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SUPREME COURT
OF THE STATE OF NEVADA

K-KEL, INC., d/b/a Spearmint Rhino Gentlemen's Club, et al.,

Appellants,

vs.

NEVADA DEPARTMENT OF TAXATION, et al.,

Respondents.

Supreme Court Docket: 69886

District Court Case: A-11-648894-J
Consolidated with A-14-697515-J

Appellants' Appendix

APPELLANTS' APPENDIX
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March 28, 2007

VIA FACSIMILE (775-684-2020)
AND OVERNIGHT COURIER
Nevada Department of Taxation
Attn: Michelle Jacobs
1550 College Parkway, Suite 100
Carson City, Nevada 89706

Re: Claim for Refund – Nevada Tax on Live Entertainment
Taxpayer: Olympus Garden, Inc.
Tax Period: February 2004

Dear Ms. Jacobs:

Please be advised that the undersigned represents Olympus Garden, 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 February 2004, together with the statutory interest provided for by N.R.S. § 368A.270.

According to our records, the Taxpayer paid a total of Seventy-Nine Thousand Five Hundred Eighty-Eight and 04/100 Dollars ($79,588.04) via check number 72227 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)

---

[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").

$ 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)

$ 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 and 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.Ed2d 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

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[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.

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 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.

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[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. Giani**, 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).

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.

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 treatises 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.

GHANEM SULLIVAN
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March 28, 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: D.I. Food & Beverage of Las Vegas, LLC
Tax Period: February 2004

Dear Ms. Jacobs:

Please be advised that the undersigned represents D.I. Food & Beverage of Las Vegas, LLC ("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 full refund of any and all Live Entertainment Taxes paid for the reporting period of February 2004, together with the statutory interest provided for by N.R.S. § 368A.270.

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.

1. Nevada's Live Entertainment Tax is a Facially Unconstitutional Direct Tax on the Exercise of Constitutional Freedoms.

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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:

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- $ 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)
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[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 and 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.Ed2d 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.***"

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[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.

." **Id.** at 112 (emphasis added). This is because "the power to impose a license tax on the exercise of these freedoms is 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**

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[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. Giani**, 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).

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.

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 treatises 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.

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GHANEM SULLIVAN

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March 28, 2007

VIA FACSIMILE (775-684-2020)
AND OVERNIGHT COURIER
Nevada Department of Taxation
Attn: Michelle Jacobs
1550 College Parkway, Suite 100
Carson City, Nevada 89706

Re: Claim for Refund – Nevada Tax on Live Entertainment
Taxpayer: D.Westwood, Inc.
Tax Period: February 2004

Dear Ms. Jacobs:

Please be advised that the undersigned represents D.Westwood, 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 February 2004, together with the statutory interest provided for by N.R.S. § 368A.270.

According to our records, the Taxpayer paid a total of Seventy Thousand Three Hundred Sixty-Six and 56/100 Dollars ($70,366.56) via check number 11017 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)

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[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 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)

$ 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 and admission charge or the purchase of any food, refreshments or merchandise (m)

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[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. Giani**, 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).

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.

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 treatises 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.

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Diana L. Sullivan
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March 28, 2007

VIA FACSIMILE (775-684-2020)
AND OVERNIGHT COURIER
Nevada Department of Taxation
Attn: Michelle Jacobs
1550 College Parkway, Suite 100
Carson City, Nevada 89706

Re: Claim for Refund – Nevada Tax on Live Entertainment
Taxpayer: SHAC, LLC
Tax Period: February 2004

Dear Ms. Jacobs:

Please be advised that the undersigned represents SHAC, LLC ("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 February 2004, together with the statutory interest provided for by N.R.S. § 368A.270.

According to our records, the Taxpayer paid a total of Fifty-Nine Thousand Nine Hundred Seventy-Six and 66/100 Dollars ($59,976.66) via check number 1740 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.

1. ***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)

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[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 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)

$ 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 and 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.Ed2d 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.

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[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.

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 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

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[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. Giani**, 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).

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.

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 treatises 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.

GHANEM SULLIVAN
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March 28, 2007

VIA FACSIMILE (775-684-2020)
AND OVERNIGHT COURIER
Nevada Department of Taxation
Attn: Michelle Jacobs
1550 College Parkway, Suite 100
Carson City, Nevada 89706

Re: Claim for Refund – Nevada Tax on Live Entertainment
Taxpayer: K-Kel, Inc.
Tax Period: February 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 February 2004, together with the statutory interest provided for by N.R.S. § 368A.270.

According to our records, the Taxpayer paid a total of Ninety-Eight Thousand One and 70/100 Dollars ($98,001.70) via check number 5525 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)

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[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").

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

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$ 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.Ed2d 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

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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

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[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. Giani, 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).

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.

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 treatises 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.

GHANEM SULLIVAN
Attorneys At Law

Elizabeth M. Ghanem
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Diana L. Sullivan
dsullivan@gs-lawyers.com

March 28, 2007

VIA FACSIMILE (775-684-2020)
AND OVERNIGHT COURIER
Nevada Department of Taxation
Attn: Michelle Jacobs
1550 College Parkway, Suite 100
Carson City, Nevada 89706

Re: Claim for Refund – Nevada Tax on Live Entertainment
Taxpayer: The Power Company, Inc.
Tax Period: February 2004

Dear Ms. Jacobs:

Please be advised that the undersigned represents The Power Company, 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 February 2004, together with the statutory interest provided for by N.R.S. § 368A.270.

According to our records, the Taxpayer paid a total of Eighty-One Thousand Five Hundred Seventy-Four and 82/100 Dollars ($81,574.82) via check number 7987 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.

1. ***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)

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[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 provided in the common area of a shopping mall (j)

$ 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 and 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.

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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).

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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).

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Sincerely,

GHANEM & SULLIVAN, LLP

By: Diana L. Sullivan, Esq.

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

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April 3, 2007

D.I.FOOD & BEVERAGE OF LAS VEAGS LLC
JAGUARS
3355 PROCYON ST
LAS VEGAS NV 89102

Dear Sir:

Re: Live Entertainment Tax Claim for Refund

I am in receipt of a letter from Ghanem & Sullivan, Attorneys at Law, dated March 28, 2007, requesting a refund of Live Entertainment Taxes paid by D.I. Food & Beverage of Las Vegas LLC for the period ending February, 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 368A090 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 D.I. Food Y Beverage of Las Vegas LLC, DBA Jaguars, 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

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
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Carson City, Nevada 89706-7937
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Henderson, Nevada 89074
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Fax: (702) 486-3377

CERTIFIED MAIL: 7006 2150 0000 6989 5501

April 3, 2007

THE POWER COMPANY INC
CRAZY HORSE TOO
2476 INDUSTIAL RD
LAS VEGAS NV 89102

Dear Mr. Rizzolo:

Re: Live Entertainment Tax Claim for Refund

I am in receipt of a letter from Ghanem & Sullivan, Attorneys at Law, dated March 28, 2007, requesting a refund of Live Entertainment Taxes paid by The Power Company, Inc. for the period ending February 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 368A090 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 The Power Company, Inc. DBA Crazy Horse Too 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,

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CERTIFIED MAIL: 7006 2150 0000 6989 5488

April 3, 2007

PETER ELIADES & OG ELIADES LLC
OLYMPIC GARDEN
1531 LAS VEGAS BLVD S
LAS VEGAS NV 89104

Dear Sir:

Re: Live Entertainment Tax Claim for Refund

I am in receipt of a letter from Ghanem & Sullivan, Attorneys at Law, dated March 28, 2007, requesting a refund of Live Entertainment Taxes paid by Olympus Garden, Inc. for the period ending February, 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 368A090 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.

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CERTIFIED MAIL: 7006 2150 0000 6989 5471

April 3, 2007

SHAC LLC
SAPPHIRE
3025 INDUSTRIAL RD
LAS VEGAS NV 89109

Dear Sir:

Re: Live Entertainment Tax Claim for Refund

I am in receipt of a letter from Ghanem & Sullivan, Attorneys at Law, dated March 28, 2007, requesting a refund of Live Entertainment Taxes paid by SHAC LLC, for the period ending February, 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 368A090 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.

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CERTIFIED MAIL: 7006 2150 0000 6989 5464

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 March 28, 2007, requesting a refund of Live Entertainment Taxes paid by K-KEL Inc. for the period ending February, 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 368A090 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.

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Sincerely,

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Enclosures: NRS 360.245

cc: Ghanem & Sullivan, LLP

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CERTIFIED MAIL: 7006 2150 0000 6989 5457

April 3, 2007

D. WESTWOOD INC
TREASURES
2801 WESTWOOD DR
LAS VEGAS NV 89109

Dear Sir:

Re: Live Entertainment Tax Claim for Refund

I am in receipt of a letter from Ghanem & Sullivan, Attorneys at Law, dated March 28, 2007, requesting a refund of Live Entertainment Taxes paid by D. Westwood Inc. for the period ending February, 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 368A090 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.

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CERTIFIED MAIL: 7005 1820 0003 8673 2868

April 3, 2007

PETER ELIADES & OG ELIADES LLC
OLYMPIC GARDEN
1531 LAS VEGAS BLVD S
LAS VEGAS NV 89104

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 Olympus Garden, Inc. for the period ending January, 2004.

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Enclosures: NRS 360.245

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CERTIFIED MAIL: 7005 1820 0003 8673 2875

April 3, 2007

THE POWER COMPANY INC
CRAZY HORSE #2
2476 INDUSTIAL RD
LAS VEGAS NV 89102

Dear Mr. Rizzolo:

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 The Power Company, 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 368A090 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.

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Sincerely,

Dino DiCianno
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Enclosures: NRS 360.245

cc: Ghanem & Sullivan, LLP

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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.

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CERTIFIED MAIL: 7005 1820 0003 8673 2813

April 3, 2007

D. WESTWOOD INC
TREASURES
2801 WESTWOOD DR
LAS VEGAS NV 89109

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 D. Westwood 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 368A090 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.

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CERTIFIED MAIL: 7005 1820 0003 8673 2837

April 3, 2007

D.I.FOOD & BEVERAGE OF LAS VEAGS LLC
JAGUARS
3355 PROCYON ST
LAS VEGAS NV 89102

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 D.I. Food & Beverage of Las Vegas LLC 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 368A090 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 D.I. Food Y Beverage of Las Vegas LLC, DBA Jaguars, 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.

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Executive Director

Enclosures: NRS 360.245

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CERTIFIED MAIL: 7005 1820 0003 8673 2844

April 3, 2007

SHAC LLC
SAPPHIRE
3025 INDUSTRIAL RD
LAS VEGAS NV 89109

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 SHAC LLC, 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 368A090 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.

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Enclosures: NRS 360.245

cc: Ghanem & Sullivan, LLP

GHANEM SULLIVAN

Attorneys At Law

Elizabeth M. Ghanem
eghanem@gs-lawyers.com

Diana L. Sullivan
dsullivan@gs-lawyers.com

April 26, 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: D.Westwood, Inc.
Tax Period: March 2004

Dear Ms. Jacobs:

Please be advised that the undersigned represents D.Westwood, 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 March 2004, together with the statutory interest provided for by N.R.S. § 368A.270.

According to our records, the Taxpayer paid a total of Sixty-Eight Thousand Six Hundred Sixteen and 01/100 Dollars ($68,616.01) 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.

1. ***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)

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[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").

- 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)

- 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 and 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.Ed2d 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

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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 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).

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[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. Giani**, 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).

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.

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 treatises 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

Diana L Sullivan

By: Diana L. Sullivan

GHANEM SULLIVAN

Attorneys At Law

Elizabeth M. Ghanem
eghanem@gs-lawyers.com

Diana L. Sullivan
dsullivan@gs-lawyers.com

April 26, 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: Olympus Garden, Inc.
Tax Period: March 2004

Dear Ms. Jacobs:

Please be advised that the undersigned represents Olympus Garden, 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 March 2004, together with the statutory interest provided for by N.R.S. § 368A.270.

According to our records, the Taxpayer paid a total of Ninety-Four Thousand Nine Hundred Fifty-Five and 85/100 Dollars ($94,955.85) via check number 72401 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.

1. 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)

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[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").

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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 treatises 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

GHANEM SULLIVAN

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Diana L. Sullivan
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April 26, 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: SHAC, LLC
Tax Period: March 2004

Dear Ms. Jacobs:

Please be advised that the undersigned represents SHAC, LLC ("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 March 2004, together with the statutory interest provided for by N.R.S. § 368A.270.

According to our records, the Taxpayer paid a total of Eighty Thousand Two Hundred Forty and 97/100 Dollars ($80,240.97) via check number 1917 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)

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[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").

- 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)

- 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 and 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.Ed2d 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

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[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.

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 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).

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[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. Giani**, 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).

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.

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 treatises 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

Elizabeth M. Ghanem for

By: Diana L. Sullivan

GHANEM SULLIVAN
Attorneys At Law

Elizabeth M. Ghanem
eghanem@gs-lawyers.com

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April 26, 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: March 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 March 2004, together with the statutory interest provided for by N.R.S. § 368A.270.

According to our records, the Taxpayer paid a total of One Hundred Forty-Seven Thousand Six Hundred Twelve and 55/100 Dollars ($147,612.55) via check number 5602 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.

1. Nevada's Live Entertainment Tax is a Facially Unconstitutional Direct Tax on the Exercise of Constitutional Freedoms.

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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:

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[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").

- Any boxing contest or exhibition governed by the provisions of Chapter 467
- 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)
- 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 and 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.Ed2d 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***

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[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.

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 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.***

[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. Giani**, 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).

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.

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 treatises 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

Diana L. Sullivan

By: Diana L. Sullivan

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April 26, 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: The Power Company, Inc.
Tax Period: March 2004

Dear Ms. Jacobs:

Please be advised that the undersigned represents The Power Company, 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 March 2004, together with the statutory interest provided for by N.R.S. § 368A.270.

According to our records, the Taxpayer paid a total of One Hundred Eleven Thousand Two Hundred Twenty-Nine and 07/100 Dollars ($111,229.07) via check number 8097 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.

1. 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)

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[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").

- 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)

- 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 and 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 (l)

- 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.Ed2d 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

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[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.

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 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.

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[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. Giani**, 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).

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.

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 treatises 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

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April 26, 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: D.I. Food & Beverage of Las Vegas, LLC
Tax Period: March 2004

Dear Ms. Jacobs:

Please be advised that the undersigned represents D.I. Food & Beverage of Las Vegas, LLC ("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 full refund of any and all Live Entertainment Taxes paid for the reporting period of March 2004, together with the statutory interest provided for by N.R.S. § 368A.270.

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

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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)

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[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").

- 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)

- 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 and 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 (l)

- 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.Ed2d 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

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[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.

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 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).

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[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. Giani**, 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).

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.

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 treatises 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

Diana L Sullivan

By: Diana L. Sullivan

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Executive Director

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April 30, 2007

D.I. FOOD & BEVERAGE OF LAS VEGAS, LLC
JAGUARS
3355 PROCYON ST
LAS VEGAS NV 89102

Dear Sir:

Re: Live Entertainment Tax Claim for Refund

I am in receipt of a letter from Ghanem & Sullivan, Attorneys at Law, dated April 26, 2007, requesting a refund of Live Entertainment Taxes paid by D.I. Food & Beverage of Las Vegas, LLC for the period ending March, 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, D.I. Food & Beverage of Las Vegas, LLC falls within the purview of this statute and is required to pay the live entertainment tax.

As I find no basis in law that would preclude D.I. Food & Beverage of Las Vegas, LLC, DBA Jaguars, 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

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

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April 30, 2007

THE POWER COMPANY INC
CRAZY HORSE TOO
2476 INDUSTIAL RD
LAS VEGAS NV 89102

Dear Mr. Rizzolo:

Re: Live Entertainment Tax Claim for Refund

I am in receipt of a letter from Ghanem & Sullivan, Attorneys at Law, dated April 26, 2007, requesting a refund of Live Entertainment Taxes paid by The Power Company, Inc. for the period ending March 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, The Power Company, Inc. falls within the purview of this statute and is required to pay the live entertainment tax.

As I find no basis in law that would preclude The Power Company, Inc., DBA Crazy Horse Too, 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

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

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April 30, 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 April 26, 2007, requesting a refund of Live Entertainment Taxes paid by K-KEL Inc. for the period ending March, 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, K-Kel, Inc. falls within the purview of this statute and is required to pay the live entertainment 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

JIM GIBBONS
Governor
THOMAS R. SHEETS
Chair, Nevada Tax Commission
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May 1, 2007

D. WESTWOOD INC
TREASURES
2801 WESTWOOD DR
LAS VEGAS NV 89109

Dear Sir:

Re: Live Entertainment Tax Claim for Refund

I am in receipt of a letter from Ghanem & Sullivan, Attorneys at Law, dated April 26, 2007, requesting a refund of Live Entertainment Taxes paid by D. Westwood, Inc. for the period ending March, 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, D. Westwood, Inc. falls within the purview of this statute and is required to pay the live entertainment tax.

As I find no basis in law that would preclude D. Westwood, Inc., DBA Treasures, 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

JIM GIBBONS
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THOMAS R. SHEETS
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May 1, 2007

PETER ELIADES & OG ELIADES LLC
OLYMPIC GARDEN
1531 LAS VEGAS BLVD S
LAS VEGAS NV 89104

Dear Sir:

Re: Live Entertainment Tax Claim for Refund

I am in receipt of a letter from Ghanem & Sullivan, Attorneys at Law, dated April 26, 2007, requesting a refund of Live Entertainment Taxes paid by Olympus Garden, Inc. for the period ending March, 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 tax.

As I find no basis in law that would preclude Olympus Garden, Inc, DBA Olympic Garden, 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

JIM GIBBONS
Governor
THOMAS R. SHEETS
Chair, Nevada Tax Commission
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CERTIFIED MAIL: 7006 2150 0000 6989 5419

May 1, 2007

SHAC LLC
SAPPHIRE
3025 INDUSTRIAL RD
LAS VEGAS NV 89109

Dear Sir:

Re: Live Entertainment Tax Claim for Refund

I am in receipt of a letter from Ghanem &.Sullivan, Attorneys at Law, dated April 26, 2007, requesting a refund of Live Entertainment Taxes paid by SHAC LLC, for the period ending March, 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, SHAC LLC falls within the purview of this statute and is required to pay the live entertainment tax.

As I find no basis in law that would preclude SHAC LLC, DBA Sapphire, 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