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Elizabeth A. Brown
Clerk of Supreme Court

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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May 30, 2007

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AND OVERNIGHT COURIER
Nevada Department of Taxation
Attn: Michelle Jacobs
1550 College Parkway
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RECEIVED
MAY 31 2007
STATE OF NEVADA
DEPARTMENT OF TAXATION

Re: Claim for Refund – Nevada Tax on Live Entertainment
Taxpayer: D.I. Food & Beverage of Las Vegas, LLC
Tax Period: April 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 April 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 First Amendment guarantee. . .") (emphasis added); **Winters v. New York**, 333 U.S.507, 510, 68

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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)

---

[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).

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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.

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]

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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).

2. ***Nevada's Live Entertainment Tax is an Unconstitutional Differential Tax on First Amendment Freedoms.***

Chapter 268A is also unconstitutional because it treats certain live entertainment facilities differently than other amusements and other providers of live entertainment. Nevada is unable to assert an overriding government interest for this disparate treatment, and the statute must, therefore, fail.

The Supreme Court has plainly stated "that differential taxation of First Amendment speakers is constitutionally suspect when it threatens to suppress the expression of particular ideas or viewpoints." **Leathers v. Medlock**, 499 U.S. 439, 447, 111 S.Ct. 1438, 113 L.Ed.2d 494 (1991), *citing* **Minneapolis Star**, 460 U.S. at 585; and **Grosjean v. American Press Co.**, 297 U.S. 233, 244-249, 56 S.Ct. 444, 80 L.Ed. 660 (1936). This is because selective taxation is a "powerful weapon" to suppress the speaker or viewpoint selected. **Minneapolis Star**, 460 U.S. at 585, *citing* **Railway Express Agency v. New York**, 336 U.S. 106, 112-113, 69 S.Ct. 463, 93 L.Ed. 533 (1949) (Jackson, J., concurring).

As stated above, Chapter 368A not only singles out live entertainment, but also discriminates among providers of live entertainment. First, it discriminates on the basis of the size of the facility. It excludes small facilities with a maximum occupancy of less than two hundred (200) persons. N.R.S. §§ 368A.200(5)(d)(e). Those not excluded on the basis of size are then taxed at different rates according to their size, with the smaller venues paying the higher rate. N.R.S. § 368A.200(1). The smaller venues are further taxed on their food, refreshment, and merchandise sales, while the larger venues are not. **Id.** This scheme, like that in **Minneapolis Star**, impermissibly discriminates among businesses on the basis of their size. **Minneapolis Star**, 460 U.S. at 591-92. The statute offers no rationale to justify this disparate treatment.

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.

Very Truly Yours,

GHANEM & SULLIVAN, LLP

Diana L Sullivan

By: Diana L. Sullivan, Esq.

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May 30, 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: April 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 April 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-Six Thousand Two Hundred Fifty-Six and 72/100 Dollars ($56,256.72) via check number 11269 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**

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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.

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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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- 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)

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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).

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]

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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

2. ***Nevada's Live Entertainment Tax is an Unconstitutional Differential Tax on First Amendment Freedoms.***

Chapter 268A is also unconstitutional because it treats certain live entertainment facilities differently than other amusements and other providers of live entertainment. Nevada is unable to assert an overriding government interest for this disparate treatment, and the statute must, therefore, fail.

The Supreme Court has plainly stated "that differential taxation of First Amendment speakers is constitutionally suspect when it threatens to suppress the expression of particular ideas or viewpoints." **Leathers v. Medlock**, 499 U.S. 439, 447, 111 S.Ct. 1438, 113 L.Ed.2d 494 (1991), *citing* **Minneapolis Star**, 460 U.S. at 585; and **Grosjean v. American Press Co.**, 297 U.S. 233, 244-249, 56 S.Ct. 444, 80 L.Ed. 660 (1936). This is because selective taxation is a "powerful weapon" to suppress the speaker or viewpoint selected. **Minneapolis Star**, 460 U.S. at 585, *citing* **Railway Express Agency v. New York**, 336 U.S. 106, 112-113, 69 S.Ct. 463, 93 L.Ed. 533 (1949) (Jackson, J., concurring).

As stated above, Chapter 368A not only singles out live entertainment, but also discriminates among providers of live entertainment. First, it discriminates on the basis of the size of the facility. It excludes small facilities with a maximum occupancy of less than two hundred (200) persons. N.R.S. §§ 368A.200(5)(d)(e). Those not excluded on the basis of size are then taxed at different rates according to their size, with the smaller venues paying the higher rate. N.R.S. § 368A.200(1). The smaller venues are further taxed on their food, refreshment, and merchandise sales, while the larger venues are not. **Id.** This scheme, like that in **Minneapolis Star**, impermissibly discriminates among businesses on the basis of their size. **Minneapolis Star**, 460 U.S. at 591-92. The statute offers no rationale to justify this disparate treatment.

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.

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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).

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.

Very Truly Yours,

GHANEM & SULLIVAN, LLP

By: Diana L. Sullivan, Esq.

GHANEM SULLIVAN
Attorneys At Law

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Diana L. Sullivan
dsullivan@gs-lawyers.com

May 30, 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: April 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 April 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-Nine Thousand Three Hundred Ninety and 89/100 Dollars ($99,390.89) via check number 8233 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**

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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.

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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).

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.

Very Truly Yours,

GHANEM & SULLIVAN, LLP

Diana L Sullivan

By: Diana L. Sullivan, Esq.

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May 30, 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: April 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 April 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-One Thousand Nine Hundred Thirty and 88/100 Dollars ($61,930.88) via check number 1986 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**

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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:

---

[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 of the Nevada Revised Statutes (c)

- Live entertainment in a non-gaming facility with a maximum seating capacity of less than 200 (d)

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

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

- Live entertainment provided in the common area of a shopping mall (j)

- 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]

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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.

Most importantly, is the simple fact that such differential taxes upon First Amendment activities are "***presumed unconstitutional.***" **Minneapolis Star**, 460 U.S. at 586 (emphasis added). *See also* **Simon & Schuster v. Crime Victims Bd.**, 502 U.S. 105, 115, 112 S.Ct. 501, 116 L.Ed.2d 476 (1991) ("A statute is ***presumptively inconsistent*** with the First Amendment if it imposes a financial burden on speakers because of the content of their speech") (emphasis added).

Utilizing these standards, it is clear that Chapter 368A is blatantly, and *facially*, unconstitutional under the First Amendment.

The Supreme Court dealt with the issue of taxing First Amendment rights in the case of **Murdock v. Pennsylvania**, 319 U.S. 105, 63 S.Ct. 870, 87 L.Ed. 1292 (1943). The case dealt with a city ordinance that required those who wished to canvas or solicit to pay a license fee of $1.50 per day or $7.00 for one week. **Id.** at 106. The Supreme Court stated that, in regard to First Amendment freedoms, "it could hardly be denied that a tax laid specifically on the exercise of those freedoms would be unconstitutional. Yet the license tax proposed by this ordinance is in substance just that." **Id.** at 108. In the case of the Nevada Tax on Live Entertainment, there is not even the pretext of a license involved, as it is merely a direct imposition of a tax on First Amendment freedoms.

The Supreme Court noted in **Murdock** that freedom of speech is "available to all, not merely to those who can pay their own way," and that "the power to tax the exercise of a privilege is the power to control or suppress its enjoyment . . . those who can tax the exercise of this [First Amendment freedom] can make its exercise so costly as to deprive it of the resources necessary for its maintenance." **Id.** at 111-12. The Court flatly stated that "***a state may not impose a charge for the enjoyment of a right granted by the federal constitution.***" **Id.** at 112 (emphasis added). This is because "the power to impose a license tax on the exercise of these freedoms is 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]

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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

2. ***Nevada's Live Entertainment Tax is an Unconstitutional Differential Tax on First Amendment Freedoms.***

Chapter 268A is also unconstitutional because it treats certain live entertainment facilities differently than other amusements and other providers of live entertainment. Nevada is unable to assert an overriding government interest for this disparate treatment, and the statute must, therefore, fail.

The Supreme Court has plainly stated "that differential taxation of First Amendment speakers is constitutionally suspect when it threatens to suppress the expression of particular ideas or viewpoints." **Leathers v. Medlock**, 499 U.S. 439, 447, 111 S.Ct. 1438, 113 L.Ed.2d 494 (1991), *citing* **Minneapolis Star**, 460 U.S. at 585; and **Grosjean v. American Press Co.**, 297 U.S. 233, 244-249, 56 S.Ct. 444, 80 L.Ed. 660 (1936). This is because selective taxation is a "powerful weapon" to suppress the speaker or viewpoint selected. **Minneapolis Star**, 460 U.S. at 585, *citing* **Railway Express Agency v. New York**, 336 U.S. 106, 112-113, 69 S.Ct. 463, 93 L.Ed. 533 (1949) (Jackson, J., concurring).

As stated above, Chapter 368A not only singles out live entertainment, but also discriminates among providers of live entertainment. First, it discriminates on the basis of the size of the facility. It excludes small facilities with a maximum occupancy of less than two hundred (200) persons. N.R.S. §§ 368A.200(5)(d)(e). Those not excluded on the basis of size are then taxed at different rates according to their size, with the smaller venues paying the higher rate. N.R.S. § 368A.200(1). The smaller venues are further taxed on their food, refreshment, and merchandise sales, while the larger venues are not. **Id.** This scheme, like that in **Minneapolis Star**, impermissibly discriminates among businesses on the basis of their size. **Minneapolis Star**, 460 U.S. at 591-92. The statute offers no rationale to justify this disparate treatment.

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.

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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).

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.

Very Truly Yours,

GHANEM & SULLIVAN, LLP

Diana L Sullivan

By: Diana L. Sullivan, Esq.

GHANEM & SULLIVAN
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May 30, 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: April 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 April 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-Seven Thousand One Hundred Fifty-Seven and 00/100 Dollars ($87,157.00) via check number 72492 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**

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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 of the Nevada Revised Statutes (c)

- Live entertainment in a non-gaming facility with a maximum seating capacity of less than 200 (d)

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

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

- Live entertainment provided in the common area of a shopping mall (j)

- 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]

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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.

Most importantly, is the simple fact that such differential taxes upon First Amendment activities are "***presumed unconstitutional.***" **Minneapolis Star**, 460 U.S. at 586 (emphasis added). *See also* **Simon & Schuster v. Crime Victims Bd.**, 502 U.S. 105, 115, 112 S.Ct. 501, 116 L.Ed.2d 476 (1991) ("A statute is ***presumptively inconsistent*** with the First Amendment if it imposes a financial burden on speakers because of the content of their speech") (emphasis added).

Utilizing these standards, it is clear that Chapter 368A is blatantly, and *facially*, unconstitutional under the First Amendment.

The Supreme Court dealt with the issue of taxing First Amendment rights in the case of **Murdock v. Pennsylvania**, 319 U.S. 105, 63 S.Ct. 870, 87 L.Ed. 1292 (1943). The case dealt with a city ordinance that required those who wished to canvas or solicit to pay a license fee of $1.50 per day or $7.00 for one week. **Id.** at 106. The Supreme Court stated that, in regard to First Amendment freedoms, "it could hardly be denied that a tax laid specifically on the exercise of those freedoms would be unconstitutional. Yet the license tax proposed by this ordinance is in substance just that." **Id.** at 108. In the case of the Nevada Tax on Live Entertainment, there is not even the pretext of a license involved, as it is merely a direct imposition of a tax on First Amendment freedoms.

The Supreme Court noted in **Murdock** that freedom of speech is "available to all, not merely to those who can pay their own way," and that "the power to tax the exercise of a privilege is the power to control or suppress its enjoyment . . . those who can tax the exercise of this [First Amendment freedom] can make its exercise so costly as to deprive it of the resources necessary for its maintenance." **Id.** at 111-12. The Court flatly stated that "***a state may not impose a charge for the enjoyment of a right granted by the federal constitution.***" **Id.** at 112 (emphasis added). This is because "the power to impose a license tax on the exercise of these freedoms is 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]

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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

2. ***Nevada's Live Entertainment Tax Is an Unconstitutional Differential Tax on First Amendment Freedoms.***

Chapter 268A is also unconstitutional because it treats certain live entertainment facilities differently than other amusements and other providers of live entertainment. Nevada is unable to assert an overriding government interest for this disparate treatment, and the statute must, therefore, fail.

The Supreme Court has plainly stated "that differential taxation of First Amendment speakers is constitutionally suspect when it threatens to suppress the expression of particular ideas or viewpoints." **Leathers v. Medlock**, 499 U.S. 439, 447, 111 S.Ct. 1438, 113 L.Ed.2d 494 (1991), *citing* **Minneapolis Star**, 460 U.S. at 585; and **Grosjean v. American Press Co.**, 297 U.S. 233, 244-249, 56 S.Ct. 444, 80 L.Ed. 660 (1936). This is because selective taxation is a "powerful weapon" to suppress the speaker or viewpoint selected. **Minneapolis Star**, 460 U.S. at 585, *citing* **Railway Express Agency v. New York**, 336 U.S. 106, 112-113, 69 S.Ct. 463, 93 L.Ed. 533 (1949) (Jackson, J., concurring).

As stated above, Chapter 368A not only singles out live entertainment, but also discriminates among providers of live entertainment. First, it discriminates on the basis of the size of the facility. It excludes small facilities with a maximum occupancy of less than two hundred (200) persons. N.R.S. §§ 368A.200(5)(d)(e). Those not excluded on the basis of size are then taxed at different rates according to their size, with the smaller venues paying the higher rate. N.R.S. § 368A.200(1). The smaller venues are further taxed on their food, refreshment, and merchandise sales, while the larger venues are not. **Id**. This scheme, like that in **Minneapolis Star**, impermissibly discriminates among businesses on the basis of their size. **Minneapolis Star**, 460 U.S. at 591-92. The statute offers no rationale to justify this disparate treatment.

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.

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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).

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.

Very Truly Yours,

GHANEM & SULLIVAN, LLP

Diana L. Sullivan

By: Diana L. Sullivan, Esq.

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May 30, 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: April 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 April 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-Six Thousand Eight Hundred Fifty-Eight and 23/100 Dollars ($96,858.23) via check number 537 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**

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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)

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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 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*** 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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Very Truly Yours,

GHANEM & SULLIVAN, LLP

Diana L Sullivan

By: Diana L. Sullivan, Esq.

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