460 U.S. at 586 (emphasis added). See also Simon & Schuster v. Crime Victims Bd., 502 U.S. 105, 115, 112 S.Ct. 501, 116 L.Ed.2d 476 (1991) ("A statute is *presumptively inconsistent* with the First Amendment if it imposes a financial burden on speakers because of the content of their speech") (emphasis added).

Utilizing these standards, it is clear that Chapter 368A is blatantly, and *facially*, unconstitutional under the First Amendment.

The Supreme Court dealt with the issue of taxing First Amendment rights in the case of Murdock v. Pennsylvania, 319 U.S. 105, 63 S.Ct. 870, 87 L.Ed. 1292 (1943). The case dealt with a city ordinance that required those who wished to canvas or solicit to pay a license fee of \$1.50 per day or \$7.00 for one week. *Id.* at 106. The Supreme Court stated that, in regard to First Amendment freedoms, "it could hardly be denied that a tax laid specifically on the exercise of those freedoms would be unconstitutional. Yet the license tax proposed by this ordinance is in substance just that." *Id.* at 108. In the case of the Nevada Tax on Live Entertainment, there is not even the pretext of a license involved, as it is merely a direct imposition of a tax on First Amendment freedoms.

The Supreme Court noted in Murdock that freedom of speech is "available to all, not merely to those who can pay their own way," and that "the power to tax the exercise of a privilege is the power to control or suppress its enjoyment . . . those who can tax the exercise of this [First Amendment freedom] can make its exercise so costly as to deprive it of the resources necessary for its maintenance." *Id.* at 111-12. The Court flatly stated that "*a state may not impose a charge for the enjoyment of a right granted by the federal constitution*." *Id.* at 112 (emphasis added). This is because "the power to impose a license tax on the exercise of these freedoms is

⁴ See, e.g., Sable Communications of California, Inc. v. F.C.C., 492 U.S. 115, 126, 109 S.Ct. 2829, 106 L.Ed.2d 93 (1989) (narrow tailoring requires that the government choose the "least restrictive means to further the articulated interest). We assume that the governmental interest is raising taxes, which the State previously had accomplished without infringing on First Amendment constitutional rights of expression when the tax was directed against gambling casinos. See also United States v. Playboy Entertainment Group, Inc., 529 U.S. 803, 816-17, 120 S.Ct. 1878, 146 L.Ed.2d 865 (2000) ("When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions. . . . [T]he Government bears the burden of identifying a substantial interest and justifying the challenged restriction The breadth of this content-based restriction of speech imposes an especially heavy burden on the Government to explain why a less restrictive provision would not be as effective (citations deleted)). See also Minneapolis Star, 460 U.S. at 585 (the government must assert "a counterbalancing interest of compelling importance that it cannot achieve without differential taxation"). Nevada cannot do that here.

indeed as potent as the power of censorship which this court has repeatedly struck down.” *Id.* at 113. These principles were reaffirmed in the cases of Minneapolis Star and Ragland.⁵

2. *Nevada's Live Entertainment Tax is an Unconstitutional Differential Tax on First Amendment Freedoms.*

Chapter 268A is also unconstitutional because it treats certain live entertainment facilities differently than other amusements and other providers of live entertainment. Nevada is unable to assert an overriding government interest for this disparate treatment, and the statute must, therefore, fail.

The Supreme Court has plainly stated “that differential taxation of First Amendment speakers is constitutionally suspect when it threatens to suppress the expression of particular ideas or viewpoints.” Leathers v. Medlock, 499 U.S. 439, 447, 111 S.Ct. 1438, 113 L.Ed.2d 494 (1991), citing Minneapolis Star, 460 U.S. at 585; and Grosjean v. American Press Co., 297 U.S. 233, 244-249, 56 S.Ct. 444, 80 L.Ed. 660 (1936). This is because selective taxation is a “powerful weapon” to suppress the speaker or viewpoint selected. Minneapolis Star, 460 U.S. at 585, citing Railway Express Agency v. New York, 336 U.S. 106, 112-113, 69 S.Ct. 463, 93 L.Ed. 533 (1949) (Jackson, J., concurring).

As stated above, Chapter 368A not only singles out live entertainment, but also discriminates among providers of live entertainment. First, it discriminates on the basis of the size of the facility. It excludes small facilities with a maximum occupancy of less than two hundred (200) persons. N.R.S. §§ 368A.200(5)(d)(e). Those not excluded on the basis of size are then taxed at different rates according to their size, with the smaller venues paying the higher rate. N.R.S. § 368A.200(1). The smaller venues are further taxed on their food, refreshment, and merchandise sales, while the larger venues are not. *Id.* This scheme, like that in Minneapolis Star, impermissibly discriminates among businesses on the basis of their size. Minneapolis Star, 460 U.S. at 591-92. The statute offers no rationale to justify this disparate treatment.

⁵ While Supreme Court precedent clearly establishes the invalidity of the Live Entertainment Tax, lower court decisions further exemplify this point. In the case of Fernandes v. Limmer, 663 F.2d 619 (5th Cir. 1981), the Court there was dealing with a \$6.00 daily fee required of anyone exercising First Amendment rights in the Dallas/Ft. Worth airport. *Id.* at 632. The court noted that “exaction of fees for the privilege of exercising First Amendment rights has been condemned by the Supreme Court. . . were states permitted to tax First Amendment activities, the eventual result might be the total suppression of all those voices whose pockets are not so deep. ‘[F]reedom of speech. . . [must be] available to all, not merely to those who can pay their own way.’ Murdock v. Pennsylvania 319 U.S. 105, at 111.” *Id.* at 632. See also American Target Advertising, Inc. v. Gianj, 199 F.3d 1241 (10th Cir. 2000), where the court there examined a statute that required the posting of a bond in the amount of \$25,000.00 before persons or entities could engage in First Amendment activities. The court upheld a \$250.00 annual registration fee because it determined that “the fee does no more than defray reasonable administrative costs.” *Id.* at 1249. But in terms of the requirement of posting a bond in the amount of \$25,000.00, the court determined that this “imposes a sizeable price tag upon the enjoyment of a guaranteed freedom. . . the chilling financial reality of the bond ‘unnecessarily interfer[es] with First Amendment freedoms,’ . . . and is therefore unconstitutional. . . .” *Id.* at 1249. (internal cite omitted); and Joelner v. Village of Washington Park, Ill., 378 F.3d 613, 628 (7th Cir. 2004).

Second, the statute discriminates among *types* of live entertainment. Most notably, the statute exempts certain sporting venues such as boxing and NASCAR races. N.R.S. §§ 368A.200(5)(c) and (o). These exemptions impermissibly discriminate among speakers on the basis of the content of the entertainment. It demonstrates a preference for family entertainment, which is clearly evident from the legislative history: "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." ASSEMBLY COMMITTEE ON COMMERCE AND LABOR OF NEVADA, 73d Sess. 17-18 (2005).

For obvious reasons, taxes such as this, which discriminate on the basis of the content of the speech, trigger heightened scrutiny under the First Amendment. Leathers, 499 U.S. at 447. Further, the fact that Chapter 368A singles out live entertainment venues and discriminates among them distinguishes Chapter 368A from a generally applicable amusement tax. *See, generally, American Multi-Cinema, Inc. v. City of Warrenville*, 748 N.E.2d 746, 321 Ill.App.3d 349 (2001).

These modes of discrimination among taxpayers are presumptively invalid and, to sustain constitutional muster, require a compelling governmental justification. Leathers, 499 U.S. at 446-47; Minneapolis Star, 460 U.S. at 592-93. The government's interest in collecting revenues cannot sustain Chapter 368A, because the State must show that the tax is necessary to serve a compelling state interest which could not be achieved without differential taxation. Minneapolis Star, 460 U.S. at 586. Defendants cannot assert a compelling reason for taxing live entertainment differently from other forms of entertainment or for the differential taxation of live entertainment based on the size of the facility or whether the facility meets Defendants' unilateral designation of "family-oriented." Therefore, Chapter 368A is unconstitutional.

3. *The Taxpayer is exempt from taxation pursuant to the provisions of N.R.S. § 368A.200(5).*

As stated above, Chapter 368A contains numerous exemptions to the Live Entertainment Tax, one of which involves "live entertainment that the State is prohibited from taxing under the Constitution, laws or treaties of the United States or Nevada Constitutions." N.R.S. § 368A.200(5)(a). Here, for the reasons as set forth in the two subsections immediately above, the State of Nevada is, in fact, precluded from directly taxing "live entertainment" in general. Accordingly, the Taxpayer is exempt for having to pay the Live Entertainment tax pursuant to the exemption as set forth in N.R.S. § 368A.200(5)(a).

For the reasons that I have set forth above, the Taxpayer is entitled to a total refund of all Live Entertainment Taxes paid, together with appropriate interest, and requests immediate payment of the same. If there is any further information that you need in order to be able to complete the processing of this Claim for Refund, please do not hesitate to contact me directly.

Sincerely,

GHANEM & SULLIVAN, LLP

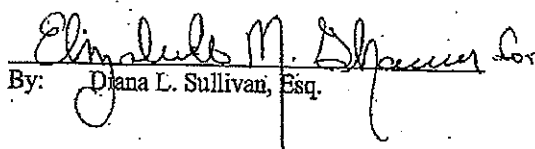
By:  Diana L. Sullivan, Esq.

EXHIBIT 9



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

STATE OF NEVADA
DEPARTMENT OF TAXATION

Web Site: <http://tax.state.nv.us>
1550 College Parkway, Suite 115
Carson City, Nevada 89706-7937
Phone: (775) 684-2000 Fax: (775) 684-2020

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555 E. Washington Avenue
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Phone: (702) 486-2300 Fax: (702) 486-2373

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Reno, Nevada 89502
Phone: (775) 688-1285
Fax: (775) 688-1308

HENDERSON OFFICE
2550 Paseo Verde Parkway Suite 180
Henderson, Nevada 89074
Phone: (702) 486-2300
Fax: (702) 486-3377

CERTIFIED MAIL: 7005 1820 0003 8673 2851

April 3, 2007

K-KEL INC
SPEARMINT RHINO
15423 E VALLEY BLVD
CITY OF INDUSTRY CA 91746

Dear Sir:

Re: Live Entertainment Tax Claim for Refund

I am in receipt of a letter from Ghanem & Sullivan, Attorneys at Law, dated February 27, 2007, requesting a refund of Live Entertainment Taxes paid by K-KEL Inc. for the period ending January, 2004.

Nevada Revised Statutes (NRS) Chapter 368A requires a business to pay an excise tax on admission to any facility in this State where live entertainment is provided. NRS 368A.060 defines a facility and NRS 368A.090 defines live entertainment. Based on the Department's interpretation of the law as it currently exists, Olympus Garden, Inc. falls within the purview of this statute and is required to pay the live entertainment excise tax.

As I find no basis in law that would preclude K-KEL, Inc., DBA Spearmint Rhino, from its obligation to pay this tax, I must deny your request for refund.

After reviewing the enclosed information, should you disagree with this decision, you may appeal it to the Nevada Tax Commission, pursuant to NRS 360.245, by filing a written notice of appeal with the Department within thirty days of service of this letter.

Sincerely,


Dino DiCianno
Executive Director

Enclosures: NRS 360.245

cc: Ghanem & Sullivan, LLP

EXHIBIT 10



JIM GIBBONS
Governor

THOMAS R. SHEETS
Chair, Nevada Tax Commission

DINO DICIANNO
Executive Director

STATE OF NEVADA
DEPARTMENT OF TAXATION

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Fax: (775) 688-1303

HENDERSON OFFICE
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Henderson, Nevada 89074
Phone: (702) 486-2300
Fax: (702) 486-3377

March 21, 2008

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

Re: K-Kel, Inc.
Request for Refund of Live Entertainment Tax

Dear Ms. Sullivan:

This letter is sent to acknowledge receipt of the notice of appeal filed on behalf of the above-referenced taxpayer (hereinafter "Taxpayer") in response to the Department's letter, dated February 5, 2008, denying Taxpayer's claim for refund. Taxpayer had requested a refund of Live Entertainment Tax for the period of December 2004.

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

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

Should you have any questions, please call me at (775) 684-2070.

Sincerely,

Christopher G. Nielsen
Deputy Executive Director

EXHIBIT 11



JIM GIBBONS
Governor

THOMAS R. SHEETS
Chair, Nevada Tax Commission

DINO DICIANNO
Executive Director

STATE OF NEVADA
DEPARTMENT OF TAXATION

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Phone: (702) 486-2300
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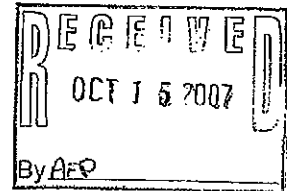
October 12, 2007

Bradley Shafer, Esq.
Shafer and Associates
3800 Capital City Blvd., Ste 2
Lansing, Michigan 48906

CERTIFIED MAIL 7003 1680 0001 3683 7108

Dianna L. Sullivan, Esq.
Ghanem & Sullivan
8861 W. Sahara Ave., Ste 120
Las Vegas, Nevada 89117

CERTIFIED MAIL 7003 1680 0001 3683 6538



IN THE MATTER OF:

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

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

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

FINDINGS OF FACT

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


CONCLUSIONS OF LAW

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

DECISION

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

FOR THE COMMISSION:



DINO DICIANO
Executive Director
Nevada Department of Taxation

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

EXHIBIT 12

Alison B. Lavin
CLERK OF THE COURT

1 **ORDR**
2 **CATHERINE CORTEZ MASTO**
3 **Attorney General**
4 **BLAKE A. DOERR**
5 **Senior Deputy Attorney General**
6 **Nevada State Bar #9001**
7 **555 E. Washington Ave., Suite 3900**
8 **Las Vegas, Nevada 89101**
9 **(702) 486-3420**
10 **(702) 486-3416 fax**
11 **bdoerr@ag.nv.gov**
12 **Attorneys for the Nevada Defendants**

DISTRICT COURT
CLARK COUNTY NEVADA

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

Case No. A533273
Dept. No. IX

ORDER DENYING MOTION TO DISMISS
WITHOUT PREJUDICE

Plaintiff(s),

vs.

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

22 **NEVADA DEPARTMENT OF TAXATION,**
23 **NEVADA TAX COMMISSION, NEVADA**
24 **STATE BOARD OF EXAMINERS, and**
25 **MICHELLE JACOBS, in her official**
26 **capacity only,**

Defendants.

27 **DEFENDANTS' MOTION TO DISMISS came on for hearing on July 31, 2008;**

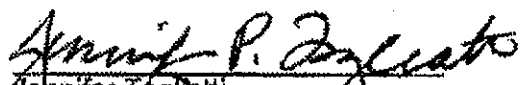
28 **David J. Pope, Senior Deputy Attorney General, and Blake A. Doerr, Deputy Attorney**
General, appeared on behalf of the Defendants;

Diana Sullivan, Esq. and Bradley J. Shafer, Esq. appeared on behalf of the Plaintiffs;

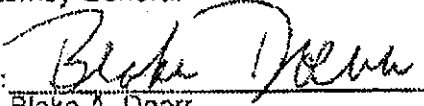
Attorney General's Office
555 E. Washington, Suite 3900
Las Vegas, NV 89101

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The Court having considered the papers and pleadings as well as the oral argument
hereby orders:
DEFENDANTS' MOTION TO DISMISS is DENIED without prejudice.
IT IS SO ORDERED.
DATED this 1st day of December, 2010.


Jennifer Togliatti
DISTRICT COURT JUDGE

Respectfully submitted:
CATHERINE CORTEZ MASTO
Attorney General

By: 
Blake A. Doerr
Senior Deputy Attorney General

Attorney General's Office
355 E. Flamingo, Suite 3700
Las Vegas, NV 89101


CLERK OF THE COURT

1 **ORDR**
2 CATHERINE CORTEZ MASTO
3 Attorney General
4 BLAKE A. DOERR
5 Senior Deputy Attorney General
6 Nevada State Bar #9001
7 555 E. Washington Ave., Suite 3900
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9 (702) 486-3095
10 (702) 486-3416 fax
11 bdoerr@ag.nv.gov
12 Attorneys for the Nevada Defendants

8 DISTRICT COURT
9 CLARK COUNTY NEVADA

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

Case No. A533273
Dept. No. IX

**ORDER DENYING MOTION FOR SUMMARY
JUDGMENT WITHOUT PREJUDICE**

Plaintiff(s),

vs.

Date of Hearing: November 13, 2008
Time of Hearing: 9:00 a.m.

22 NEVADA DEPARTMENT OF TAXATION,)
23 NEVADA TAX COMMISSION, NEVADA)
24 STATE BOARD OF EXAMINERS, and)
25 MICHELLE JACOBS, in her official)
26 capacity only,)

Defendants.

27 DEFENDANTS' MOTION FOR SUMMARY JUDGMENT came on for hearing on
28 November 13, 2008;

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

...

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

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The Court having considered the papers and pleadings as well as the oral argument and finding that material issues of fact exist, hereby orders:

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT is DENIED without prejudice.


IT IS SO ORDERED.

DATED this 9th day of December, 2010.


Jennifer Fogliatti
DISTRICT COURT JUDGE

Respectfully submitted:

CATHERINE CORTEZ MASTO
Attorney General

By: 
Blake A. Doerr
Senior Deputy Attorney General

Attorney General's Office
655 E. Washington, Suite 2000
Las Vegas, NV 89101

EXHIBIT 13

**MINUTES OF THE MEETING
OF THE
ASSEMBLY COMMITTEE ON COMMERCE AND LABOR**

**Seventy-Third Session
May 16, 2005**

The Committee on Commerce and Labor was called to order at 2:09 p.m., on Monday, May 16, 2005. Chairwoman Barbara Buckley presided in Room 4100 of the Legislative Building, Carson City, Nevada, and, via simultaneous videoconference, in Room 4406 of the Grant Sawyer State Office Building, Las Vegas, Nevada. Exhibit A is the Agenda. All exhibits are available and on file at the Research Library of the Legislative Counsel Bureau.

COMMITTEE MEMBERS PRESENT:

Ms. Barbara Buckley, Chairwoman
Mr. John Ocegüera, Vice Chairman
Ms. Francis Allen
Mr. Bernie Anderson
Mr. Morse Arberry Jr.
Mr. Marcus Conklin
Mrs. Heidi S. Gansert
Ms. Chris Giunchigliani
Mr. Lynn Hettrick
Ms. Kathy McClain
Mr. David Parks
Mr. Richard Perkins
Mr. Bob Seale
Mr. Rod Sherer

COMMITTEE MEMBERS ABSENT:

None

GUEST LEGISLATORS PRESENT:

Senator Michael Schneider, Clark County Senatorial District No. 11
Senator Dennis Nolan, Clark County Senatorial District No. 9
Senator Dean Rhoads, Northern Nevada Senatorial District
Senator Dina Titus, Clark County Senatorial District No. 7

STAFF MEMBERS PRESENT:

Brenda J. Erdoes, Legislative Counsel
Diane Thornton, Committee Policy Analyst
Russell Guindon, Deputy Fiscal Analyst
Vanessa Brown, Committee Attaché

OTHERS PRESENT:

Dino DiCianno, Deputy Director, Nevada Department of Taxation
Bobbette Bond, M.P.H., Government and Community Affairs Manager,
Culinary Workers Health Fund
Jack Jeffrey, Legislative Advocate, representing Southern Nevada
Building and Construction Trades Council
Bob Ostrovsky, Legislative Advocate, representing Employers Insurance
Company of Nevada
Nancyann Leeder, Nevada Attorney for Injured Workers, Nevada
Department of Business and Industry
Valerie Rosalin, Director, Consumer Health Assistance, Office of the
Governor
Robin Drew, Private Citizen, Las Vegas, Nevada
Jim Nadeau, Legislative Advocate, representing the Nevada Association
of Realtors
Charlie Mack, Owner and Broker, Mack Realty Commercial Specialists,
Las Vegas, Nevada; and President, Nevada Real Estate Commission
Buffy Dreiling, Legal Counsel, Nevada Association of Realtors, Reno,
Nevada
Gail Anderson, Administrator, Real Estate Division, Nevada Department of
Business and Industry
Joseph Johnson, Legislative Advocate, representing Independent Power
Corporation, Reno, Nevada; and representing the Toiyabe Chapter
of the Sierra Club
Bill Bible, President, Nevada Resort Association, Las Vegas, Nevada
Denis Neilander, Chairman, Nevada State Gaming Control Board
Terry Graves, Legislative Advocate, representing The Beach Night Club,
Las Vegas, Nevada
Don Logan, President and General Manager, Las Vegas 51s Baseball Club,
Las Vegas, Nevada
Joe Brown, Legislative Advocate, representing Las Vegas Motor
Speedway, Las Vegas, Nevada
Chris Powell, General Manager, Las Vegas Motor Speedway, Las Vegas,
Nevada

Scott Sherer, Legislative Advocate, representing Paramount Parks,
Las Vegas, Nevada
Taylor Dew, Magical Hula Girls, Las Vegas, Nevada
Billy Johnson, Vice President and Chief Operating Officer, Las Vegas
Wranglers, Las Vegas, Nevada
Richard Clauser, Naturist Society and The Naturist Action Committee
Sabra Smith-Newby, Legislative Advocate, representing The City of
Las Vegas, Las Vegas, Nevada
Allen Lichtenstein, General Counsel, American Civil Liberties Union,
Nevada
Don Soderberg, Chairman, Public Utilities Commission of Nevada
Jon Wellingshoff, Legislative Advocate, representing MGM/Mirage, Power
Light Corporation, and Freus Corporation, Las Vegas, Nevada
Michael Yackira, Executive Vice President and Chief National Officer,
Sierra Pacific Resources, Nevada Power, and Sierra Pacific Power
Company, Nevada
Adriana Escobar-Chanos, Consumer Advocate and Chief Deputy Attorney
General, Bureau of Consumer Protection, Office of the Attorney
General, State of Nevada
Mark Russell, Chairman, Nevada Renewable Energy and Conservation
Task Force
Tim Carlson, Member, Renewable Energy Task Force
Fred Schmidt, Legislative Advocate, representing ORMAT, Sparks,
Nevada
Dan Schochet, Vice President, ORMAT, Sparks, Nevada; and Geothermal
Member, Nevada Renewable Energy Task Force
Robert Tretiak, Business Development Officer, International Energy
Conservation, Las Vegas, Nevada

Chairwoman Buckley:

[Called the meeting to order. Roll called.] I'll open the hearing on S.B. 483.

**Senate Bill 483: Establishes joint and severable liability for payment of certain
taxes, interest and penalties administered by Department of Taxation.
(BDR 32-394)**

Dino DiCianno, Deputy Director, Nevada Department of Taxation:

Senate Bill 483 is brought to you on behalf of the Department of Taxation. The
bill moves the provisions with respect to responsible party determinations from
the sales tax provisions found in S.B. 372 and S.B. 374, and includes them into
NRS [*Nevada Revised Statutes*] 360, which are the general administrative

Assemblyman Seale:

Are there other states on the West Coast that have an exemption on this kind of equipment as well?

Senator Rhoads:

I'm sure there are, but LCB [Legislative Counsel Bureau] staff would have to tell you that.

Chairwoman Buckley:

Thanks for that. We'll close the public hearing on S.B. 398 and open the hearing on S.B. 247.

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

Senator Dina Titus, Clark County Senatorial District No. 7:

The tax package from the 2003 Legislative Session included the entertainment tax, which quickly proved a bookkeeping nightmare. It also failed to generate the revenue we had anticipated and it didn't adequately bring in a group some of us intended to be covered, which are the striptease clubs that have proliferated, primarily in southern Nevada. It did, however, introduce us to the touring hula girls who are constantly before us and were helpful in bringing some of the problems with the original bill to our attention. For those reasons, I've introduced S.B. 247 as a reform of the entertainment tax.

The amended bill sets up parallel entertainment taxes, a live entertainment tax, and an adult entertainment tax. The live entertainment tax applies only to non-restricted gaming facilities. It's administered by the Gaming Control Board and exempts sporting events that occur in non-restricted gaming facilities, keeping the same tax that was in place before, at 10 percent on admission, drinks, food, and souvenirs.

The adult entertainment tax in Section 11 provides a tax at 10 percent on everything in non-restricted gaming and non-gaming facilities that offer live adult entertainment, which is defined in Section 8 of the statute. It would be administered by the Department of Taxation and it does not include houses of prostitution.

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. It also eliminates taverns and restaurants that have occasional entertainment on weekends such as a piano player or a small band. It will do a better job of capturing adult live entertainment because it eliminates that 300 seating requirement. This is an industry that should pay its fair share because it does put additional burdens on society in terms of law enforcement and alcohol regulation. Because these people don't pay workers' comp or any benefits, their employees often become a burden on social services of the state, so it's only fair they should contribute.

[Senator Titus, continued.] An amendment (Exhibit D) is being brought forward by the Nevada Resort Association and others who would like us to put in statute the regulations that have worked over the last 18 months. The Tax Commission did a good job of working those out, so we don't want to start that process all over again. I support putting those regulations in the statute; it's a good amendment. There's also an amendment (Exhibit E) to clarify that mechanical rides like you find in the "*Star Trek* Experience" would not be considered live entertainment. I don't have any problem with that amendment, either.

There was some testimony on the Senate side by a group of naturists. I thought that meant people who hiked and picked flowers, but in the old days you called them nudist colonies. Certainly the intent of the live entertainment tax was not to get nudist colonies, but to get striptease clubs. If there's some way you can accommodate them, that is fine too.

If you are going to consider amendments to this bill, you might also consider amending the provision that's the severability clause. The clause says that if some part of this is found to be unconstitutional, it goes back to the old entertainment tax. We don't want that to happen, so it should be written to say if something is found unconstitutional the other part of the tax in this new bill would stand.

Chairwoman Buckley:

My biggest concern with the bill is its constitutionality. We already had an Assembly bill we passed that exempts the *Star Trek* ride. Now someone is claiming the free pens they give you at a convention should be taxed, so we put that in there. We clarified the strolling and the hula girls, and I don't think anyone opposes the Resort Association language (Exhibit D). We can clarify that wasn't the intent and everyone supports that. A lot of that was already in the Assembly bill that we sent to Ways and Means. I'm concerned that if we just put live adult entertainment, that might be held unconstitutional. I wonder if a better approach might be to pick out a few more things like the racetrack and

sporting events, but to delineate all those separate ones and leave it like that. 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 to put into our statute the phrase "adult entertainment," which puts a big red flag on it for the courts. What are your thoughts on that?

Senator Titus:

At one time, the brothels were included, so that would be broader. You can make the argument that this is a special kind of business that poses special kinds of social problems and therefore you can attach them. It's worth doing, and if an elected court in the state wants to challenge it, that's fine. None of the parts of the *Constitution* are absolute and they're all subject to interpretation. They interpreted the property tax we recently passed as maybe constitutional, and we can see how flexible the *Constitution* is in Nevada. I think it's worth the chance to put it in there.

Chairwoman Buckley:

I wonder if we could do it in a way that's a little broader but gets at the problems so we would avoid losing the revenue. We're getting the most revenue from adult entertainment clubs, which is \$6 million dollars, the highest amount paid under the live entertainment tax. The next one is race tracks at \$1.5 million, but everything else pales in comparison to how much they're bringing in now, and I would hate to give them back their \$6 million. Perhaps with the severability clause, but I hate to bring back anything we might want to fix now in terms of getting them excluded from the bill. It sounds like the goals are pretty much the same.

Senator Titus:

I agree with that. The 300-seat requirement has kept a lot of those 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.

Chairwoman Buckley:

Could staff obtain the fiscal information on the live entertainment tax for the Committee members? It can't be by business, but it can be by group and you can distribute that to the entire Committee. Senator Titus, we thank you for your testimony. We don't have a problem with the *Star Trek* amendment (Exhibit E); we already approved codifying the definitions.

Bill Bible, President, Nevada Resort Association [NRA], Las Vegas, Nevada:

You've seen the proposed amendment (Exhibit D) which codifies some of the existing regulations resolved in a lot of work between the Department of Taxation, the Tax Commission, the Gaming Control Board, and the Nevada Gaming Commission to resolve the less-than-perfect bill that emerged from the 2003 Legislative Session. We had a concern if S.B. 247 included or excluded it from taxation, and it doesn't exclude them, but we have a problem in outdoor venues in Laughlin and northern Nevada. Clearly in an outdoor venue, if you have some type of entertainment function that would be subject to the live entertainment tax and you pay a live admission fee, that becomes a taxable event. You also have a number of activities that take place with a band where there's no admission charge. Typically, those events have been excluded from taxation through some of the regulatory structure, but it would be helpful if we had a specific amendment that indicated that in an outdoor venue there would be no applicability of tax unless there's actually an admission charge. This created a two-part threshold which is an admission charge, and the other being live entertainment present.

Chairwoman Buckley:

That's current law?

Bill Bible:

That's current law through interpretation. This was a very complicated bill and we spent a lot of time debating and refining the various points of the various regulatory bodies, which is why we want to codify some of those existing regulations. That would at least provide additional clarity, principally in northern Nevada, but to some extent in Laughlin, where we have outdoor events on a seasonal basis.

Denis Neilander, Chairman, Nevada State Gaming Control Board:

There are a number of exemptions we've created through the rule-making process, and if the Committee chooses to codify those, that would be appropriate. Mr. Bible mentioned the situation with outdoor venues, and most of them have been excluded from the tax because they fit under one of these other exemptions in the amendment. There is no one particular provision that just addresses outdoor venues and there could be an open question about whether or not it's a taxable event even if you don't have an admission charge. The intent has been to focus on venues where there are no admission charges, and that would be an appropriate amendment. There are amendments that are currently in S.B. 392, which hasn't come over yet, but if you choose to process this legislation, the Board would be able to provide you with those amendments.

[Denis Neilander, continued.] The original legislation housed the regulation authority with the Board instead of the Nevada Gaming Commission, and that was an oversight. While the Board adopted the regulations, we did it together with the Commission and the Nevada Tax Commission, so that would go back to the way we do rulemaking, which is to say the Nevada Gaming Commission does it.

There is a provision in the existing law that requires you to place funds in a certain trust account and you'll hear from the Department of Taxation and us. That's not necessary, we've never required it before, and it would be a simple repeal of that provision.

You can read certain provisions that require the taxes be paid on a cash basis within the month they're collected, but it's probably more appropriate to give licensees the option of paying on either an accrual or cash basis. Right now, we do allow licensees to pay some of those taxes on an accrual basis, so we give them the option.

Assemblyman Anderson:

I can think of several events that take place outside in my community because of the redevelopment agency. Are you saying within an outdoor area you have one part of it with a separate entry which requires an admission fee, compared to something that is provided free of charge to everyone who's at the event? If it's part of Reno's ArtTown and if you had to come into Idylwild Park to see the entertainment show, you'd have to pay for it, but if you stand on the river, you don't have to pay for it? So if you can stand outside and see it, you don't have to pay for it, but if you enter into a special area where you have designated seating, you do have to pay for it, and therefore it's subject to the entertainment tax?

Bill Bible:

That's correct. In outdoor venues, mostly in northern Nevada or Laughlin, there has been some difficulty in the interpretation of the statute. If you conceptualize with the Rib Cook-Off, you have a "village" sponsored by the Sparks Nugget, and maybe two other licensees. In order to get into that village, you have to go through a gate to control access and pay an admission fee. There is live entertainment present, so that is subject to tax. In a different situation in the parking lot of the Hilton during Hot August Nights, there are vending stands, a bandstand, and sales of food and beverages. There was an argument that this would be subject to an entertainment tax because you could hear and see the live entertainment even though you did not pay an admission fee. Because of the way the existing regulations were interpreted by the Nevada State Gaming Control Board, they did not choose to apply the tax, but it was their legal

construction of some of the language that was adopted through the rule-making process, so we want to codify it to make it clear that in an outdoor venue, unless there's restricted access and someone is charged an admission price, there is no applicability of the tax.

Assemblyman Anderson:

If we were to take the Candy Dance in Genoa and it had music and there was an admission charge, then it would—

Bill Bible:

Under this proposal, the Candy Dance will no longer be a valid example because that's not a licensed gaming premise. If that was a licensed gaming premise, if you had to pay an admission fee and there was live entertainment, everything from the food, beverages, merchandise, and the admission fee would be subject to the entertainment tax.

Assemblyman Anderson:

The Rib Cook-Off, because it's put on by the Nugget, fits into the scenario, as does the Big Easy, which is put on by the Silver Club. But Hot August Nights doesn't because it's not put on by a casino?

Bill Bible:

It's not necessarily who sponsors, but who has control of the property and what are considered the premises of the establishment. With the Rib Cook-Off, part of that is done within the property controlled by the City of Sparks, but they've agreed to allow the Nugget and the sponsoring entities control over that particular property. It becomes a technical issue as to the applicability of the tax. If you think about them within the parking lot of the Hilton, or the parking lot of the Atlantis across Virginia Street, those are considered part of the premises of licensed gaming establishments, even though they're not within the confines of the buildings.

Assemblyman Anderson:

This bill doesn't change when we are taxing those entertainments and when we aren't?

Bill Bible:

This will clarify the existing tax and make it abundantly clear that those outdoor venues, unless there is an admission charge and live entertainment, don't have applicability with the tax.

Chairwoman Buckley:

I'm going to ask our staff to do a comprehensive document combining these proposed amendments, the ones we already approved, the clarifications on further exempting some of the folks from the live entertainment tax, and prepare it for our Ways and Means staff. We should not just say only the adult entertainment tax, but look at all the ones we want to exempt and pass it out that way. We really get into constitutional trouble. I don't have a problem with any of these amendments, including the one from the nudist colony (Exhibit D). I don't think the current term was intended to sweep into this. If we could list all the exemptions, we can re-refer this to Ways and Means, which has our other live entertainment bill. The Chairman of Ways and Means can identify fiscal impact. Most of these things we've identified are de minimus and can be passed. At some point with the larger ticket items, there might be a concern, but we should list and price them all and re-refer it to Ways and Means and have all the bills in one Committee. Is this exempted, Brenda?

Brenda Erdoes:

I don't believe it is exempted at this time. We might need to ask Mark [Stevens, Fiscal Division] if he's going to declare this eligible for exemption.

Chairwoman Buckley:

What about the other bill that Mr. Parks presented testimony on? That's definitely exempted, so maybe we can exempt this one, too, if Mark is willing to look at it. The same issues are with the Assembly committee bill, so we could combine them all after we price them all and figure out which way we're going to go. Why don't we refer without recommendation, get the complete list, and then we'll see those members in Ways and Means or on the Floor as we put them all together so we don't delay it.

Assemblywoman Giunchigliani:

I'll email Mark to see if this will qualify for an exemption at the same time.

Assemblyman Anderson:

I appreciate the fact that we want to move with some speed and dispatch, but if we don't have it exempt ahead of time, we'll have a problem, and we need at least a couple of the amendments for clarity.

Chairwoman Buckley:

We'll hold it to Wednesday or Friday, but in the meantime I'd ask staff to go ahead and work on that list.

Assemblyman Perkins:

If there's a problem with an exemption, you can always refer it back to Committee, and if you hold onto it until Wednesday or Friday and you can't get the exemption, then we'll have other issues. As Ways and Means looks at the bills collectively to see what we want to do with the live entertainment tax in the state, it's best to remove that without recommendation. If it's not exemptible, then we can refer it back to Commerce and Labor and we'll deal with it here.

ASSEMBLYWOMAN GIUNCHIGLIANI MOVED TO RE-REFER
SENATE BILL 247 TO THE ASSEMBLY COMMITTEE ON WAYS
AND MEANS.

ASSEMBLYMAN ANDERSON SECONDED THE MOTION.

Senator Titus:

There are a number of people who made a special trip up here to testify in favor of the bill. Would you let them come forward and put it on the record to make their trip worthwhile?

Chairwoman Buckley:

Of course.

**Terry Graves, Legislative Advocate, representing The Beach Night Club,
Las Vegas, Nevada:**

We participated extensively during the interim hearings with the Tax Commission and the Gaming Commission on formulating the regulations. I did not have a chance to see what NRA [Nevada Resort Association] was proposing in that amendment (Exhibit D), but we certainly helped craft that. On the Senate side, we were supportive of Senator Titus's bill to try to clean up the live entertainment tax, and we appreciated her efforts.

**Don Logan, President and General Manager, Las Vegas 51s Baseball Club,
Las Vegas, Nevada:**

We're the only professional team that's survived in Las Vegas for 23 years. We do provide the best fun, family-oriented entertainment in southern Nevada. The explosive growth and changes that have taken place down there make it more and more difficult each year, and the entertainment tax is one added burden that fell in our lap inadvertently last time. Unfortunately, we've had to pay the bill, and not having to do it would make it that much easier. Our margins

continue to shrink, and for us to provide entertainment with something real and wholesome in Las Vegas, it would help us.

Joe Brown, Legislative Advocate, representing Las Vegas Motor Speedway, Las Vegas, Nevada:

In my 40 years practicing law in Las Vegas, the term "entertainment capital" has been based on bringing tourists to Nevada and attracting them any way possible. We then get taxes from them by room taxes, sales taxes, gasoline taxes, gaming taxes, and every other way you can take money from their wallets. A few years ago, some people invested millions of dollars in a speedway and it's not the largest event in Nevada every year.

Chris Powell, General Manager, Las Vegas Motor Speedway, Las Vegas, Nevada:

I'm here in support of S.B. 247. The Las Vegas Motor Speedway provides an enormous contribution to Nevada's economy. The implementation of the live entertainment tax has proven to be unduly burdensome to our business. The passage of S.B. 247 not only will enhance our business, but it will put us back on an equal playing field with other speedways in an increasingly competitive environment. We've not yet received comparable numbers for the 2005 NASCAR Weekend; the 2004 Weekend put more than \$142 million into Nevada's economy. That's a one-time expenditure that did not just affect Las Vegas Motor Speedway, but also gaming, hotels, restaurants, taxicabs, and retail shops. Furthermore, we employ roughly 2,500 people during the course of the weekend in March.

NASCAR's growth over the years has been astounding. These events routinely draw 100,000 to 175,000 people at various events across the country. Several members of the Legislature were in attendance at our March event. In the past year, speedways in the Los Angeles and Phoenix markets have been awarded with a second annual NASCAR event, an event that has put millions of dollars into their communities. A second date in Las Vegas, possibly in the fall, would be worth hundreds of millions of dollars to our state each year and would yield much more to our economy than the current live entertainment tax.

Occasionally we have issues where an event might get rained out, yet we've already paid the tax on it. As we sit here right now, there are ticket agents at the speedway who are putting numbers into computers, selling tickets, and entering in renewals for next year's event. If one day gets rained out and we have to refund money, the tax we are paying for next March's event is being paid at the end of this quarter, so it gets unwieldy. A lot of our tickets are tied to food, so the food is not taxed, but the ticket is. Another issue is a ticket may say \$49, but because of our ticketing system, a \$49 ticket has to be advertised

at the total price of \$51.45, which is above that \$50 threshold that any retailer wants to be below.

Chairwoman Buckley:

Could you tell us if the other states where other tracks are have any sort of tax?

Chris Powell:

The two markets that in the last 12 months have been awarded second NASCAR dates per year are in California in Arizona. They don't have an admissions tax.

Chairwoman Buckley:

What about ones with the first race? How does it compare to any one? Are there other places?

Chris Powell:

I'm just speaking to states whose speedways have recently been given second dates.

Chairwoman Buckley:

What other states have speedways with a tax?

Chris Powell:

Texas has some type of tax, but it's not just an admissions tax, it's everything involved in that category.

Chairwoman Buckley:

So it's more extensive than ours. The most convincing thing is last year it raised \$1.5 million?

Chris Powell:

According to the Las Vegas Convention and Visitors Authority, which intercepts customers throughout the course of the event weekend, those three days in March pumped \$142.5 million into the economy.

Chairwoman Buckley:

I'm saying that last year, the tax only rose. What you paid was relatively small, which means it doesn't affect the budget much; so I'm trying to make a point for you.

Scott Sherer, Legislative Advocate, representing Paramount Parks, Las Vegas, Nevada:

I appreciate your comments regarding the *Star Trek* amendment (Exhibit E). If this bill is processed in this fashion with regard to the effective date, it might make sense to make these exemptions that are being added effective upon passage and approval so they would be part of the chapter as it exists on June 30, 2005, if in fact there is any ruling on the unconstitutionality.

Chairwoman Buckley:

Let's move to Las Vegas.

Taylor Dew, Magical Hula Girls, Las Vegas, Nevada:

Lines 21 through 24 state "this bill provides that if the provisions of this bill concerning the tax on adult entertainment are held to be unconstitutional, the tax and all forms of live entertainment will be reinstated as currently set forth in provisions in NRS 368A." If this is removed, I'm in favor of this bill.

Billy Johnson, Vice President and Chief Operating Officer, Las Vegas Wranglers, Las Vegas, Nevada:

If you think the Speedway had a relatively small total in tax, wait until you hear about ours. Don Logan of the 51s was right when he said that they are the only franchise in Las Vegas to make it in 20 years. We're relatively new at two years old, going into our third season. That's a factor that we looked at when we decided to put a minor league hockey team in Las Vegas. That history in Las Vegas has been very difficult.

Our business in minor league sports tends to be fragile. In hockey, we only have 36 dates, which means we're effectively closed 11 months out of the season, so we have to capture our revenues in order to survive in a brief period of time. We only have 36 three-hour opportunities to do that. Most of our customers are families who want affordable entertainment. That's how we thrive and that's why we're fragile as a business. The tax last year meant we had to charge and pass that tax on to our customers. Oftentimes, families buy four to six season tickets at \$144 for a family of four, and one season ticket holder told me last season when the tax was applied, "That's basically an electric bill for me for one month." We're here to represent our contingency of families in Las Vegas who are looking for something to do with quality time with their kids, friends, and families, to preserve that and increase our chances of surviving.

Chairwoman Buckley:

Thank you, and good luck with the Wranglers. For those of us with children who want more options, we do appreciate you, so thanks very much.

Richard Clauser, Naturist Society and The Naturist Action Committee:

We've changed the terms of what we call ourselves. "Colonies" doesn't fit anymore, so we call ourselves resorts and groups. We are not opposed to the adult entertainment tax. If you look at nudist people, probably 95 percent wouldn't go to an adult entertainment place. Our concern is that the definition of "adult entertainment" is so broad that it would encompass a lot of activities of a nudist group or resort. Our activities are family-oriented and are no different than if you went to a clothed resort; our patrons simply don't have clothes on. Our concern is that it's so broad that we need to better define what constitutes "adult entertainment." I realize there are constitutional issues if you narrow it down too much, but it's so broad it could be onerous on some of these small groups, and some are trying to help and doing good things. The Tahoe area naturists are always out there helping with causes around the Lake, and if they have a fundraiser this could conceivably apply, and that's what our concern is.

Sabra Smith-Newby, Legislative Advocate, representing the City of Las Vegas, Nevada:

I'm in support of this bill.

Allen Lichtenstein, General Counsel, American Civil Liberties Union, Nevada:

We're here to talk about the lack of constitutionality in this bill. This isn't a new issue for the courts. I dealt with an issue similar to this about 10 years ago as it related to a Clark County ordinance. The adult entertainment tax specifies a particular type of expressive content, and the courts have been very reluctant to allow that. It doesn't mean that adult entertainment venues are free from a general applicability tax, but taxing one particular type of content is not acceptable, and the courts have been clear about that. One possible exception in that is if taxes or fees can be specifically related to administrative costs for checking working cards, et cetera. This is not a revenue-neutral tax. It is not to relieve the state of certain burdens; the only exception might be to cover administrative costs. There is ample case law that proves this.

If this is passed in its current form, someone will challenge it. We at the ACLU [American Civil Liberties Union] don't involve ourselves in adult entertainment, but we would certainly lend our hand in opposing this. If it is dressed up differently, the impact is still to burden one particular type of business involving one type of content. That fact would weigh on the federal court, which would likely turn it down. The federal courts have dealt with these issues before, and we're sure this would fall as it has in other states.

Chairwoman Buckley:

I'll close the public hearing on S.B. 247. This bill is eligible for an exemption. I'd like to have the opportunity to work out the language of NRS 545, some more

exemptions, and have our Fiscal staff price it out. There are a lot of changes that will cost the state relatively little. Some changes will cost nothing at all, and that has to be part of the discussions of the money Committees.

ASSEMBLYMAN ANDERSON MOVED TO RE-REFER
SENATE BILL 247 WITHOUT RECOMMENDATION TO THE
ASSEMBLY COMMITTEE ON WAYS AND MEANS.

ASSEMBLYWOMAN GIUNCHIGLIANI SECONDED THE MOTION.

THE MOTION CARRIED. (Mr. Arberry and Mr. Perkins were not present for the vote.)

Chairwoman Buckley:

We'll open the hearing on S.B. 188.

**Senate Bill 188 (1st Reprint): Makes various changes relating to energy.
(BDR 58-364)**

Don Soderberg, Chairman, Public Utilities Commission of Nevada (PUC):

Senate Bill 188 is a product of discussions that have gone on for 11 months, bringing together people involved in Nevada's energy business, energy regulation, and people with overall interest in how we are doing things. We weren't going to get together and talk about a number of regulatory issues, but we wanted to proactively address some of our bigger problems. One individual who participated in this group from the beginning was the late Richard Burdett, who was the Governor's Energy Advisor. Prior to that, he worked with us at the Commission. Mr. Burdett continually reminded us that we are spending about \$3 billion a year in fossil fuels. This \$3 billion for the most part is going out of the state. We kept asking ourselves what we can do about that, and we looked at the renewable portfolio standard, which was put together by the Legislature in past sessions, to reduce our dependence on fossil fuel to generate electricity. In Nevada, we're not doing a very good job of conservation.

We are called the Saudi Arabia of renewable energy in Nevada. Unfortunately, the Western United States, in which we are a leader when it comes to growth, is also the Saudi Arabia of energy waste, because over the last 25 years since the last oil crisis, we've lost the art of conserving. It's not something that is part of our daily lives and it's looked at from a dollar-and-cents point of view in

EXHIBIT 14

Deja Vu, et al. v. Nevada Department of Taxation
 Spreadsheet of LET Collections by Taxpayer Group

	Taxpayer Groups								
	10% LET payers								
	FY04	FY05	FY06	FY07	FY08	FY09			
Gentlemen's Club	\$ 3,001,494.94	\$ 5,036,598.82	\$ 5,441,714.56	\$ 6,890,235.73	\$ 7,193,498.60	\$ 6,812,760.62			
Agents and Managers for Artists, Athletes, Entertainers, and Other Public Figures	\$ 1,945.17	\$ 20,720.90	\$ 19,277.17	\$ -	\$ -	\$ -			
All Other Miscellaneous Store Retailers (except Tobacco Stores)	\$ -	\$ -	\$ 2,812.14	\$ -	\$ -	\$ -			
Caterers	\$ -	\$ -	\$ -	\$ -	\$ 150.00	\$ -			
Civic and Social Organizations	\$ 11,528.35	\$ 13,444.70	\$ 77,185.89	\$ -	\$ -	\$ -			\$ 15.00
Corporate, Subsidiary, and Regional Managing Offices	\$ -	\$ 1,655.37	\$ -	\$ -	\$ -	\$ -			
Cosmetics, Beauty Supplies, and Perfume Stores	\$ 48,020.54	\$ 968,956.07	\$ 1,118,434.14	\$ 1,220,534.24	\$ 1,096,763.03	\$ 1,145,338.40			
Drinking Places (Alcoholic Beverages)	\$ -	\$ 619.60	\$ -	\$ -	\$ 38.50	\$ -			
Electronic Shopping	\$ 1,300.20	\$ 1,237.05	\$ 1,169.20	\$ 900.17	\$ 774.60	\$ 784.00			
Fine Arts Schools	\$ -	\$ -	\$ -	\$ 2,683.50	\$ 982.20	\$ 1,123.30			
Fitness and Recreational Sports Centers	\$ -	\$ -	\$ 5,271.44	\$ 18,017.16	\$ -	\$ -			
Food Service Contractors	\$ 6,777.17	\$ 58,516.30	\$ 21,812.05	\$ -	\$ 173.50	\$ 4,312.99			
Full-Service Restaurants	\$ -	\$ -	\$ -	\$ 293.80	\$ 125.11	\$ 3,338.09			
Gift, Novelty, and Souvenir Stores	\$ -	\$ -	\$ -	\$ 1,405.46	\$ 7,088.44	\$ -			
Hotels (except Casino Hotels) and Motels	\$ -	\$ -	\$ -	\$ -	\$ 100.00	\$ -			
Hotels (except Casino Hotels) and Motels (except Miniwarehouses)	\$ -	\$ -	\$ -	\$ -	\$ -	\$ 73,418.34			
Lessors of Nonresidential Buildings (except Miniwarehouses)	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -			
Motion Picture and Video Production	\$ 21,011.88	\$ 47,941.83	\$ 2,400.78	\$ 74,782.08	\$ 61,020.46	\$ 26,655.95			\$ 1,921.00
Musical Groups and Artists	\$ 302.58	\$ -	\$ -	\$ -	\$ -	\$ -			
Other Direct Selling Establishments	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -			
Other Spectator Sports	\$ 39,176.58	\$ 77,738.74	\$ 113,704.49	\$ 202,196.66	\$ 46,142.18	\$ 80,816.68			
Promoters of Performing Arts, Sports, and Similar Events without Facilities	\$ 12,872.10	\$ 7,625.10	\$ 9,686.50	\$ 8,193.10	\$ 3,905.69	\$ -			
Recreational Goods Rental	\$ -	\$ 6,875.00	\$ 3,726.30	\$ -	\$ -	\$ -			
Sound Recording Studios	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -			
Sporting and Athletic Goods Manufacturing	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -			
Sporting Goods Stores	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -			
Sports and Recreation Instruction	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -			
Sports Teams and Clubs	\$ -	\$ -	\$ -	\$ -	\$ 6,802.27	\$ -			\$ 4,002.73
Theater Companies and Dinner Theaters	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -			
Unclassified	\$ 142,348.10	\$ 1,875.22	\$ 2,389.63	\$ 141,593.95	\$ 339,214.97	\$ 159,338.03			
Subtotal of All 10% LET payers collected by the Department	\$ 22,222.22	\$ 22,222.22	\$ 22,222.22	\$ 22,222.22	\$ 22,222.22	\$ 22,222.22			

This document was prepared pursuant to an Report and Recommendations of Bonnie Bulla, Discovery Commissioner. This is not an official document of any agency of the State of Nevada.

Deja Vu, et al. v. Nevada Department of Taxation
 Spreadsheet of LET Collections by Taxpayer Group

	5% LET payers									
	FY04	FY05	FY06	FY07	FY08	FY09	FY10	FY11	FY12	FY13
Administration of General Economic Programs		\$ 98,757.47	\$ 211,194.41	\$ 279,580.21	\$ 20,738.94	\$ 6,422.75				
Agents and Managers for Artists, Athletes, Entertainers, and Other Public Figures			\$ 30,287.05	\$ 24,708.62	\$ 10,690.65	\$ 6,422.75				
All Other Miscellaneous Store Retailers (except Tobacco Stores)	\$ 654,447.45	\$ 1,141,170.90	\$ 1,405,014.45	\$ 1,544,953.37	\$ 309,355.09	\$ 255,347.93				
Cosmetics, Beauty Supplies, and Perfume Stores	\$ 49,363.85									
Drinking Places (Alcoholic Beverages)	\$ 29,945.81	\$ 101,543.05	\$ 91,936.57	\$ 81,820.89						
Gift, Novelty, and Souvenir Stores			\$ 19,806.90							
Jewelry, Watch, Precious Stone, and Precious Metals										
Lessors of Nonresidential Buildings (except Minnowhouses)										
Musical Groups and Artists		\$ 335.00	\$ 34,133.17	\$ 38,092.17	\$ 2,080.00	\$ 1,428.57				
Other Spectator Sports					\$ 41,312.53	\$ 20,945.87				
Promoters of Performing Arts, Sports, and Similar Events with Facilities	\$ 390,840.80	\$ 680,924.43	\$ 495,626.24	\$ 743,093.21	\$ 48,278.03	\$ 13,963.05				
Promoters of Performing Arts, Sports, and Similar Events without Facilities			\$ 99,852.91		\$ 460,512.11	\$ 400,102.70				
Racetracks	\$ 2,906.82	\$ 4,655.45	\$ 4,546.09	\$ 5,495.81	\$ 3,468.95	\$ 743.75				
Sound Recording Studios					\$ 3,277.50	\$ 3,086.25				
Sporting and Athletic Goods Manufacturing					\$ 10,045.55	\$ 12,316.00				
Sports Teams and Clubs	\$ 4,557.50	\$ 5,982.25	\$ 6,209.00	\$ 6,568.00	\$ 7,422.75	\$ 5,749.50				
Underspecified	\$ 19,610.93	\$ 23,327.71	\$ 39,734.78	\$ 39,055.69						
Subtotal of All 5% LET payers collected by the Department										
Department Total LET Collected										
Total Gaming LET Collections										
Total LET (Gaming + Department)										
Gentlemen's Clubs as % of Total Collected per FY	3%	5%	5%	5%	5%	6%				5%

This document was prepared pursuant to an Report and Recommendations of Bonnie Bulla, Discovery Commissioner. This is not an official document of any agency of the State of Nevada.

EXHIBIT 15

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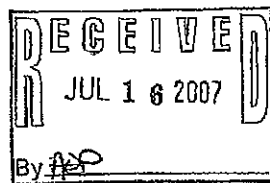
STATE OF NEVADA

TAX COMMISSION

TELECONFERENCED OPEN MEETING

MONDAY, JULY 9, 2007

CARSON CITY AND LAS VEGAS, NEVADA



THE BOARD:

THOMAS SHEETS, Chairman
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JOHN MARVEL, Member
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1

INDEX

AGENDA ITEM	PAGE
I. COMPLIANCE DIVISION:	
A. Review, Discussion and Implementation of AB 433 of the 2007 Legislative Session. Briefing provided by Open Meeting Law Senior Deputy Attorney General George Taylor	4
B. Review, Discussion and Implementation of AB 621 of the 2007 Legislative Session	14
C. Taxpayers' Appeal of the Department's Denial of Refund Claims pursuant to NRS 368A.260	
1) K-Kel, Inc., dba Spearmint Rhino Gentlemen's Club	
2) D. Westwood, Inc., dba Treasures	
3) SHAC, LLC, Olympus Garden, Inc., dba Sapphire	
4) D.I. Food & Beverage of Las Vegas, LLV, dba Jaguars	
5) Olympus Garden, Inc., dba Olympic Garden	
6) The Power Company, Inc., dba Crazy Horse Too Gentlemen's Club	
Cases Continued - Discussion, Motion and Vote	24-38
D. Taxpayer's Appeal of Hearing Officer's Decision to Revoke Petitioner's Seller's Permit and Business License and to Lock and Seal Petitioner's Business as a result of Deficiencies for Sales, Use, Modified Business and Business Tax and Status Report by all parties	
1) Tropical Penguin Scuba - Kevin Schwartz Discussion, Questions, Motion and Vote	38-48
II. BRIEFINGS:	
A. Briefing to/from the Commission and the Deputy Attorney General	49
B. Briefing to/from the Commission and the Executive Director	49
III. Next Meeting Date	51
IV. Public Comment	53
V. Items for Future Agendas	53
VI. Adjourn	53

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

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

8 It's also important to mention NAC 368A.170 which
9 requires that if it is determined that a refund is
10 appropriate in this case, that the taxpayer would first have
11 to establish that any amounts of the refund could be or have
12 been actually refunded to the patrons of the taxpayer, and
13 there has been no indication in this case that there is any
14 ability of the taxpayer to refund that money to the patrons.

15 With that, the Department has nothing further.

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

EXHIBIT 16

Nev. Admin. Code ch. 368A, s. 170

NEVADA ADMINISTRATIVE CODE
CHAPTER 368A. TAX ON LIVE ENTERTAINMENT
ADMINISTRATION OF TAX BY DEPARTMENT OF TAXATION

Current through August 1, 2007, Supplement 2007-2

NAC 368A.170 Over-collection of tax: Duties of taxpayer and Department. (NRS 360.090, 368A.140)

1. As used in this section, "over-collection" means any amount collected as a tax on live entertainment that is exempt from taxation pursuant to subsection 5 of NRS 368A.200, or any amount in excess of the amount of the applicable tax as computed in accordance with subsections 1 to 4, inclusive, of NRS 368A.200.

2. Any over-collection must, if possible, be refunded by the taxpayer to the patron from whom it was collected.

3. A taxpayer shall:

(a) Use all practical methods to determine any amount to be refunded pursuant to subsection 2 and the name and address of the person to whom the refund is to be made.

(b) Within 60 days after reporting to the Department that a refund must be made, make an accounting to the Department of all refunds paid. The accounting must be accompanied by any supporting documents required by the Department.

4. If a taxpayer is unable for any reason to refund an over-collection, the taxpayer shall pay the over-collection to the Department.

5. If an audit of a taxpayer reveals the existence of an over-collection, the Department shall:

(a) Credit the over-collection toward any deficiency that results from the audit, if the taxpayer furnishes the Department with satisfactory evidence that the taxpayer has refunded the over-collection as required by subsection 2.

(b) Within 60 days after receiving notice from the Department that a refund must be made, seek an accounting of all refunds paid. The accounting must be accompanied by any supporting documents required by the Department.

(Added to NAC by Tax Comm'n by R212-03, eff. 12-4-2003)

NAC 368A.170, NV ADC 368A.170

NV ADC 368A.170
END OF DOCUMENT

EXHIBIT 17

DOCKET NO. 06-16634

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

**DÉJÀ VU SHOWGIRLS OF LAS VEGAS, L.L.C., d/b/a DÉJÀ VU
SHOWGIRLS; LITTLE DARLINGS OF LAS VEGAS, L.L.C., d/b/a LITTLE
DARLINGS; K-KEL, INC. d/b/a SPEARMINT RHINO GENTLEMAN'S
CLUB; OLYMPUS GARDEN, INC. d/b/a OLYMPIC GARDEN; SHAC,
L.L.C. d/b/a SAPPHIRE; THE POWER COMPANY, INC., d/b/a CRAZY
HORSE TOO GENTLEMEN'S CLUB; D. WESTWOOD, INC. d/b/a
TREASURES; and D.I. FOOD AND BEVERAGE OF LAS VEGAS, L.L.C.,
d/b/a SCORES.**

Appellants,

v.

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

Appellees.

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA**

APPELLEES' ANSWERING BRIEF

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TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES	ii-vi
I. STATEMENT OF JURISDICTION.....	2
II. STATEMENT OF THE ISSUES.....	2
III. STATEMENT OF THE CASE.....	3
IV. STATEMENT OF THE FACTS RELEVANT TO THE ISSUES SUBMITTED FOR REVIEW.....	3
V. SUMMARY OF THE ARGUMENT.....	6
VI. LEGAL ARGUMENT	7
A. AUTHORITY OF DISTRICT COURT TO GRANT MOTION TO DISMISS	7
1. FAILURE TO STATE ACLAIM	7
2. LACK OF SUBJECT MATTER JURISDICTION.....	9
B. THE DISTRICT COURT WAS CORRECT IN DISMISSING THE ACTION BASED ON THE TAX INJUNCTION ACT	9
1. THE RELIEF REQUESTED BY THE CLUBS IS SUBJECT TO THE TAX INJUNCTION ACT.....	10
2. THE CLUBS HAVE A PLAIN, SPEEDY AND EFFICIENT REMEDY UNDER STATE LAW.....	11
(a) THE REMEDY IS PLAIN	11
(b) THE REMEDY IS SPEEDY	16
(c) THE REMEDY IS EFFICIENT.....	18
3. THERE IS NO EXEMPTION TO THE TAX INJUNCTION ACT FOR FACIAL CONSTITUTIONAL CHALLENGES.....	21

VII. CONCLUSION 25
STATEMENT OF RELATED CASES 27
CERTIFICATE OF COMPLIANCE PURSUANT TO
CIRCUIT RULE 32-1 28
CERTIFICATE OF MAILING 29

California v. Grace Brethren Church, 457 U.S. 393, 417, 102 S.Ct. 2498, 2512, 2513 (1982).

It is clear, therefore, that Nev. Rev. Stat. Chapter 368A confers upon the taxpayer a plain remedy in the form of the right to bring an action in state district court upon denial of a claim for refund by the NTC. The District Court properly rejected the Clubs' efforts to nullify Nev. Rev. Stat. § 368A.290-300 through a misinterpretation of Nev. Rev. Stat. § 368A.280. E.R. 47. The District Court further noted that the Nevada Supreme Court had specifically recognized a judicial remedy in the face of parallel language in Nev. Rev. Stat. Chapters 372 and 374. *State, Nevada Dept. of Taxation v. Scotsman Mfg. Co., Inc.*, 109 Nev. 252, 849 P.2d 317 (1993), E.R. 48.⁷

Scotsman involved an action for declaratory relief by a taxpayer challenging application of the sales tax to it. The various components of the sales tax in Nevada are governed by procedures set forth in Nev. Rev. Stat. Chapters 372 and 374, which contained provisions with respect to judicial review that are almost identical to those in Nev. Rev. Stat. Chapter 368A. For example, Nev. Rev. Stat. § 372.670 and Nev. Rev. Stat. § 374.675, applicable to the sales taxes, and Nev. Rev. Stat. § 368A.280(1), applicable to the Live Entertainment tax, are substantially identical:

⁷ Even if *Scotsman* is merely persuasive, not determinative, of the State court's interpretation of Nev. Rev. Stat. § 368A.280(1), it should carry sufficient weight against the Clubs' unproven arguments concerning the lack of a remedy. Cf. *Franchise Tax Board v. Alcan Aluminum Limited*, 493 U.S. 331, 341, 110 S.Ct. 661, 667(1990)(Supreme Court declined to assume that California court would not afford opportunity to seek relief, noting California intermediate appellate decision supportive of such an opportunity).

Sales Tax

Nev. Rev. Stat. § 372.670: "No injunction, writ of mandate or other legal or equitable process may issue in any suit, action or proceeding in any court against this State or against any officer of the State to prevent or enjoin the collection under this chapter of any tax or any amount of tax required to be collected."

Sales Taxes

Nev. Rev. Stat. § 374.675: "No injunction or writ of mandate or other legal or equitable process shall issue in any suit, action or proceeding in any court against the State, a county, any officer thereof to prevent or enjoin the collection under this chapter of any tax or any amount of tax required to be collected."

Live Entertainment Tax

Nev. Rev. Stat. § 368A.280(1): "No injunction, writ of mandate or other legal or equitable process may issue in any suit, action or proceeding in any court against this State or against any officer of the State to prevent or enjoin the collection under this chapter of the tax imposed by this chapter or any amount of tax, penalty or interest required to be collected."

Applying the sales tax law to the matter before it, the Nevada Supreme Court in *Scotsman* found not only that the taxpayer was entitled to challenge the Constitutionality of the tax as applied to it, but, under the circumstances, it could do so without having exhausted administrative remedies. *Id.* at 255-6, 849 P.2d at 320-1.

The Clubs take the position that Nev. Rev. Stat. § 368A.280(1) should be construed to bar any judicial remedy for taxpayers. In doing so, the Clubs do not harmonize Nev. Rev. Stat. § 368A.280(1) with the remedy clearly laid out in Nev. Rev. Stat. § 368A.290, they do not distinguish *Scotsman*, and they do not cite any other Nevada legal authority in support

parties involving the same issues of law or fact.” Appellant’s Opening Brief, p. 30, citing *Matthews v. Rodgers*, 284 U.S. 521, 530, 52 S.Ct. 217, 221 (1932). On the contrary, under Nev. Rev. Stat. Chapter 368A, the Clubs could file requests for refunds for the periods going back over the entire span of time at issue herein, and if denied, could proceed to judicial review thereon. Prospectively, there is nothing hindering consolidations. In the event that the NTC⁹ decides that the Live Entertainment Tax is unconstitutional, that would be determinative as to Plaintiffs and similarly situated taxpayers, obviating further litigation. See Nev. Rev. Stat. § 360.291(1)(a) and (g) (requiring prompt refunds and consistent treatment taxpayers).¹⁰

Hypothetical concerns about the state administrative remedy under Nev. Rev. Stat. Chapter 368A disappear in light of *Scotsman, supra*, which the District Court found to be authority for a direct action to the state district court in the case of a challenge to the sales tax on Federal constitutional grounds. E.R. 47-48. If the remedy of a refund action directly brought in state district court is available under Nevada’s sales tax provisions, it is available under Nev. Rev. Stat. Chapter 368A, which is *in part materia*, with its virtually identical refund provisions. *State, Division of Insurance v. State Farm Mutual Auto Insurance Co.*, 116 Nev. 290, 294, 995 P.2d 482,

⁹ While the taxpayer may seek judicial review of decisions by the Nevada Tax Commission, the Department may not. Nev. Rev. Stat. § 360.245(5).

¹⁰ The Clubs raise a concern that each will be required to file a separate lawsuit. That, too, is unsubstantiated. Nevada’s permissive joinder rules are the same as the Federal. Compare NRCP 20 and FRCP 20. Moreover, the Clubs point to no caselaw that for a state law procedure to be efficient, there must be permissive joinder at either the administrative level or the court level.

employee of the state, the claim for damages against that person in her official capacity would nevertheless be barred under that same provision as well as by the Eleventh Amendment, which precludes damage actions against the state in Federal district court without consent or abrogation by Congress. *Hans v. Louisiana*, 134 U.S. 1, 10 S.Ct. 504 (1890), cited in *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 98, 104 S.Ct. 900, 906 (1984); *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 237-41, 105 S.Ct. 3142, 3145-6 (1985)(superseded by statute on other grounds). The State of Nevada has specifically retained Eleventh Amendment immunity by statute. Nev. Rev. Stat. § 41.031(3). *Cent. Reserve Life Ins. Co. of North America v. Struve*, 852 F.2d 1158, 1160 (9th Cir. 1988).

VII.

CONCLUSION

Without so much as an attempt at testing the refund procedures under Nev. Rev. Stat. Chapter 368A, the Clubs filed this action in U.S. District Court, District of Nevada. The Clubs failed to plead, in a short and plain statement, that these procedures were not plain, not speedy, or not efficient. They offer as argument on this appeal only speculative bases for concluding that the procedures are deficient. These speculative bases are insufficient; they do not give any convincing reason for doubting that the Nevada district court will entertain the Clubs' arguments in a speedy or efficient manner. *Cf. Franchise Tax Board v. Alcan Aluminum Limited, supra*, 493 U.S. at 341, 110 S.Ct. at 667. Measuring the procedures against case law interpreting and applying the Tax Injunction Act, 28 U.S.C.A. § 1341, these procedures are in fact not wanting. Therefore, it is respectfully submitted

that the decision of the District Court, the Honorable Roger Hunt presiding, should be upheld.

Dated this ^{5th} day of January, 2007.

Respectfully submitted,
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Nevada Attorney General

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Board of Examiners

STATEMENT OF RELATED CASES
(Ninth Circuit Rule 28-2.6)

Appellees and their counsel are unaware of any cases presently pending in this Court which are related to this one within the meaning of Ninth Circuit Rule 28-2.6.

DATED THIS 5th day of January, 2007.

Respectfully submitted,

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EXHIBIT 18

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STATE OF NEVADA

TAX COMMISSION

TELECONFERENCED OPEN MEETING

MONDAY, AUGUST 6, 2007

CARSON CITY AND LAS VEGAS, NEVADA

THE BOARD:

THOMAS SHEETS, Chairman
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JOHN MARVEL, Member
JOAN LAMBERT, Member
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GEORGE KELESIS, Member
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1

INDEX

AGENDA ITEM	PAGE
I. COMPLIANCE DIVISION:	
A. Taxpayer's Appeal of the Department's Denial of Refund Claims pursuant to NRS 368A.260	
1) K-Kel, Inc., dba Spearmint Rhino Gentlemen's Club	
2) D. Westwood, Inc., dba Treasures	
3) SHAC, LLC, Olympus Garden, Inc., dba Sapphire	
4) D.I. Food & Beverage of Las Vegas, LLC, dba Jaguars	
5) Olympus Garden, Inc., Olympic Garden	
6) The Power Company, Inc., dba Crazy Horse Too Gentlemen's Club	
Department Overview	6
Appellant Presentation	8
Department Presentation	29
Appellant Rebuttal	39
Department Rebuttal	42
Questions, Discussion, Motion and Vote	46-94
B. Department's Recommendation to the Commission for Approval of an Offer-In-Compromise pursuant to NAC 360.438:	
1) John M. Jacobs, dba Mountain Overhead Door	
Department Presentation	95
Discussion, Motion and Vote	98-100
III. Consent Calendar	
(NOTE: For a complete listing of entities under This agenda item consult posted agenda.)	
A. Matters of General concern	100
1) Bonds Administratively Waived from May 25, 2007 Through June 30, 2007	
2) Waiver of Penalty and Interest Due to Disallowance Of Collection Allowance from May 25, 2007 through June 30, 2007	
Motion and Vote	101
B. Consideration of Recommended Settlement Agreements And Stipulations	100
1 Through 36 and 38 through 40 - Motion and Vote	101
37) Washoe Homes, Inc.	102
Motion and Vote	104
C. Waiver of Penalty and/or Interest Pursuant to NRS 360.419	100
Motion and Vote	101

INDEX (Continued)

AGENDA ITEM	PAGE
III. COMPLIANCE DIVISION:	
A. Informational Items	105
1) Penalty and Interest Waivers granted by the Department for Sales/Use and Modified Business Tax from May 25, 2007 through June 30, 2007	
2) Approval and Denial Status Report Log for Organizations created for Religious, Charitable Or Educational Purposes as of July 30, 2007	
IV. BRIEFINGS:	
A. Briefing to/from the Commission and the Deputy Attorney General	105
B. Briefing to/from the Commission and the Executive Director	105
V. Next Meeting Date	108
VI. Public Comment	121
VII. Items for Future Agendas	121
VIII. Adjourn	122

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

5 MR. POPE: To the extent that the tax is
6 applicable it's to be collected from the patrons of the
7 gentlemen's clubs, and in fact, there is to be an accounting
8 or should have been an accounting by the gentlemen's club six
9 days after they indicated that they were entitled to a
10 refund.

11 I think that they may have some approach to that
12 and it may lead to further argument, so I think it's still an
13 issue that is applicable and we'll have to address.

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

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

25 And to the extent that a refund is ordered, a

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

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

14 Now, I guess what the Commission, I'm sorry, what
15 the Department would say is that if a customer buys
16 Coca-Cola, for us to get a refund of this tax, we have to get
17 the name and address of every person buying a Coca-Cola or a
18 beer coming in the facility and I don't think any of you in
19 your real life experiences have ever had anytime where you
20 went to buy food and drink and had to give your name and
21 address, and that doesn't happen here.

22 What the affidavits say is that none of the
23 facilities have raised their admission fees in order to
24 recoup the tax, the tax merely is deducted out of the general
25 receipts of the business and it's the businesses' money that

1 we're trying to get back.

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

8 MR. POPE: May I respond?

9 CHAIRMAN SHEETS: All right.

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

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

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

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

25 CHAIRMAN SHEETS: That's right. If this becomes

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1 way with --

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

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

7 MEMBER BARENGO: You collect the tax.

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

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

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

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

18 CHAIRMAN SHEETS: Sure. Go ahead.

19 MR. POPE: I know we've reserved time to argue
20 this, but the law does require that that admission charge be
21 collected from the patrons and I believe it also requires
22 that if it's included in the ticket or included in the
23 admission charge, then there has to be some notification of
24 that.

25 To the extent that it's not included as was

1 stated here today, that it's just being paid on behalf of the
2 patrons, then I think it's difficult to say that the patrons
3 aren't paying it even though they don't know that they are
4 not. The law requires that it's being collected from the
5 patrons and the appellants are paying it on behalf of the
6 patrons.

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

14 CHAIRMAN SHEETS: Commissioner Bersi.

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

25 MR. SHAFER: Right, but respectfully I believe

1 problem with the legislature expanding their tax base.

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

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

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

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

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

17 MEMBER LAMBERT: Second.

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

20 MEMBER TURNER: Mr. Chair, I would put one
21 additional comment on the record. Counsel for the taxpayers,
22 Mr. Shafer, argued that this is really a tax that's being
23 absorbed by the businesses he represents.

24 It is a pass-through tax, and the businesses if
25 the tax did not exist could reduce what they're charging to

1 their customers by the amount of the tax and have the same
2 bottom line today.

3 Even though we didn't deal with this really in
4 any depth during the course of our discussions with the
5 Attorney General's office or the taxpayers' counsel, I would
6 find in addition that a refund to the taxpayers being the
7 clients of Mr. Shafer at this point in time would constitute
8 an unjust enrichment at the same time.

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

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

20 Not that that has made any difference to the
21 Chairman or I think to any other Commissioner, but it is a
22 unique situation to be put into, to be a named defendant in a
23 lawsuit and then after the fact be asked to make a
24 determination about the underlying law.

25 There might have been a different way to do this,