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SUPREME COURT
OF THE STATE OF NEVADA

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

Appellants,

vs.

NEVADA DEPARTMENT OF TAXATION, et al.,

Respondents.

Supreme Court Docket: 69886

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

Appellants' Appendix

APPELLANTS' APPENDIX
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BEFORE THE NEVADA TAX COMMISSION

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

NEVADA DEPARTMENT OF TAXATION'S BRIEF ON REMAND TO CONSIDER ADDITIONAL EVIDENCE

The Nevada Department of Taxation (hereinafter "Department"), by and through its attorney, Catherine Cortez Masto, Attorney General, by Vivienne Rakowsky, Deputy Attorney general, David Pope, Senior Deputy Attorney General and Blake Doerr, Senior Deputy Attorney General, hereby requests that the Nevada Tax Commission [hereinafter "Commission"] find the additional evidence proffered by the Petitioners would not change the Commission's original Findings of Fact, Conclusions of Law and Final Decision [hereinafter "Decision"] dated October 12, 2007, issued in the above-entitled matter, attached hereto as **Exhibit "A",** and submits the following Points and Authorities in support thereof.

POINTS AND AUTHORITIES

I. INTRODUCTION

This matter has been remanded from the District Court to allow the Commission to consider additional evidence and make a determination to either amend the administrative findings of fact, conclusion of law and decision dated October 12, 2007, reverse the decision, or affirm the original decision. *See* Court Order dated January 24, 2012, attached hereto as **Exhibit "B".**

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II. STANDARD OF REVIEW

The reviewing Court has Ordered that the Commission look at the additional evidence proffered by the Petitioners and either amend the original findings, reverse the findings or find that the original Findings of Fact, Conclusions of Law and Decision dated October 12, 2007 applies as written. Judicial review of a final decision of an agency must be confined to the record. NRS 233B.135(1)(b). The reviewing Court can consider all material evidence considered by the Commission. If this Commission determines that the additional evidence the Petitioners are offering is not material, or if there is not a good reason that this evidence was not offered during the original hearing, it should make such a finding so the reviewing court will not consider the additional evidence when performing judicial review.

The court performing judicial review is to show deference to the judgment of the agency as to the weight of the evidence with respect to the questions of fact. NRS 233B.135(3). With respect to questions of law, deference should also be shown when the agency's conclusions of law are closely related to the agency's view of the facts. *See* Department of Motor Vehicles and Public Safety v. Jones-West Ford, Inc., 114 Nev. 766, 772, 962 P.2d 624, 628 (1998) ("the agency's conclusions of law which will necessarily be closely related to the agency's view of the facts, are entitled to deference, and will not be disturbed if they are supported by substantial evidence.").

Notwithstanding, in very limited circumstances, NRS 233B.131(2) provides that the district court *may* order that additional evidence and any rebuttal evidence be taken before the agency. NRS 233B.131(2) (emphasis added). Additional evidence may be considered when it is material, (a higher standard than relevance),[1] and if "good reasons" exist for the failure to present the evidence to the administrative agency. NRS 233B.131(2); *see also* Consolidated Municipality of Carson City v. Lepire, 112 Nev. 363, 365, 914 P.2d 631 (1996) (explaining that NRS 233B.131(2) requires that before a court may consider evidence beyond what was

[1] "Relevant, as applied to evidence, must be understood as touching upon the issue which the parties have made by their pleadings, so as to assist in getting at the truth of the disputed facts. Evidence is material when it has an effective influence or bearing on the question in issue." Barr v. Dolphin Holding Corp, 141 NYS 2d 906, 908 (internal quotations omitted).

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presented to the agency, there must be a showing that the "additional evidence is material and that there were good reasons for failure to present it in the proceeding before the agency."). If both prongs are met, the court "may *then* order that the additional evidence ... be taken before the agency." Id. (emphasis added). However, if both prongs are not met, the additional evidence should not be considered. *See generally* Consolidated Municipality of Carson City 112 Nev. at 365. Here, the Court has remanded this to the Commission to see if the additional evidence would have changed the outcome of the 2007 Tax Commission hearing.

III. STATEMENT OF FACTS

Petitioners are the above-captioned exotic dancing establishments. Respondents are the Nevada Department of Taxation [hereinafter "Department"] and the Nevada Tax Commission [hereinafter "Commission"] who collect and administer the Live Entertainment Tax [hereinafter "LE Tax"]. As background, there have been two Eighth Judicial District Court Cases commenced by all or some of the Petitioners (Case No. 06A533273 and Case No. 08A554970).

On December 19, 2006, all the Petitioners commenced Case No. 06A533273[2] (hereinafter "Case 1") seeking as their remedies: (1) an injunction enjoining the enforcement of the provisions of the LE Tax; (2) a refund of all LE Tax payments that have been "involuntarily" made; (3) a declaration that the LE Tax is unconstitutional; and, (4) an award for damages, costs and fees pursuant to 42 U.S.C. §1983. *See* Complaint filed in District Court Case No. 06A533273. Before filing the Complaint in District Court, none of the Case 1 Plaintiffs, i.e. Petitioners, had ever requested a refund from the Department of Taxation pursuant to NRS 368A.290.

After filing the Complaint in Case 1, six of the Plaintiffs [hereinafter "Permissible Petitioners"] requested refunds from the Department and pursued their administrative

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

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remedies. In January 2007, the six Permissible Petitioners[3] requested a refund of the LE Tax they remitted for January, February, March and April 2004. *See* Refund Requests contained in the Administrative Record and referenced as Nos. 1, 2, 4 and 6 on the Index to the Administrative Record attached hereto as **Exhibit "C"** (Bates Nos. 1-41; 42-84; 97-139; 146-188). The Department denied the refund requests. The six Permissible Petitioners appealed the Department's denial of the refunds to the Commission. *See* Notice of Appeal in the Administrative Record, Index No. 8 (Bates Nos. 195-273).

The appeals were originally scheduled to be heard by the Commission on July 9, 2007. See Transcript of Commission Meeting, July 9, 2007, in the Administrative Record, **Exhibit "C"**, Index No. 22 (Bates Nos. 1219-1237). The hearing was continued to August 6, 2007. *See* Transcript of Commission Meeting, August 6, 2007, in the Administrative Record, **Exhibit "C",** Index No. 23 (Bates Nos. 1238-1332). The sole reason that the hearing was continued was to give the Parties adequate time to submit all of the evidence that they wanted the Commission to consider. The Commission stated that they wanted all issues fleshed out during the hearing because they wanted to consider everything while the parties were present so they could ask questions. **Exhibit "C",** Transcript, July 9, 2007, p. 33, ll. 1-4, (Bates Nos. 1230). Plaintiffs' counsel asked if the commissioners wanted the case law, and was told that "[they] want the whole thing." **Exhibit "C",** Transcript, July 9, 2007, p. 36, ll. 3-6(Bates Nos. 1233). Chairman Sheets stated "We'll read whatever you send to us." Id. It is noteworthy that at the time that the discussions that took place on July 9, 2007, the Plaintiffs had never once requested any discovery. Nevertheless, the 1,335 page record from the August 6, 2007 hearing is substantial.

Moreover, the records from both July 9th and August 6th unequivocally show that the Tax Commission reviewed all of the documents, briefs, and the voluminous case law submitted by both sides, and gave the parties an additional opportunity to gather and submit

[3] The six Permissible Petitioners include: K-KEL, INC.; OLYMPUS GARDEN, INC.; SHAC, LLC; THE POWER COMPANY, INC.; D. WESTWOOD, INC.; and D.I. FOOD & BEVERAGE OF LAS VEGAS, LLC. The other two Petitioners, DÉJÀ VU SHOWGIRLS OF LAS VEGAS, LLC and LITTLE DARLINGS OF LAS VEGAS, LLC, did not file claims for a refund with the Department pursuant to NRS 368A.260 until after the Commission meetings in 2007 and are not properly part of this record.

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more evidence by continuing the hearing until August 6, 2007. *See* **Exhibit "C",** Transcript July 9, 2007 p. 24, ll. 24-25; p. 25, ll. 1-12; p. 32, ll. 24-25; pp. 33-36, (Bates Nos. 1224-1333) ("Let's just continue it today and they can put together whatever they have to put together, like in the past, they have seven days before the hearing to get it to us, and if you don't have it here, don't submit anything supplement, you're done."). On August 6, 2007 the Tax Commission Hearing took place.

The hearing transcript from August 6, 2007, along with the questions asked by members of the Tax Commission and the deliberations that took place during the open meeting provide the proof that the Tax Commission read and considered all of the evidence and testimony submitted by the parties before rendering their decision. *See generally,* Transcripts from July 9, 2007 and August 6, 2007 hearings Bates Nos. 1219-1332.

In addition, Petitioners' July 20, 2007 letter to the Commission containing the supplemental materials produced for the August 2007 hearing states "[t]hese document packets include additional materials that the Taxpayers *believe are necessary for the Commissioners to have a full understanding* of these proceedings...." show that the Petitioner's developed a specific strategy and took the opportunity afforded them to produce all of the information they felt necessary to prove their case. *See* Administrative Record Bates Nos. 747-749 (emphasis added). Not only did the Petitioner's provide the documents but they highlighted the portions of the supplemental materials in places that they believe "warrant[ed] particular attention by the Commissioners" and placed tabs on top of each page highlighted. *Id.* Petitioners also produced a power point presentation to dispute the power point presentation and case law produced by the Department at the prior Commission Hearing on July 9, 2007. *See* **Exhibit "C",** Administrative Record, (Bates Nos. 750-787).

The explanation of the 568 pages of supplemental materials provided by the Petitioners were described as containing: 1) "various legal decisions that have ruled upon (or discussed) the constitutionality of taxes that are applied to First Amendment protected activities...that discuss the inability to tax First Amendment Rights"; 2) "Supreme Court cases that discuss how neutral laws can be gerrymandered in such a fashion as to demonstrate that

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they are actually directed at First Amendment Activity, and are therefore subject to strict constitutional scrutiny"; 3) cases cited by the Department highlighted to "demonstrate why they are not applicable to the circumstances at issue here"; 4) various Nevada statutes, proposed legislation, excerpts of certain legislative history, portions of the Department's annual reports for the last two years, amendments to the statute, adopted regulations, proposal for a specific tax that was not enacted along with other amendments that were enacted "to demonstrate the targeting of this tax to adult cabarets; and 5) a specimen copy of a request for refund along with all of the various denials issued by the Department.

Following the August 6, 2007 hearing, the Commission upheld the Department's denials of the refunds, and issued its final written decision dated October 12, 2007. *See* **Exhibit "C",** Commission Decision in the Administrative Record; Index No. 25 (Bates Nos. 1335), *also attached as* **Exhibit "A**".

On January 9, 2008, the Permissible Petitioners commenced District Court Case No. 08A554970 (hereinafter "Case 2"). See Complaint filed in District Court Case No. 08A554970. The Case 2 Complaint alleges that the LE Tax, established by Chapter 368A of the Nevada Revised Statutes (hereinafter "NRS"), is an impermissible state tax and requests the refund of LE Tax remitted for the tax periods at issue. The Complaint further alleges that the LE Tax is an unconstitutional infringement by the State of Nevada on constitutionally protected expression. As the remedy, the Complaint seeks: (1) an injunction enjoining the enforcement of the provisions of the LE Tax; (2) a refund of all LE Tax payments which they remitted for January, February, March and April 2004; and (3) a declaration that the LE Tax is unconstitutional. Thus, the Petitioners skipped the requirement to file a Petition for Judicial Review pursuant to NRS 233B.130 and went straight to District Court.

On or about January 28, 2009, an Amended Complaint was filed in Case 1 in order to add an "as applied" cause of action to the facial challenge to the LE Tax contained in the initial Complaint.

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On or about December 19, 2010, an Amended Complaint was filed in Case 2 enlarging the caption to include all eight Petitioners without leave of the Court.[4]

On August 23, 2011, following a motion hearing, the Eighth Judicial District Court, Dept. XI, among other things, dismissed Case 2, granted 30 days for the filing of a Ch. 233B petition for judicial review and denied Petitioners' request to remand the case to the Commission. *See* Court Minutes and Order dated October 27, 2011, attached hereto as **Exhibit "D"**.

On or about September 23, 2011, Petitioners filed a Petition for Judicial Review, and followed up on or about September 26, 2011 with a Motion for Leave to Present Additional Evidence to the Nevada Tax Commission. *See* Petitioners' Motion for Leave, attached hereto as **Exhibit "E"**. In its Motion, Petitioners' argued that the additional evidence discovered in the intervening time between the time that this matter was heard by the Nevada Tax Commission in August 2007 and the present is relevant and material to the constitutional challenges in this matter. *See* **Exhibit "E"**.

The Respondents filed an objection to the Motion for Leave, and after a hearing on the matter, the District Court Ordered that the evidence should be reviewed by the Commission in order for the Commission to determine if the evidence would have changed the outcome of the August 2007 hearing. *See* Objection, exhibits and transcript of hearing attached hereto as **Exhibit "F",** *see also* Order dated January 24, 2012, attached hereto as **Exhibit "B"** (Petitioner's Application for leave to present additional evidence to the Nevada Tax Commission is GRANTED so the administrative agency can look at additional evidence an do one of the following: Amend the Findings of Fact, Conclusions of Law dated October 12, 2007, Reverse the Decision or Affirm the Decision.").

Petitioners state in their Motion for Leave that "discovery undertaken in both Cases 1 and 2 has uncovered extensive documentation that is directly relevant and material to the constitutional challenges that will be decided by this Honorable Court." Petitioners' Motion for

[4] This may have been an inadvertent mistake on the part of the Petitioners, since two of the parties listed on the Amended Complaint had never even asked for refunds (Little Darlings of Las Vegas, LLC and Déjà Vu Showgirls of Las Vegas, LLC) and the parties listed in the Amended Complaint list only the original six Case 2 Plaintiffs. *See* Case 2 Amended Complaint, pp. 3-4, paras. 6–11.

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Leave, p.5, l. 25; p. 6, ll.1-2, attached hereto as **Exhibit "E".** Of course, the Petitioners are incorrect in their assertion because the reviewing court is performing judicial review pursuant to NRS Chapter 233B, and not a de novo trial on the constitutional challenges.[5]

Nevertheless, the Court's Order does not require the Commission to re-open discovery. In fact, Petitioners asked the Court for a remand to "complete their discovery..." and the Court did not grant that request. *See* Motion for Leave, p. 10, ll. 13-15, **Exhibit "E".** The Court solely said that the agency can look at *additional* evidence- the Court did not state that the Petitioners could gather new evidence. **Exhibit "B".**

Contrary to the Petitioner's contention, Respondents argue the so-called "additional evidence" is basically the same evidence that the Commission considered in 2007—including the legislative history and discussions by legislators related to SB 247—the bill that was *never enacted.*[6] *See* **Exhibit "C",** Transcript, August 6, 2007, p. 34, ll. 14-15 (Bates No. 1231). This never- enacted bill which the Petitioners are attempting to use to expand the record was discussed and considered by the Tax Commission which found that "[s]tatements by legislators with respect to a bill that would have taxed live adult entertainment as a separate class, where the bill did not pass, does not prove the intent of a separate bill that did not select live adult entertainment." *See* Findings of Fact, Conclusions of Law and Decision at Conclusions of Law #11. In fact, the Commission also found that "[m]ention by legislators of taxability of live adult entertainment under a proposed bill that was subsequently enacted does not prove that the bill was enacted because of disagreement with the message provided by live adult entertainment". *See* **Exhibit "A",** Findings of Fact, Conclusions of Law and

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[5] To perform judicial review, pursuant to NRS 233B.135 the reviewing court makes a determination as to whether the Nevada Tax Commission acted:
(a) In violation of constitutional or statutory provisions;
(b) In excess of the statutory authority of the agency;
(c) Made upon unlawful procedure;
(d) Affected by other error of law;
(e) Clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or
(f) Arbitrary or capricious or characterized by abuse of discretion.

[6] The bill that was passed, A.B. 554, is more streamlined and condensed than S.B. 247. AB 554 is a generally applicable tax, SB 247 was not. *See* Senate Committee on Taxation, June 5, 2004 at p. 45; Transcript August 6, 2007 at p. 34-35; Defendant's power point at pp. 10-13.

Decision at Conclusions of Law #10. Thus, all of the statements by individual legislators that the Petitioners consider "new evidence," was not material or relevant to the Commission's decision in 2007, and is certainly not any more material or relevant today. When reviewing the rest of the documents, it becomes obvious that all of the additional evidence was considered by the Commission in 2007, and nothing is new.

Accordingly, the Respondents respectfully request that the Commission find that there is nothing in the offering by the Petitioners that is "new" or "material" and that the original Decision Letter containing the Findings of Fact, Conclusions of Law and Decision dated October 12, 2007 stands as written. In addition, based on a letter from the Petitioners' dated June 14, 2012, the Commission should also find that the Petitioners had the opportunity to request and perform discovery prior to the August 2007 hearing, and deny the Petitioners' request to re-open discovery nearly five years later.

IV. FACTUAL AND LEGAL FINDINGS FROM AUGUST 2007

After reviewing all evidence and a full hearing on the merits of the Petitioner's claims, the Commission denied the Petitioners claims for refunds. The findings detailed in the Findings of Fact, Conclusions of Law and Final Decision dated October 12, 2007 ["Decision"] show that the Commission considered substantially the same evidence that Petitioners' seek to readmit.

Findings of Fact

1. Appellants, as providers of live entertainment, are or have been taxpayers under NRS chapter 368A, through which is imposed the Live Entertainment Tax ("LET").
2. Appellants filed timely requests for refunds pursuant to NRS 368A.260for the tax periods of January 2004, February 2004,March 2004 and April 2004, claiming that the LET is facially unconstitutional, that it unconstitutionally targets them or their message, and that they are entitled to refunds for the taxes paid by them, pursuant to NRS368A.200(5)(a).
3. The Department denied Appellants' requests.

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4. Appellants flied timely appeals from the Department's denials of their refund requests.

5. In this appeal, Appellants contend that a tax on live entertainment is per se unconstitutional, that the LET is rendered unconstitutional by the number of statutory exemptions, which Appellants claim make the tax one targeted at live adult entertainment and that the legislative record shows an intent to tax based on content, to the detriment of providers of live adult entertainment

Conclusions of Law

1. NRS 368A.200(5)(a) exempts from the live entertainment tax "(l)ive entertainment that this State Is prohibited from taxing under the Constitution, laws or treaties of the United States or the Nevada Constitution.'

2. Entertainment can be a form of speech protected under the First Amendment of the United States Constitution and Article I, section 9 of the Nevada Constitution.

3. The United States and Nevada Constitutions do not forbid taxation of live entertainment as such.

4. NRS 368A.090 contains a definition of live entertainment. Regulations and an amendment to NRS 368A.090 define what is not live entertainment.

5. NRS 368A.200, as initially enacted in 2003 and as amended in 2005 and 2007, contains exemptions from the live entertainment tax.

6. A tax that targets a small group of speakers may violate the United States and Nevada constitutional protections against infringement of speech.

7. The live entertainment tax under NRS chapter 368A is an extension of the former casino entertainment tax (NRS chapter 463). It is imposed on an array of types of entertainment, both at licensed gaming establishments and other locations. It therefore does not target a small group of speakers.

8. A tax that constitutes a "regulation of speech because of disagreement with the message which it conveys" may violate the United States and Nevada

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constitutional protections against infringement of speech. Ward v. Rock against Racism, 491 U.S. 781,791 (1989).

9. The definition in NRS 368A.090, the exemptions in NRS 368A.200, and other provisions of NRS chapter 368A delineating the scope of the tax are reasonable classifications for tax purposes and do not appear to be aimed at any message that may be contained in the entertainment by Appellants or any other speakers. See Madden v. Kentucky, 309 U.S. 83, 87-88, 60 S.Ct. 406, 408 (1940) (providing, "[i]n taxation, even more than in other fields, legislatures possess the greatest freedom in classification").

10. Mention by legislators of taxability of live adult entertainment under a proposed bill that was subsequently enacted does not prove that the bill was enacted because of disagreement with the message provided by live adult entertainment.

11. Statements by legislators with respect to a bill that would have taxed live adult entertainment as a separate class, where the bill did not pass, does not prove the intent of a separate bill that did not select live adult entertainment.

Decision

After due deliberation, and based on the foregoing, the Commission denied the appeal. *See* Findings of Fact, Conclusions of Law and Decision, **Exhibit "A".**

V. AUTHORITIES AND ARGUMENT

A. Petitioners are not entitled to re-open discovery

This matter has been remanded from the District Court to the Commission for the sole purpose of allowing the Commission to review evidence proffered by the Petitioners as "additional evidence." *It has not been remanded for the purpose of re-opening discovery.* *See* Order, **Exhibit "B".** In fact, nothing in the statutes gives the District Court the power to Order the Commission to "re-open" discovery; the Court can only remand to review "additional evidence" that meets the standards of NRS 233B.131. *See also,* Consolidated Municipality of Carson City v. Lepire, 112 Nev. 363, 365, 914 P.2d 631 (1996) In Consolidated Municipality, the Court explained that NRS 233B.131(2) requires that before a court may consider evidence

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beyond what was presented to the agency, there must be a showing that the "additional evidence is material and that there were good reasons for failure to present it in the proceeding before the agency." If both prongs are met, the court "may *then* order that the additional evidence ... be taken before the agency." Id. (emphasis added).

Based on the law, the only way the District Court Judge could have granted the Petitioners' Motion to provide additional evidence would be for Petitioners to have provided the particular evidence to the judge and prove that the evidence was material and that there were good reasons why the Petitioners did not produce that particular evidence in 2007. Otherwise it would have been an advisory opinion by the Judge, and District Courts do not provide advisory opinions. NRS 233B.131 provides in part:

> 2. If, before submission to the court, an application is made to the court for leave to present additional evidence, and it is shown to the satisfaction of the court that the additional *evidence is material and that there were good reasons for failure to present it in the proceeding before the agency,* the court may order that the additional evidence and any rebuttal evidence be taken before the agency upon such conditions as the court determines.
> 3. *After receipt of any additional evidence, the agency:*
> *(a) May modify its findings and decision*; and
> (b) Shall file the evidence and any modifications, new findings or decisions with the reviewing court.

NRS 233B.131 (Emphasis added).

Thus, NRS 233B.131 gives Petitioners an opportunity to provide additional evidence that they already have in their possession—if and only if, they can show that the evidence is both material and that they have "good reasons" for their failure to produce the evidence during the August 2007 hearing. It is impossible for the Petitioners to show the court that the evidence is material if they do not have the evidence in the first place, nor can they show good reasons why they failed to produce the evidence during the original proceeding before the agency if they do not have the evidence to provide to make this showing. Consequently, NRS 233B.131 does not provide for a "fishing expedition."

Moreover, the Petitioners' new strategy does not give them the ability to re-litigate this matter. The courts all agree that when evidence is available at the time of the administrative hearing, but apparently not presented based on a tactical decision, it should not be

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considered later. Garcia v. Scolari's Food and Drug, 200 P.3d 514, 519 (Nev. 2009). Regardless of why a party's attorney makes a "poor decision in regard to what evidence to present at an administrative proceeding [it] will not suffice to justify remand for consideration of additional evidence, especially after an adverse decision is issued... and when the evidence sought to be presented was available at the time of the administrative hearing." Garcia, 200 P.3d at 519. A party cannot wait for the results of the administrative hearing, change strategies and then seek to expand the record. Garcia, 200 P.3d at 519.

As background, under the guise of requesting that the Court grant the Petitioners leave to supplement the record pursuant to NRS 233B.131, the Petitioners have twice requested a second bite of the apple in the form of a remand to the Nevada Tax Commission. The first motion by the Plaintiffs to remand the matter to the Tax Commission was already emphatically denied on August 23, 2011 in open court by District Court Judge Gonzales. *See also* Court Order dated October 27, 2011, attached hereto as **Exhibit "D".** ("With regard to Plaintiffs motion to remand Case 2 to the Nevada Tax Commission, the motion is denied" and further Ordered "with regard to DEFENDANTS' MOTION TO COMPEL, this Court finds that any further discovery would be inappropriate and is hereby ordered cancelled.").

Although Rule 19 of the Rules of the District Courts of the State of Nevada clearly prohibits the Petitioners from asking for a remand a second time from another judge, on September 26, 2011, Petitioners also asked the reviewing District Court Judge Weise, for a remand in the Motion for Leave asking "this Court remand this matter back to the Commission in order to allow the Petitioners to complete their discovery and to present additional evidence to the administrative Tribunal before review by this Court." *See* Petitioners' Motion for Leave at 10, lines 13-16, **Exhibit "E".**

Rule 19 states:

> When an application or petition for any writ or order shall have been made to a district judge and is pending or has been denied by such judge, the same application or motion shall not again be made to the same of another district judge, except upon consent in writing of the judge to whom the application or motion was first made.

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Judge Weise did not give the Petitioners a full remand. He only gave the Petitioners the right to present "additional evidence," not gather new evidence or have a second hearing on the as applied challenge. *See* Order, **Exhibit "B".**

On June 14, 2012, Petitioners requested by letter that the "Tax Commission via its Hearing Officer issue subpoenas" so they can gather new evidence. *See* Letter to William Chisel dated June 14, 2012, attached hereto as **Exhibit "G".** This is now the third request to reopen this case. The time for discovery is over. The District Court has *not* granted the Petitioners' a right to re-open discovery, and it is important that the Commission is aware of the limited scope of Judge Weise's Court's Order "to present additional evidence..." which includes the evidence that the Petitioner's argued to the District Court "unearth[ed] [] proverbial 'smoking guns' that the extensive judicial proceedings unveiled." [7] Petitioners' Motion for Leave at p. 19, ll. 5-6, **Exhibit "E**". Thus, the scope of the documents that the District Court determined were both material and not produced in 2007 for good reasons, does not include reopening discovery.

Going back to the events of 2007, Petitioners *never* requested the Commission to allow them to conduct discovery. This was their strategy. According to the Petitioner's Motion for Leave; "the K-Kel Petitioners did not undertake any discovery, and only placed a limited constitutional challenge to Chapter 368A ..." Petitioners' Motion for Leave at p. 3, ll. 23-24, *see also* p. 9, ll. 18-20, **Exhibit "E**". In fact, Petitioners did not pursue discovery until two and one-half (2-1/2) years after Petitioners filed the original District Court Complaint. In an analogous case, Pannoni v. Bd. of Trustees, the Plaintiff sought to add additional evidence to the record after an adverse administrative decision. Pannoni claimed it was new evidence since the expert reports were prepared after the administrative hearing. The court stated:

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[7] Petitioners claim that based on the acrimonious history of the discovery motions, they "unearth[ed] proverbial smoking guns...." Petitioners' Application for Leave, p. 19, ll. 4-9. Petitioners' statement is nonsense. The discovery issues occurred because the Petitioners wanted the Department to reveal confidential and privileged information regarding non-party taxpayers which is prohibited pursuant to NRS 368A.180 and NRS 49.025. As a compromise, pursuant to a Court Order, Defense counsel prepared a spread sheet showing the general categories and how much tax is paid by each. This is not "smoking gun" discovery, it is not part of the Defendants records, it is an intentionally prepared spreadsheet for litigation purposes.

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> Good cause does not include the reports of new experts sought out after the hearing. The discovery of the evidence was not out of Pannoni's control, as occurs with the discovery of a new witness not known about until after a hearing has concluded.

Pannoni v. Bd. of Trustees, 90 P.3d 438, 450 (Mont. 2004) (internal quotations omitted).

Here, as in Pannoni, the Petitioners could have asked for discovery during the administrative proceedings. Petitioners made a tactical decision not to request discovery at that time. NRS Chapter 233B.123 allows for discovery along with a liberal evidentiary standard, but NRS 233B131(2) does not provide for new discovery or new evidence after receiving an adverse decision, when the Party proffering the evidence chose not to include other evidence available at the time of the administrative process for tactical reasons. The fact that the Petitioners' strategy did not work for them does not provide a reason to expand the record with re-opened discovery or additional evidence or new testimony.

It must not be overlooked that in 2007 the Commission asked the parties for *everything* that was to be considered during the administrative process, and continued the hearing for a month in order to allow the parties to supplement the record.[8] Both sides supplemented the record as they chose. The Commission did not place any restrictions on the evidence to be presented. *See* **Exhibit "C"**, Administrative Record, Tr., July 5, 2007, p. 36, ll.6, (Bates No. 1233) (Member Kelesis: Yes, I want the whole thing).

As an example, the Legislative history is public record, and if the Petitioners did not perform a complete search of the public records in 2007, there is no reason for Petitioners to intimate that the Respondents had access to legislative public records that the Petitioners could not access,[9] nor does Petitioners incomplete search of public records constitute a

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[8] The Petitioners averred to the 2006 case filed in Federal Court by the same Plaintiffs, i.e. Petitioners, on the same issues decided during the July 9, 2007 administrative hearing. Tr. July 9, 2007, p. 28, ll. 7-10 ("I've also been admitted pro hoc vice in both the federal and state court proceedings that are peripherally involved in this live entertainment tax matter."). Accordingly, although given the chance to supplement the record with this information, the Petitioners tactically decided not to include the record from Federal Court in the supplement. Now they wish to expand the record with cherry picked portions of the Federal Court record due to a change in strategy, and it should not be considered.

[9] In fact during the discovery process, Respondents provided the websites where they obtained the legislative history, and for Petitioners to hint that public documents were somehow withheld is outrageous.

reason to allow the Petitioners to supplement the record four and one-half (4 1/2) years later, especially with a draft of a bill and testimony regarding a bill that was never enacted.

During the August 6, 2007 hearing, the Petitioners argued both the facial challenge and as applied challenge to the Commission. The Petitioners received an adverse decision on August 6, 2007 and a written final decision dated October 12, 2007, and did not file a petition for judicial review although judicial review is the process required under NRS 233B.130. However, pursuant to Judge Gonzales' Order dated October 27, 2012, dismissing all claims with the exception of the facial claim, she tolled the statute of limitations and allowed the Petitioners' to file a petition for judicial review within 30 days from August 23, 2011, which they did. *See* October 27, 2011 Order, **Exhibit "D".** Therefore, the matter before this Commission is to consider the additional evidence and determine whether to affirm, revise or modify its original decision, and not to re-open discovery and start the administrative process over again.

B. <u>There is No Need to Supplement the Record with Additional Evidence because the evidence is basically the same that was considered in 2007</u>

In very limited circumstances, NRS 233B.131(2) provides that "the court may order that the additional evidence and any rebuttal evidence be taken before the agency upon such conditions as the court determines."

Here, Petitioners have made the same substantive arguments in their Application for Leave in October 2011 as they did before this Commission in July and August of 2007. The Administrative Record, attached to this Brief, confirms that nothing has changed, and no additional evidence is necessary to perform judicial review of the Commission's findings contained in its final decision. *See* full Administrative Record, Bates Nos. 1 through 1335, to be filed herein and a copy of the Index to the Administrative Record attached hereto as **Exhibit "C"**.[10]

[10] Petitioners claim that based on the acrimonious history of the discovery motions, they "unearth[ed] proverbial smoking guns...." Petitioners' Application for Leave, p. 19, ll. 4-9. Petitioners' statement is nonsense. The discovery conflicts occurred because the Petitioners wanted the Department to reveal confidential and privileged information regarding non-party taxpayers which is prohibited pursuant to NRS 368A.180 and NRS 49.025. As a compromise, pursuant to a Court Order, Defense counsel prepared a spread sheet showing the

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In 2007, Petitioners argued that the LE Tax is unconstitutional both facially and as applied to them by arguing that: 1) The LE Tax singles out first amendment activities for special taxation; 2) The LE Tax targets a narrowly defined group of speakers; 3) The LE Tax singles out facilities under 7500 seats for the most burdensome 10% tax on admissions, food, refreshments and merchandise; 4) LE Tax excludes most types of live entertainment so that adult cabarets pay virtually all of the non-gaming taxes; 5) LE Tax is content based- the numerous exceptions, which now leave adult cabarets as the near sole non-gaming payee, demonstrate that the purpose of the tax was to burden a specific form of live entertainment of which the legislature disapproved; and, 6) The legislative history demonstrates that it was enacted and amended with the illicit intent to burden adult cabarets. *See* **Exhibit "C",** Petitioners' Power Point presentation at p. 37 (Bates No. 786). Simply stated, the above Petitioners argued that: 1) The LE Tax unconstitutionally directly taxes the engagement of First Amendment protected activities; 2) the LE Tax targets a narrowly defined group of speakers (gerrymandering); and, 3) The LE Tax is a content based tax.

Four years later, in Petitioners' October 2011 Application for Leave, Petitioners still argue that the LE Tax is unconstitutional "both facially and as applied" (Application for Leave at p. 9, ll. 10-11) and make the same arguments as they did before the Commission: 1) LE Tax unconstitutionally directly taxes the engagement of First Amendment protected activities; 2) the LE Tax targets a narrowly defined group of speakers (gerrymandering), and, 3) the LE Tax is a content based tax. *See* Application for Leave, p. 11, ll. 9-26; p. 12, ll. 1-28; p. 13, ll. 26, **Exhibit "E".**

The additional Legislative history that the Plaintiffs seek to add to the record would not change the outcome. "It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." U.S. v. O'Brian, 391 U.S. 367, 383 (1968). The Supreme Court went on to say that they may look at statements of legislators for guidance on the purpose of the legislature, but when they are asked to void a statute on the basis of "what fewer than a handful of

general categories and how much tax is paid by each category. The spreadsheet is not "smoking gun" discovery, it is not part of the Department's records, it is an intentionally prepared spreadsheet for litigation purposes.

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Congressmen said about it" that is different. O'Brian, 391 U.S. at 383-84. The inquiry into "congressional motives or purposes are a hazardous matter." O'Brian, 391 U.S. at 383. To "resort to legislative history is only justified where the face of the Act is inescapably ambiguous..." Garcia v. United States, 469 U.S. 70 (1984). The Supreme Court has "eschewed reliance on the passing comments of one Member and casual statements from the floor debates." Garcia, 469 U.S. at p. 76 (internal cites omitted).

The U.S. Supreme Court wisely recognized that what motivates one legislator to make a speech about a statute is not necessarily the same as what motivates scores of others to enact the legislation. O'Brian, 391 U.S at 384. Finally, the Court stated that they would not void a statute on the grounds of comments made by individual legislators when the same statute could be reenacted in its exact form "if the same or another legislator made a 'wiser' speech about it." O'Brian, 391 U.S at 184; *see also* Texas Dep't of Public Safety v. Kreipe, 29 S.W.3dd 334 (2000) ("the individual legislator's intent is not legislative history controlling the construction to be given a statute."). The Nevada Supreme Court has stated:

> In construing a statute we do not consider the motives or understandings of individual legislators who cast their votes in favor of it. Nor do we carve an exception to this principle simply because the legislator whose motives are proffered actually authored the bill in controversy; no guarantee can issue that those who supported his proposal shared his view of its compass.

A-NLV Cab Co. v. State of Nev., 108 Nev. 92, 95, 825 P.2d 585 (1992).

Thus, there is no reason for this Commission or the Court to consider additional comments from individual legislators because in 2007 the Commission already ruled that these comments are not indicative of legislative intent. *See* **Exhibit "C",** Decision Letter, Bates Nos. 1333-1334, Conclusions of Law No. 11 ("Statements by legislators with respect to a bill that would have taxed live adult entertainment as a separate class, where the bill did not pass, does not prove the intent of a separate bill that did not select live adult entertainment"), **Exhibit "C",** Decision Letter, Bates Nos. 1333-1334, conclusions of Law No. 10 ("Mention by legislators of taxability of live adult entertainment under a proposed bill that was subsequently enacted does not prove that the bill was enacted because of disagreement with the message

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provided by live adult entertainment"). Nevertheless, Plaintiffs continue to argue comments made by legislators taken out of context or comments made during discussions on bills which were never passed show some unconstitutional hidden agenda against gentlemen's clubs.

The majority of the legislative documents additionally offered by the Petitioners concern comments made regarding SB 247 and includes a draft of SB 247—the bill that was *never enacted.*[11] Tr., August 6, 2007, p. 34, ll. 14-15. Thus, the Commission has already heard the Petitioners' arguments relying on the Legislative hearings and determined that the comments of the individual legislators with respect to legislation that was not passed as well as legislation that was passed does not prove the intent of the legislature.

The other additional documents and case law are also not new. The Commission has already heard and considered the same arguments and reviewed all the case law, prior to making its decision in 2007, and the additional evidence is more of the same.

The following table is based on the transcript of the August 6, 2007 Commission hearing in order to illustrate the depth of the evidence and arguments presented, and the Commission's consideration of Petitioners' arguments. The table references places in the August 6, 2007 hearing transcript where these same arguments were made and the evidence and testimony were considered by the Commission in order to make its determination of the issues. This reference does not include every reference in the transcript, but is provided to show that all Petitioners' arguments in 2007 (which are the same as those arguments are today) were made, and all of the evidence provided was considered and discussed. As a result it is easy to see that the Petitioners are not providing anything new through this remand, but the Petitioners simply want to change strategy in order to get a second bite of the apple.

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[11] The bill that was passed, A.B. 554, is more streamlined and condensed than S.B. 247. AB 554 is a generally applicable tax, SB 247 was not. *See* Senate Committee on Taxation, June 5, 2004 at p. 45; Tr. August 6, 2007 at pp. 34-35; Defendant's power point at pp. 10-13.

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Plaintiffs same Arguments in 2007 as in the 2011 Motion for Leave	Plaintiffs Power point, and Case Law	Transcript August 6, 2007	Defendants response during hearing
Impermissible for a direct tax on first amendment activities	*Murdock v. Commonwealth of PA.* p. 5 *Minneapolis Star v. Minnesota Commissioner of Revenue* pg 6 *Leathers v. Medlock* pp. 6,7	p. 15, ll. 1 --25 p. 13, ll. 18-25 p. 28, ll. 10–23 p. 56, ll. 21-25 p. 57,ll. 1-25 p. 58, ll. 1-25, p. 59, ll. 1-2.	p. 33, ll. 6-25 p. 34, ll. 1-11 p. 44, ll. 17-3 p. 45, ll. 17-25 p. 46, ll. 1-17 p. 59, ll. 23-25 p. 60, ll. 1-25 p. 73, ll. 14-25 p. 74, ll. 1-24
Government may not single out activities protected by the First Amendment for special taxation	*Murdock* p. 8 *Minneapolis Star* p. 9 *Arkansas Writers Project* p. 10 *Clark v. City of Lakewood* p. 10	p. 39, ll. 12-25 p. 40, ll. 1-16 p. 69, ll. 4-12	p. 37, ll. 20-25 p. 38, ll. 1-8, 11-18 p. 61, ll. 3-15
Matter Subject to Strict Scrutiny	*US. v. Lee* p. 11 *Minneapolis Star* p. 11 *Minneapolis Star* p. 12 *Leathers* p. 25	p. 16, ll. 6-18 p. 19, ll. 1-12 p. 24, ll. 9-11	p. 7, ll. 2-10 p. 29, ll. 22-25 p. 30, ll. 1-25 p. 33, ll. 1-25
Gerrymandering and Exemptions to Live Entertainment Tax	*Arkansas Writers Project* p. 13 *Leathers v. Murdock* p. 13 *City of Ladue v. Gilleo* p. 14 Church of Lukimi v. *Hialeah* p. 14 *U.S. v. Eichman* p. 14	p. 12, ll. 8-13, pp. 15-16 pp. 17-20 p. 17, ll. 15-25 p. 18, ll. 1-25 p. 19, ll. 1-25 p. 20, ll. 1-25 p. 21, ll. 1-9 p. 56, ll. 10-12 p. 75, ll. 13 -25 p. 76, ll. 1-22 p. 17, ll. 6-9 pp. 10-14	p. 35, ll. 19-25 p. 36, ll. 1-25 p. 37, ll. 1-14 p. 38, ll. 19-24 p. 44, ll. 24-25 p. 45, ll. 1-16 p. 71, ll. 2-25 p. 72, ll. 1-22 p. 79, l. 25 p. 80, ll. 1-11 p. 83, ll. 7-13
Legislative history	pp. 21- 22	p. 21, ll. 1-21 p. 22, ll. 1-25 p. 31, ll. 6-7	p. 34, ll. 12-25 p. 35, ll. 1-18 p. 76, ll. 24-25 p. 77, ll. 1-18

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Content based (Exclusions)	p. 23 p. 24 *Leathers v. Medlock* pp. 25, 27 *Jimmy Swaggart* p. 25 *Minneapolis Star* p. 26 *Arkansas Writers Project* p. 26	p. 23, ll. 1-25 p. 24, ll. 1-25 p. 24, ll. 1-14 p. 27, ll. 19-25 p. 28, ll. 1-3 p. 41, ll. 2-25 p. 42, ll. 1-19 p. 85, ll. 2-25	p. 37, ll. 15-23 p. 89, ll. 18-25 p. 90, ll. 1-25 p. 91, ll. 1-4
Major U.S. Supreme Court First Amendment tax cases	*Grosjean* *Murdock* *Minneapolis Star* p. 35 *Arkansas writer project* *Jimmy Swaggart* *Leathers* p. 36	p. 13, ll. 8-25 p. 14, ll. 1-25 p. 15, ll. 1-25 p. 16, ll. 1-5 p. 25, ll. 21-25 p. 26, ll. 1-25 p. 27, ll. 1-24	

As stated above, Petitioners never requested the Commission to allow discovery and did not pursue any discovery until more than two and one-half (2-1/2) years after the Petitioners filed the Case 1 Complaint in District Court. It was the Petitioners' tactical decision not to conduct discovery.[12]

Petitioners' July 20, 2007 letter to the Commission containing the supplemental materials states "[t]hese document packets include additional materials that the Taxpayers believe are necessary for the Commissioners to have a *full* understanding of these proceedings...." *See* **Exhibit "C",** Administrative Record Bates Nos. 747-749 (emphasis added). The Petitioners then highlighted portions of the supplemental materials in places that they believe "warrant[ed] particular attention by the Commissioners" and placed tabs on top of each page highlighted. Id. Thus, the Petitioners believed that the Commission would have a full understanding of the issues with the documents produced in 2007. Now, because the Petitioners received an adverse decision, it is too late for additional evidence.

[12] Petitioners argue that they "placed *only a limited constitutional challenge* before the administrative Tribunal." Application for Leave at p. 9, l. 20, **Exhibit "E"** (emphasis added). However, it does not appear to Respondents that the Petitioners presented a "limited challenge" since the arguments in 2007 are the same as in 2011. Furthermore, the October 2011 Application for Leave is the first time that the Petitioners used the term "limited constitutional challenge." If Petitioners' Constitutional challenge was only a "limited" one, it was the Petitioners' strategy to argue their case in that manner, and pursuant to Garcia and Pannoni, *supra,* a change in strategy does not constitute a good reason to allow the consideration of additional documents.

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Petitioners additionally included an explanation of the supplemental materials which consisted of: 1) "various legal decisions that have ruled upon (or discussed) the constitutionality of taxes that are applied to First Amendment protected activities...that discuss the inability to tax First Amendment Rights"; 2) "Supreme Court cases that discuss how neutral laws can be gerrymandered in such a fashion as to demonstrate that they are actually directed at First Amendment Activity, and are therefore subject to strict constitutional scrutiny"; 3) cases cited by the Department highlighted to "demonstrate why they are not applicable to the circumstances at issue here"; 4) various Nevada statutes, proposed legislation, excerpts of certain legislative history, portions of the Department's annual reports for the last two years, amendments to the statute, adopted regulations, proposal for a specific tax that was not enacted along with other amendments that were enacted "to demonstrate the targeting of this tax to adult cabarets; and 5) a specimen copy of a request for refund along with all of the various denials issued by the Department. Petitioners also prepared and produced a power point presentation to dispute the power point presentation and case law produced by the Department at the prior Commission Hearing on July 9, 2007 where they made all of their arguments and cited to case law which they believed supported their position. *See* **Exhibit "C"**, Administrative Record, Bates Nos. 750-787. The supplemental materials produced by the Petitioners consist of 568 pages.

In 2007, the Petitioners made tactical choices as to what they were going to provide to the Commission. In 2007, the parties were given a second chance to supplement the record and additional time in the form of a hearing continuance in order to supplement the record. After receiving the supplemental materials, the Commission performed its job by considering the entire record and rendering a final decision.

C. <u>The Additional Evidence Proffered by the Petitioners does not change the outcome</u>.

Petitioners' exhibits that have been proffered would not the outcome of the case. Again, Petitioners state that they have unearthed the proverbial smoking gun through extensive judicial proceedings. Application for Leave, p. 19, l. 6, **Exhibit "E"**. The alleged

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booty of the odyssey is said to include additional legislative history and the amounts paid by different categories of LE Tax taxpayers.

The spreadsheet of amounts paid by the different categories of taxpayers is nothing more than a breakdown of information that was reviewed by the Commission at the hearing in 2007. The Commission reviewed information indicating that the strip clubs remitted a greater portion of the approximately $9 million collected by the Department in 2006, but only about 5% of the approximately $117 million total LE Tax collected by both the Department and the Gaming Control Board in 2006. *See* **Exhibit "C",** Department's Power Point Presentation, Administrative Record, Index No. 17 (Bates Nos. 393-415). The information showed that the non-gaming collections collected by the Department only amounted to about 7.4% of the total LE Tax collected and that Petitioners remitted a portion of the 7.4%. Id. Petitioners did not request the categorical break down of the 7.4% (the spoils of the odyssey) prior to, or during, the hearing before the Commission. Since that time the Petitioners asked for the breakdown, and the fact that they may pay more of the 7.4% of LE Tax which is administered by the Department, is not relevant to the Constitutionality of the tax itself. The LE Tax is a single tax, administered by two agencies. The statute requires that both gaming and taxation work together to administer the LE Tax fairly and equitably. NRS 368A.140(4), *see also* NRS and NAC Chapters 368A.

Moreover, had such information been presented to the Commission it would not have made a difference. It is merely a breakdown of information that was presented to, and considered by, the Commission in 2007. Contrary to Petitioners attempts to drag this out, the information regarding the different categories actually supports the Respondents' position that the tax is a generally applicable tax with exceptions, and exceptions are properly a product of the Legislature's broad discretion with regard to reaching an equitable distribution of the tax burden. *See generally,* Madden v. Kentucky, 309 U.S. 83, 87-88, 60 S.Ct. 406, 408 (1940).

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When reviewing the additional evidence offered by the Petitioners, it becomes obvious that there is nothing new or different from the documents that were considered in 2007. The table below contains a list of the additional evidence given to the Court at the hearing which took place on December 9, 2011 and the Respondents response.

Petitioners Exhibit	Content of Exhibit	Response by Respondents	Why it supports the Commission's original decision
Exhibit 1	Tables produced by this Office summarizing the information available in 2007	This is just the same information in the power point (Bates Nos. 393-415).	The portion of the entire LE Tax paid by the gentlemen's clubs is approximately 5% of the total LE Tax collected.
Exhibit 2	Memo dated March 14, 2005	Discusses the fiscal impact of changing the threshold from 300 seats to 200 seats	The inquiry was sent to all business which would fall under the 300 seat threshold- of the 150 businesses which responded- only 20 were gentlemen's clubs. The impact of reducing the threshold would be a 56% increase in revenue. The letter also shows that revenue is generated from sporting events, nightclubs, promoters, performing arts centers, and raceways as well as from gentlemen's clubs. This shows that the purpose of the LE Tax is to raise revenue.
Exhibit 3	Memo prepared by an associate of a law firm for his boss in 2003, not for the department of taxation- not something requested and prior to the 2005 changes	This hearsay document is not a Department prepared document, we don't know why it was prepared or its relevance.	The definition of Live Entertainment is the same whether the tax is administered by the Department or gaming. Thus, it is one single tax administered by two separate agencies.
Exhibit 4	Transcript from gaming control board meeting discussing administration of the tax from 2003- prior to the 2005 changes.	This is a gaming document.	It does show, however that the LE Tax is one tax that the definitions and interpretations of the statutes apply to both Gaming administered and Department administered taxpayers.

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Exhibit 5 and exhibit 6	Information on SB 247-	SB 247 was a bill that was not passed	Commission already determined in 2007 that this is not relevant. (Decision at #11)
Exhibit 7	More from SB 247 along with an email that discusses the fiscal impact of adding more gentlemen clubs to the tax base in order to gain more revenue.	Contains the Statement that the gentlemen's clubs "will probably expand since the customer is the one paying the tax"	It shows that the LE Tax was about raising revenue for the State and not about the taxpayer's message.
Exhibit 8	Redacted document showing taxable amounts of LE Tax for 95 different businesses which are administered by the department with less than 7,500 occupancy and are in the 10% category	Shows that there are 150 businesses with only 22 gentlemen's clubs subject to 10% LET	It becomes obvious that even with the names of the businesses redacted, that the majority of the businesses subject to LE Tax are not gentlemen's clubs.
Exhibit 9	A memo re the total number of gentlemen's clubs in Nevada	This was an informational memorandum for LCB	Shows that there were only 33 gentlemen's clubs in Nevada (in 2004), two of which are administered by gaming. Thirty three clubs are a small percentage of the total number of businesses subject to LE Tax.
Exhibit 10	Information on SB 247	SB 247 was a bill that was not passed	Discussed the fiscal impact of SB 247- not an attack on the Petitioner's message. Commission already determined in 2007 that this is not relevant. (Decision at #11).

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Exhibit 11	Contains a 2003 email discussing certain potential exemptions that the lobbyist is recommending to be incorporated.	This is an email from a lobbyist with suggestions to be considered at a workshop.	Nothing in this recommendation shows that the LE Tax is aimed at the Petitioners' message. This email from a lobbyist to the Department shows that the legislature intended for the gentlemen's clubs not to be exempt from the LE Tax and the language to define ambient entertainment would be discussed at the workshop.
Exhibit 12	Information on AB 554 the bill that was passed and reasons for not passing AB 247.	Exemption for NASCAR in order to get a second race because of the 167 million impact in southern Nevada and to remain competitive with other states for an additional race. AB554 does have live entertainment aspects, but rmore to entertainment places inside casinos.	Commission already determined in 2007 comments of legislators with regards to bills that were not passed as well as those which were passed does not show the intent of the whole legislature. Decision at #10 and #11, **Exhibit "A".**
Exhibit 13	A letter written by Norm Azevedo in 2003 regarding So. Cal. Edison which has nothing to do with this matter	This 2003 letter was in a different matter and the Petitioners did not depend on it when preparing to appear before the Commission in 2007	233B.130, which was in existence during this entire matter provides that any party who is: Identified as a party of record by an agency in an administrative proceeding; and aggrieved by a final decision in a contested case, is entitled to judicial review of the decision. NRS 233B does not provide for a trial de novo.

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. . .

Attorney General's Office
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Exhibit 14	Unreported federal case Déjà vu v. Nevada Department of Taxation	This is the decision in 2006 granting the Department Motion to Dismiss the Complaint	This decision involves the Petitioners and was known and available in 2007. The Petitioners chose not to include this decision in the 2007 documents provided to the Commission, indicating that the Petitioners did not want this decision considered by the Commission. A change in strategy since receiving an adverse decision from the Commission does not constitute a good reason for not including this information at the administrative level. This document does not impact the Commission's decision.
Exhibit 15	Defendant's Motion to dismiss amended Complaint filed in federal court	The Petitioners chose not to include this 2006 Motion in the 2007 documents provided to the Commission, indicating that the Petitioners did not want this decision considered by the Commission.	A change in strategy since receiving an adverse decision from the Commission does not constitute a good reason for not including this information at the administrative level. This document does not impact the Commission's decision.
Exhibit 16	Reply brief	Reinforces that the remedy is judicial review.	The Reply brief states that the denial of the claim for refund is subject to judicial review pursuant to NRs 233B.135(3)(a). Brief at pg. 4, ll 18-22.

As the Commission can see, none of the above documents would have changed the outcome of the 2007 Tax Commission hearing.

As discussed earlier, on July 9, 2007, the time originally scheduled for the hearing, the Commission continued the hearing in order to give the parties additional time to submit any additional evidence to be considered. The Commission wanted all issues fleshed out during the hearing. *See* **Exhibit "C"**, Tr. July 9, 2007, p. 33 ll. 1-4 (Bates No. 1230). Petitioners' counsel asked if the commissioners wanted the case law, and was told that "[they] want the whole thing." *See* **Exhibit "C"**, Tr. July 9, 2007, p. 36, ll. 3-6 (Bates No. 1233). Chairman

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Sheets stated "We'll read whatever you send to us." Id. at l. 21 (Bates No. 1233). Petitioners did not provide the pleadings or the decision from the Déjà vu federal case (Exhibit 14, 15, and 16) although the documents were in the Petitioners possession at the time. During the four week continuance between July 9, 2007 and August 6, 2007, the parties provided all of the additional information that they wanted considered by the Commission. Moreover, as stated above, although Petitioners could have, Petitioners didn't request any discovery during the proceedings before or until two and one half (2 1/2) years after the Tax Commission hearing.

Substantial Evidence is "that quantity of evidence which a reasonable [person] could accept as adequate to support a conclusion." Campbell v. Nev. Tax Comm'n, 109 Nev. 512, 515 (1993). The 2007 Administrative Record includes everything that the Petitioners wanted considered. It meets the substantial evidence standard, because the record contains information that supports the conclusion made by the Commission in 2007. Accordingly, the record from 2007 is sufficient for the District Court to perform judicial review pursuant to NRS 233B.135 and does not need any additional evidence.

Furthermore, the transcript from July 9, 2007 shows that the Commission would review all of the documents, the briefs and the voluminous case law submitted by both sides. *See* **Exhibit "C"**, Tr. July 9, 2007 p. 24, ll. 24-25; p. 25, ll. 1-12; p. 32, ll. 24-25; pp. 33-36 ("Let's just continue it today and they can put together whatever they have to put together, like in the past, they have seven days before the hearing to get it to us, and if you don't have it here, don't submit anything supplement, you're done.") *See* **Exhibit "C"**, Bates Nos. 1221-1222; 1230-1233).

The hearing transcript from August 6, 2007 along with the questions asked by members of the Commission and the deliberations during the open meeting unequivocally shows that the Commission did in fact read and consider all of the evidence and testimony submitted by the parties, and that the evidence considered is substantial and supports the Commission's findings, and that further documentation of the kind produced by the Petitioners would not modify or reverse the Commission's 2007 decision.

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CONCLUSION

Based on the foregoing, Respondents respectfully request that this Commission find the following

1. Petitioners' additional information is not material because it does not have an effective influence or bearing on the question in issue; and

2. The Findings of Fact, Conclusions of Law and Decision dated October 12, 2007 stands as written.

Dated this 19 day of June, 2012.

CATHERINE CORTEZ MASTO
Attorney General

By: _____

Vivienne Rakowsky
Deputy Attorney General
Nevada Bar No. 009160
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CERTIFICATE OF MAILING

I certify that I am an employee of the State of Nevada Attorney General's Office and that on the 19th day of June, 2012, I served the foregoing **NEVADA DEPARTMENT OF TAXATION'S BRIEF ON REMAND TO CONSIDER ADDITIONAL EVIDENCE** by mailing a copy to:

William H. Brown
Law Offices of William H. Brown, Ltd.
6029 S. Ft. Apache Rd., Ste. 100
Las Vegas, NV 89148

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

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

Via interoffice mail and e-mail to:

Christopher Nielsen
Interim Executive Director
Nevada Department of Taxation
1550 East College Parkway
Carson City, Nevada 89706
efierro@tax.state.nv.us

Traci Plotnick
An employee of the Office of the Attorney General

Attorney General's Office
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Las Vegas, NV 89101

EXHIBIT "A"

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

STATE OF NEVADA
DEPARTMENT OF TAXATION
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1550 College Parkway, Suite 115
Carson City, Nevada 89706-7937
Phone: (775) 684-2000 Fax: (775) 684-2020

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October 12, 2007

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8861 W. Sahara Ave., Ste 120
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IN THE MATTER OF: The Appeal of Olympic Gardens, Inc., D.I. Food & Beverage of Las Vegas, Shac, LLC, D. Westwood, Inc., K-Kel, Inc., The Power Co., Inc. ("Appellants") from the Department of Taxation's Denial of their refund request pursuant to NRS 368A.260

The above matter came before the Nevada Tax Commission ("the Commission") for hearing on August 6, 2007. Bradley Shafer, Esq. and Dianna Sullivan, Esq. appeared on behalf of Appellants. Senior Deputy Attorney General David J. Pope and Deputy Attorney General Dennis Belcourt appeared on behalf of the Department of Taxation ("the Department").

The Commission hereby makes the following Findings of Fact, Conclusions of Law and Decision.

FINDINGS OF FACT

1. Appellants, as providers of live entertainment, are or have been taxpayers under NRS chapter 368A, through which is imposed the Live Entertainment Tax ("LET").
2. Appellants filed timely requests for refunds pursuant to NRS 368A.260 for the tax periods of January, February 2004, March 2004 and April 2004, claiming that the LET is facially unconstitutional, that it unconstitutionally targets them or their message, and that they are entitled to refunds for the taxes paid by them, pursuant to NRS 368A.200(5)(a).
3. The Department denied Appellants' requests.
4. Appellants filed timely appeals from the Department's denials of their refund requests.
5. In this appeal, Appellants contend that a tax on live entertainment is per se unconstitutional, that the LET is rendered unconstitutional by the number of statutory exemptions, which Appellants claim make the tax one targeted at live adult entertainment, and that the legislative record shows an intent to tax based on content, to the detriment of providers of live adult entertainment.
6. If any Finding of Fact is more properly classified as a Conclusion of Law, then it shall be deemed such.

CONCLUSIONS OF LAW

1. NRS 368A.200(5)(a) exempts from the live entertainment tax "(l)ive entertainment that this State is prohibited from taxing under the Constitution, laws or treaties of the United States or the Nevada Constitution."
2. Entertainment can be a form of speech protected under the First Amendment of the United States Constitution and Article I, section 9 of the Nevada Constitution.
3. The United States and Nevada Constitutions do not forbid taxation of live entertainment as such.
4. NRS 368A.090 contains a definition of live entertainment. Regulations and an amendment to NRS 368A.090 define what is not live entertainment.
5. NRS 368A.200, as initially enacted in 2003 and as amended in 2005 and 2007, contains exemptions from the live entertainment tax.
6. A tax that targets a small group of speakers may violate the United States and Nevada constitutional protections against infringement of speech.
7. The live entertainment tax under NRS chapter 368A is an extension of the former casino entertainment tax (NRS chapter 463). It is imposed on an array of types of entertainment, both at licensed gaming establishments and other locations. It therefore does not target a small group of speakers.
8. A tax that constitutes a "regulation of speech because of disagreement with the message which it conveys" may violate the United States and Nevada constitutional protections against infringement of speech. *Ward v. Rock against Racism*, 491 U.S. 781, 791 (1989).
9. The definition in NRS 368A.090, the exemptions in NRS 368A.200, and other provisions of NRS chapter 368A delineating the scope of the tax are reasonable classifications for tax purposes and do not appear to be aimed at any message that may be contained in the entertainment by Appellants or any other speakers. See *Madden v. Kentucky*, 309 U.S. 83, 87-88, 60 S.Ct. 406, 408 (1940) (providing, "[i]n taxation, even more than in other fields, legislatures possess the greatest freedom in classification").
10. Mention by legislators of taxability of live adult entertainment under a proposed bill that was subsequently enacted does not prove that the bill was enacted because of disagreement with the message provided by live adult entertainment.
11. Statements by legislators with respect to a bill that would have taxed live adult entertainment as a separate class, where the bill did not pass, does not prove the intent of a separate bill that did not select live adult entertainment.
12. If any Conclusion of Law is more properly classified as a Finding of Fact, then it shall be deemed such.

DECISION

After due deliberation, and based on the foregoing, the Commission denied the appeal.

FOR THE COMMISSION:

DINO DICIANO
Executive Director
Nevada Department of Taxation

cc: David Pope, Sr. Deputy Attorney General
Dennis Belcourt, Deputy Attorney General
Taxpayers (via regular mail)

EXHIBIT "B"

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DISTRICT COURT

CLARK COUNTY, NEVADA

***

CLERK OF THE COURT

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

Petitioners,

v.

STATE OF NEVADA, ex rel. DEPARTMENT OF TAXATION and TAX COMMISSION,

Respondents.

Case No.: A-11-648894-J
Dept. No.: XXX

ORDER GRANTING PLAINTIFFS' APPLICATION FOR LEAVE TO PRESENT ADDITIONAL EVIDENCE TO THE NEVADA TAX COMMISSION

PETITIONERS' Application for Leave to Present Additional Evidence to the Nevada Tax Commission in the above-captioned matter came on for hearing on December 9, 2011.

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

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

The Court having considered the papers and pleadings as well as the oral argument, hereby ORDERS:

Petitioner's Application for leave to present additional evidence to the Nevada Tax Commission is GRANTED so the administrative agency can look at additional

evidence and do one of the following: Amend the Findings of Fact, Conclusions of Law dated Oct. 12, 2007, Reverse the Decision, or Affirm the Decision.

IT IS SO ORDERED.

DATED this 24 day of January, 2012.

DISTRICT COURT JUDGE

EXHIBIT "C"

(Record Bates-stamped documents provided on CD)

ADMR
CATHERINE CORTEZ MASTO
Attorney General
DAVID J. POPE
Senior Deputy Attorney General
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BLAKE A. DOERR
Senior Deputy Attorney General
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Attorneys for Nevada Department of Taxation

DISTRICT COURT

CLARK COUNTY, NEVADA

NEVADA DEPARTMENT OF TAXATION, and NEVADA TAX COMMISSION

Respondents,

vs.

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

Petitioners,

Case No. A-11-648894-J
Dept. No. XXX

.....

.....

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Las Vegas, NV 89101

ADMINISTRATIVE RECORD

Pursuant to NRS 233B.130(3), the STATE OF NEVADA DEPARTMENT OF TAXATION AND NEVADA TAX COMMISSION, hereby files the entire record of the administrative proceedings subject to review by this Court as a result of the Petition for Judicial Review filed by K-KEL, INC., et al, and in accordance with NRS 233B.135.

INDEX OF DOCUMENTS

Exhibit #	Document	Bates #
1.	Petitioners' Claims for Refund of Tax on Live Entertainment, February 27, 2007 (Tax Period: January 2004)	000000001 - 000000041
2.	Petitioners' Claims for Refund of Tax on Live Entertainment, March 28, 2007 (Tax Period: February 2004)	000000042 - 000000084
3.	Respondent's Response to Refund Requests, April 3, 2007	000000085 - 000000096
4.	Petitioners' Claims for Refund of Tax on Live Entertainment, April 26, 2007 (Tax Period: March 2004)	000000097 - 000000139
5.	Respondent's Response to Refund Requests, April 30, 2007	000000140 - 000000145
6.	Petitioners' Claims for Refund of Tax on Live Entertainment, May 30, 2007 (Tax Period: April 2004)	000000146 - 000000188
7.	Respondent's Response to Refund Requests, June 4, 2007	000000189 - 000000194
8.	Petitioners' Formal Notice of Appeal, May 1, 2007 (The following pages in this section were intentionally left blank	000000195 - 000000273
9.	Petitioners' Correspondence Regarding Amended Notice of Hearing, June 19, 2007	000000274 - 000000276
10	Respondents' Amended Notice of Hearing, June 8, 2007	000000277 - 000000280
11	Respondents' Notice of Hearing, June 7, 2007	000000281 - 000000284
12	Bradley J. Shafer Formal Notice of Appearance, June 8, 2007	000000285 - 000000286
13.	Petitioners' Correspondence Regarding Notice of Appeal of Denial of Claim for Refund, June 21, 2007	000000287 - 000000333
14.	Department's Brief and Exhibits in Support of the Department's Denial of Appellant's Refund Requests, June 15, 2007	000000334 - 000000351
15.	Appellants' Reply Brief and Exhibits in Opposition to the Nevada Department of Taxation's Denial of Appellant's Refund Requests	000000352 - 000000387
16.	Department's Supplemental Brief in Support of the Department's Denial of Appellant's Refund Requests	000000388 - 000000392
17.	Department's Power Point Presentation	000000393 - 000000415
18.	Department's Appendix of Cases, Statutes and Other Authorities	000000416 - 000000746

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19.	Petitioners' Correspondence Regarding Supplemental Material Submitted for Appeal	000000747 - 000000749
20.	Petitioners' Power Point Presentation	000000750 - 000000787
21.	Petitioners' Index to Supplemental Submission on Behalf of Taxpayers/Appellants	000000788 - 000001218
22.	Transcript of the State of Nevada Tax Commission Teleconferenced Open Meeting, Monday, July 9, 2007	000001219 - 000001237
23.	Transcript of the State of Nevada Tax Commission Teleconferenced Open Meeting, Monday, August 6, 2007	000001238 – 000001332
24.	Commission's Findings of Facts and Conclusions of Law and Decision, October 12, 2007	000001333 – 000001334
25.	Petitioners' Request for a Copy of the Nevada Tax Commission's Formal Written Ruling, August 22, 2007	000001335
	These Bates Numbered Pages Were Left Blank Intentionally	000000202 000000210 000000218 000000226 000000234 000000242 000000250 000000258 000000266 000000294 000000309 000000317 000000318 000000326

DATED this 21st day of October, 2011.

CATHERINE CORTEZ MASTO
Attorney General

By: /s/ DAVID J. POPE
DAVID J. POPE
Senior Deputy Attorney General
Nevada Bar No. 008617
BLAKE A. DOERR
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CERTIFICATION

I Erin Fierro, am a member of the staff of the Nevada Department of Taxation. I hereby certify that the entire record of the administrative proceedings, which are the subject of Case No. A-11-648894, currently pending in Department No. XXX of the Eighth Judicial District Court, are enclosed as Bates numbers 00000001 through 000001335.

NEVADA DEPARTMENT OF TAXATION

By: Erin Fierro
Erin Fierro, Executive Assistant

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

CERTIFICATE OF SERVICE

I, hereby certify that on the 21st day of October, 2011, I served the **Administrative Record** on CD, by causing to be delivered to the Department of General Services for mailing at Las Vegas, Nevada, a true copy thereof, addressed to:

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

Bradley J. Shafer
Shafer & Associates, P.C.
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Attorneys for Plaintiffs

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

/s/ Debra Turman
An employee of Office of Attorney General

Attorney General's Office
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Las Vegas, NV 89101

EXHIBIT "D"

REGISTER OF ACTIONS

CASE NO. A-11-648894-J

K-Kel, Inc., Plaintiff(s) vs. Nevada Department of Taxation, Defendant(s)

Case Type:	**Civil Petition for Judicial Review**
Date Filed:	**09/23/2011**
Location:	**Department 30**
Conversion Case Number:	**A648894**

PARTY INFORMATION

		Lead Attorneys
Defendant	**Nevada Department of Taxation**	**David J. Pope** *Retained* 7026568084(W)
Defendant	**Nevada Tax Commission**	**David J. Pope** *Retained* 7026568084(W)
Plaintiff	**D I Food and Beverage of Las Vegas LLC**	**William H. Brown** *Retained* 702-474-4222(W)
Plaintiff	**D Westwood Inc**	**William H. Brown** *Retained* 702-474-4222(W)
Plaintiff	**Deja Vu Showgirls of Las Vegas**	**William H. Brown** *Retained* 702-474-4222(W)
Plaintiff	**K-Kel, Inc.**	**William H. Brown** *Retained* 702-474-4222(W)
Plaintiff	**Little Darlings of Las Vegas LLC**	**William H. Brown** *Retained* 702-474-4222(W)
Plaintiff	**Olympus Garden Inc**	**William H. Brown** *Retained* 702-474-4222(W)
Plaintiff	**Power Company Inc**	**William H. Brown** *Retained* 702-474-4222(W)
Plaintiff	**Shac LLC**	**William H. Brown** *Retained* 702-474-4222(W)

EVENTS & ORDERS OF THE COURT

12/09/2011 Motion for Leave (9:00 AM) (Judicial Officer Wiese, Jerry A)
11/18/2011, 12/09/2011

Minutes
11/14/2011 9:00 AM

11/18/2011 9:00 AM

12/09/2011 9:00 AM

- Mr. Rakwosky noted there was a similar matter being heard in front of Judge Gonzalez. Arguments by Mr. Pope, Ms. Rakwoskty, and Mr. Doerr. COURT ADVISED counsel the Administrative Agency should take the matter up first as the Court could only review the record provided. COURT ORDERED case REMANDED to the Administrative Agency to review evidence requested by the Petitioner.

Parties Present
Return to Register of Actions

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CLERK OF THE COURT

ORDR
CATHERINE CORTEZ MASTO
Attorney General
DAVID J. POPE
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DISTRICT COURT

CLARK COUNTY, NEVADA

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

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. . .

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

ORDER

DEFENDANTS' RE-NOTICED MOTION FOR PARTIAL SUMMARY JUDGMENT ON THE PLAINTIFFS' CLAIMS FOR REFUND AND MOTION TO DISMISS THE AS APPLIED CHALLENGE TO THE LIVE ENTERTAINMENT TAX AND THE CLAIMS FOR DAMAGES PURSUANT TO 42 U.S.C. §1983 and DEFENDANTS' MOTION TO COMPEL came on for hearing on August 23, 2011;

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

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

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. . .

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

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

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

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

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

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

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

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

IT IS SO ORDERED.

DATED this 27th day of October, 2011.

DISTRICT COURT JUDGE

Respectfully submitted:

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By: _____
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EXHIBIT "E"

(Exhibits to Application provided on CD)

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DISTRICT COURT

CLARK COUNTY, NEVADA

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

Petitioners,

vs.

NEVADA DEPARTMENT OF TAXATION, and NEVADA TAX COMMISSION,

Respondents.

Case No. A-11-648894
Dept. No. XXX

APPLICATION FOR LEAVE TO PRESENT ADDITIONAL EVIDENCE TO THE NEVADA TAX COMMISSION

Date of Hearing: n/a
Time of Hearing: n/a

COME NOW the Petitioners, K-KEL, INC., d/b/a *Spearmint Rhino Gentlemen's Club,* OLYMPUS GARDEN, INC., d/b/a *Olympic Garden,* SHAC, L.L.C. d/b/a *Sapphire*, THE POWER COMPANY, INC., d/b/a *Crazy Horse Too Gentlemen's Club,* D. WESTWOOD, INC., d/b/a *Treasures*, D.I. FOOD & BEVERAGE OF LAS VEGAS, LLC, d/b/a *Scores*, DEJA VU SHOWGIRLS OF LAS VEGAS, LLC, d/b/a/ *Déjà Vu*, and LITTLE DARLINGS OF LAS VEGAS, LLC, d/b/a *Little Darlings,* by and through their attorneys, WILLIAM H. BROWN, ESQ. of TURCO & DRASKOVICH, and hereby submit, pursuant to NRS 233B.131(2), this Application for Leave to Present Additional Evidence to the NEVADA TAX COMMISSION, and in support thereof state the following:

1. Petitioners operate commercial entertainment establishments in the City of Las Vegas, which present on their business premises live performance dance entertainment to the consenting adult public. This entertainment constitutes speech and expression, as well as a form of assembly, protected by the First and Fourteenth Amendments to the United States Constitution, and by Art. I, §§ 9 and 10, of the Nevada Constitution.
2. The Nevada Department of Taxation and the Nevada Tax Commission have taken the position that the entertainment provided by the Petitioners subjects their businesses to a new (in 2003) the Live Entertainment Tax ("LET") enacted by the Nevada Legislature as NRS Chapter 368A (sometimes "Chapter 368A").
3. Petitioners believe that the LET is unconstitutional under the First and Fourteenth Amendments to the United States Constitution, as well as Art. I, §§ 9 and 10, of the Nevada Constitution, and initiated legal challenges thereto as early as 2005, shortly after the Legislature enacted a series of amendments to the breadth and scope of the LET. First, Petitioners filed suit in federal district court seeking, among other things, to declare

the LET unconstitutional and to enjoin its enforcement. That action was dismissed, pursuant to motion filed by the Respondents here, on the basis that under the federal Tax Injunction Act (28 U.S.C. § 1341), a "plain, speedy, and efficient remedy" could be had in the courts of this state. Petitioners then filed suit in this Court basically seeking the same relief. That case was docketed as Case No. 06A533273, was originally assigned to Judge Togliatti, is now assigned to Judge Gonzalez, ***and is still pending in Department XI*** (referred to hereinafter as "Case 1"). Pursuant to order of Judge Gonzalez, Petitioners have filed (as Plaintiffs), contemporaneously with this submission, a motion for summary judgment in Case 1 limited to a "facial" constitutional challenge to the LET. In addition, after the denial by the Nevada Department of Taxation ("Department") of administrative refund claims filed by Petitioners K-Kel, Inc., Olympus Garden, Inc., SHAC, LLC, The Power Company, Inc., D.Westwood, Inc., and D.I. Food & Beverage of Las Vegas, LLC (the "K-Kel Petitioners"), predicated upon the unconstitutionality of Chapter 368A, and shortly after the filing of Case 1, the Nevada Tax Commission ("Commission") heard appeals on those administrative denials but ultimately upheld them. Specifically, an order was issued by the Commission on October 12, 2007, upholding the Department's denial of the refunds of the LET paid by the K-Kel Petitioners for the January through April 2004 tax periods.[1]

4. In the Commission, the K-Kel Petitioners did not undertake any discovery, and only placed a limited constitutional challenge to Chapter 368A before the Commission, because: 1) precedent establishes that administrative agencies are not the appropriate

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[1] Appeals from all other tax periods are being held in abeyance pending the resolution of Case 1 and this Petition.

forum in which to litigate constitutional challenges; 2) precedent at the time established that the K-Kel Petitioners would be afforded de novo judicial review where discovery would be permitted (and, in fact, established that the filing of a limited petition for judicial review was procedurally improper and would be subject to dismissal); 3) the judicial redress statute contained in Chapter 368A (that being NRS 368A.290) appeared to provide for the filing of an original action for refund following the denial by the Commission of appeals regarding administrative claims for refund, where de novo review would be provided and where discovery could be conducted; and 4) the conduct and representations of the Respondents in the federal proceedings led Petitioners to believe, that following an adverse ruling by the Commission, they could, in fact, initiate judicial redress by filing an original action for refund where de novo review would be provided and where discovery could be conducted.

5. On January 9, 2008, in full accordance with NRS 368A.290(1)(b) and 368A.300(3)(b), which govern adverse decisions by the Commission in the circumstances here, the Petitioners timely filed a judicial complaint for refund, which was assigned Case No. A554970 in Division XI of this District Court (Case 2).[2]

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[2] Petitioners filed an Amended Complaint in Case 2 on or about December 19, 2010, which added Deja Vu Showgirls of Las Vegas, LLC, and Little Darlings of Las Vegas, LLC (the "Deja Vu Petitioners") to the action for refund, as they were then required to file administrative claims for refunds as a result of statutory amendments to Chapter 368A. The Deja Vu Petitioners did not become subject to the LET until Chapter 368A was amended in June of 2005, to reduce the seating capacity required for a facility to be subject to the LET from 300 to 200 persons. *See* NRS § 368A.200(5)(d). Pursuant to NRS § 368A.260(1), the statutory three year period for those two Petitioners to file their administrative requests for refunds did not then expire until mid 2008, and the Deja Vu Petitioners were not required to have filed, and had not yet submitted, administrative claims for refund when Case 2 was filed. However, starting in August, 2008 (for the July 2005 tax period), the Deja Vu Petitioners began filing administrative claims for refund, and responded to the inevitable denials from the Department with monthly notices of appeal to

6. After litigating Case 2 for three years and Case 1 for more than that, including the providing of substantial discovery and engaging in extended and acrimonious discovery disputes, the Respondents then took the position that Case 2 should have been filed as a limited petition for judicial review, and moved to then dismiss that action. Before Department XI entered a formal ruling on that motion, the Nevada Supreme Court issued its ruling in **Southern California Edison v. First Judicial District**, 127 Nev.Adv.Op. 22 (May 26, 2011), where it held that in light of a number of statutory amendments, prior precedent was no longer operative and that a petition for judicial review was the proper procedure to appeal a determination from the Commission. The Respondents then filed a motion for reconsideration of the decision on their motion to dismiss Case 2, and Judge Gonzalez then orally dismissed that suit and stated (no final written order has yet been entered) that the Petitioners would be given 30 days to file a petition for judicial review. Contemporaneously with the filing of this application, Petitioners have done just that.

7. Following the acrimonious discovery disputes and the obtaining by the Petitioners of extensive written discovery in Cases 1 and 2, Petitioners were about to take depositions of a number of representatives of the Respondents. In fact, those depositions were scheduled to commence just 3 days after Department XI orally ruled that Case 2 would be dismissed (with the consequent filing of the Petition at bar here) and that Case 1 would proceed limited to a "facial" constitutional challenge. As a result, all of the depositions were cancelled.

8. Nevertheless, discovery undertaken in both Cases 1 and 2 has uncovered extensive

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the Commission. Their appeals, however, are also being held in abeyance pending the resolution of Case 1 and this Petition.

documentation that is directly relevant and material to the constitutional challenges that will be decided by this Honorable Court. Those materials were not presented to the Commission below, however, for the reasons set forth in paragraph 4 above. As Petitioners were justifiably under the impression that they would be afforded de novo review in this Court from the decision of the Commission, where discovery could be taken and where all relevant evidence could be presented to this Honorable Court, "good reasons" exist to grant this petition and to permit the Petitioners to present additional evidence to the Commission before this Court engages in a review of the decision of that administrative Tribunal.[3] Further, the Deja Vu Petitioners never had a hearing before the Commission, as the deadline for their refund requests had not yet arrived when the K-Kel Petitioners appealed the Department's denial of their refund requests. Therefore, there is no record at all before the Commission on the Deja Vu Petitioners' refund requests. And, the type of depositions that were to be taken in Cases 1 and 2 should be permitted to proceed below in order to afford the Petitioners an opportunity to submit a full and complete record on their constitutional challenges to the Commission before judicial review by this Court commences.

9. Consequently, Petitioners respectfully assert that in order to ensure that they are all afforded a fair decision by this Court, based upon a complete record below, this Court should grant this Application and permit the Petitioners to complete discovery before the Commission and to present such additional evidence thereto as the Petitioners deem

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[3] Moreover, in light of the fact that the discovery received in Cases 1 and 2 by the Petitioners to date was only obtained after numerous hearings before the Discovery Commissioner and before two different judges (comprising of no fewer than 5 separate hearings), it would be disingenuous to believe that Petitioners would have been able to obtain such materials in the Commission had they requested discovery there.

appropriate. This will permit the Commission to base its ruling(s) on a full and complete record and provide it the chance to modify its findings and decisions pursuant to NRS 233B.131(3) before further review is undertaken by this Court.

10. Respondents will not be prejudiced by the relief requested in this application, and there will be no unnecessary delay in the resolution of the constitutional matters at issue since Judge Gonzalez has ordered the filing of the Plaintiffs' (these Petitioners') "facial" constitutional challenges in Case 1, which has been submitted to Department XI contemporaneously with this submission (Judge Gonzalez considering this Petition to encompass the Petitioners' "as applied" constitutional challenges).

11. Petitioners request that this Court grant oral argument on this application due to the complex procedural history of the various previous proceedings, and the sensitive constitutional issues at bar.

12. This Application is supported by the accompanying memorandum of points and authorities.

WHEREFORE, Petitioners respectfully request that this Honorable Court grant Petitioners leave to present additional evidence to the Nevada Tax Commission (including that already obtained in Cases 1 and 2 and that which may be uncovered in further discovery at the Commission level, including through the conducting of depositions), before the Commission transmits its record to this Court.

DATED this 26nd day of September, 2011.

Respectfully submitted,

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MEMORANDUM OF POINTS AND AUTHORITIES[4]

I. INTRODUCTION AND SUMMARY

Chapter 368A imposes a separate and unique sales tax on "live entertainment." Live entertainment constitutes speech and expression protected by the United States Constitution, and, therefore, the Constitution of the State of Nevada as well. *See, e.g.,* **Schad v. Borough of Mout Ephraim**, 452 U.S. 61, 66 (1981); **Winters v. New York**, 333 U.S. 507, 510 (1947); and **Zacchini v. Scripts-Howard Broadcasting Co.**, 433 U.S. 562, 578 (1977). Petitioners contend that the LET violates, both "facially" and "as-applied" to these Petitioners, those constitutional protections.

Petitioners have been litigating those constitutional claims in Department XI for nearly five years, and voluminous discovery has been produced as a result of elongated and acrimonious proceedings by the Petitioners to compel that production.

The K-Kel Petitioners have received rulings from the Commission denying their administrative claims for refund. However, for the reasons as set forth in the application above and more fully below, they did not undertake discovery in the Commission proceedings, and placed only a limited constitutional challenge before that administrative Tribunal. Prior to a recent Nevada Supreme Court pronouncement, Petitioners were entitled to de novo review of the Commission's ruling in the District Court, where discovery could be conducted and where a full independent record could be submitted for judicial consideration.

However, on May 22, 2011, the Nevada Supreme Court issued its ruling in **Southern California Edison v. First Judicial District**, 127 Nev.Adv.Op 22 (May 26, 2011), which held

that in light of a number of statutory amendments, its prior precedent was no longer applicable and judicial redress from a decision of the Commission would have to proceed by way of a limited petition for judicial review.[5] Department XI concluded, therefore, that Case 2 should be dismissed, that the plaintiffs there (these Petitioners) should be afforded 30 days to file a petition for judicial review, and that Case 1 should proceed as only a "facial" constitutional challenge.

In light of the limited scope of review here, and the fact that Petitioners justifiably believed that they would be able to develop a full record in the District Court in order to adjudicate their constitutional claims, Petitioners respectfully request, due to the unique procedural developments of these various proceedings (with the **Edison** decision "changing the game"), that this Court remand this matter back to the Commission in order to allow the Petitioners to complete their discovery and to present additional evidence to the administrative Tribunal before review by this Court.

II. ARGUMENT

A. Constitutional Constraints Applicable to Chapter 368A.

As discussed above, the subject matter of Chapter 368A (that being "live entertainment") receives constitutional protections under both the federal and state constitutions. In fact, the particular form of expression engaged in by these Petitioners (topless and nude performance dance entertainment) is similarly imbued with free speech protections. *See, e.g.,*

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[4] In order to reduce duplication of briefing, the Application above is incorporated herein by reference, and the definitions and short-form designations set forth therein are utilized here as well.

Barnes v. Glen Theatre, Inc., 501 U.S. 560, 565 (1991); **City of Erie v. Pap's A.M.**, 529 U.S. 277, 289 (2000).

In order for the Court to be able to appropriately consider the relief requested by way of this application, and to understand why the additional evidence requested by the Petitioners is necessary for full and adequate judicial review of the Commission's decision, Petitioners set forth below a very brief summary of the constitutional constraints regarding tax laws that impact upon the freedoms of speech, the press, and expression.

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

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

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

Stated somewhat differently:

> A power to tax differentially, as opposed to a power to tax generally, gives a government a powerful weapon against the taxpayer selected. ***When the State imposes a generally applicable tax, there is little cause for concern. We need not fear that a government will destroy a selected group of taxpayers by burdensome taxation if it must impose the same burden on the rest of its constituency.***
>
> * * *
>
> Further, ***differential treatment***, unless justified by some special characteristic of the press, suggests that the goal of the regulation is

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[5] Interestingly, the Court in **Edison** ruled that Edison's judicial redress could continue as an original action subject to de novo review in light of the principle of judicial estoppel in light of a variety of representations made by the Department and the Commission.

> not unrelated to suppression of expression, and such a goal is ***presumptively unconstitutional***.

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

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

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

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

Second, a tax that targets a *narrowly defined group of speakers* is unconstitutional. As set forth by the Supreme Court:

> A tax is also suspect if it targets a small group of speakers.
>
> * * *
>
> The danger from a scheme that targets a small number of speakers is the danger of censorship; a tax on a small number of speakers runs the risk of affecting only a limited range of views. The risk is similar to that from a content-based regulation: It will distort the market for ideas.

Leathers v. Medlock, 499 U.S. 439, 447-448 (1991).

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

Petitioners contend that the LET violates ***all three of these constitutional principles***. However, the additional evidence that the Petitioners desire to present to the Commission relate to the second and third constitutional components; that being that Chapter 368A "targets a narrowly defined group of speakers" (generally referred to by the courts as "gerrymandering")

and that it imposes a ***content-based*** tax.

B. The Standards for this Application.

NRS 233B.131(1) of the Administrative Procedures Act requires that "within 30 days after the service of the petition for judicial review or such time as is allowed by the court," the agency that rendered the decision at issue shall transmit the record to the reviewing Court. However, before submission of the record by the agency, a party may apply to the Court for leave to present additional evidence to the agency below.

Specifically, NRS 233B.131(2) states:

> If, before submission to the court, an application is made to the court for leave to present additional evidence, and it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the proceeding before the agency, the court may order that the additional evidence and any rebuttal evidence be taken before the agency upon such conditions as the court determines.

Consequently, in order for this Honorable Court to grant this application, it must find "materiality" with regard to the evidence that the Petitioners desire to present to the Commission, as well as "good reasons" as to why such evidence was not originally submitted below. These Petitioners easily satisfy both standards.

C. Materiality of the Proposed Evidence.

Following extensive proceedings to compel before the Discovery Commissioner, before Judge Togliotti, and before Judge Gonzalez, Petitioners obtained voluminous written documentation in Cases 1 and 2, much of which serves to establish Petitioners' claims that the LET is gerrymandered to apply to this group of business owners and to few else (and was legislatively ***intended*** to do so), and that it is a content-based tax. While Petitioners will not go over each and every such document that serves to prove these points, some examples are in

order.

- Charts by the Department showing LET Collections by Taxpayer Group illustrating that the gentlemen's clubs pay the vast majority of the 10% portion (the more oppressive portion) of the tax. DV 1193-1195[6] and un-numbered documents produced in supplements (Ex. 1 hereto).

- A March 14, 2005, Department memo discussing the specific inclusion of gentlemen's clubs in the proposed amended version of Chapter 368A. DV 2-3 (Ex. 2 hereto).

- An October 9, 2003, email to former Department Director Dino DiCianno from an attorney on behalf of the Bellagio hotel and casino discussion the constitutionality of the proposed amendments. DV 577-578 (Ex. 3 hereto).

- An October 21, 2003, email to DiCianno with a transcript of the Nevada Gaming Commission discussing the importance of subjecting the gentlemen's clubs to the LET. DV 614 (Ex. 4 hereto).

- The First Reprint of Senate Bill 247 which contains a counsel digest specifically referencing adult entertainment and what would happen if that proposed portion of the Bill were held unconstitutional. DV 1031. This version actually defines live adult entertainment. DV 1033 (Ex. 5 hereto).

- Minutes of the May 16, 2005, meeting of the Assembly Committee on Commerce and Labor which discusses what happens if the proposed live "adult" entertainment provisions are held unconstitutional. DV1071 (Ex. 6 hereto).

- Minutes of the May 26, 2005, meeting of the Assembly Committee on Ways and Means, which specifically references the Department's position on there being two distinct categories: live entertainment and live adult entertainment. DV 1081. Exhibit E to the minutes is an email from DiCianno setting forth this distinction. DV 1087 (Ex. 7 hereto).

More specifically, for example, on March 14, 2005, a Memorandum from Department was issued "to analyze the fiscal impact of making changes to the Live Entertainment Tax (LET)." Department of Taxation Memorandum, March 14, 2005, Ex. 2. This analysis

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[6] The page references preceded by "DV" indicate the bates-stamped numbers given to the documents by the State when they were produced to Petitioners.

recognized that eliminating the 300 person seating requirement[7] would raise an additional $4,197,900 from gentlemen's clubs, and $1,614,600 from other bars and nightclubs. *See also* Untitled Revenue Analysis, Ex. 8 (analyzing the impact of the 300-seat requirement separately for "men's clubs" from other businesses and specifically analyzing revenue to be generated from 200-seat men's clubs; no other specific category of businesses being mentioned or identified).

Another Memorandum on November 4, 2004, to Chuck Chinnock, then-Executive Director of the Nevada Department of Taxation, specifically identifies those gentlemen's clubs statewide that have seating capacities of less than 300. Memorandum of November 9, 2004, Ex. 9. And, in an April 24, 2005 email, Dino DiCianno, then-Executive Director of the Department of Taxation, explained:

> Chris Janzen asked me [sic] take a look at the fiscal impact of Senator Titus's new version of SB 247. ***There is no question that the focus of the bill is to tax for LET all adult entertainment, except for brothels. Currently the vast majority of the revenue that we collect comes from the gentlemen's clubs that have a seating capacity greater than 300.*** For example, 1.2 million from nightclubs, 1.4 million from raceways, 1.0 million from performing arts, 5.2 million from gentlemen's clubs; for a total collected of about 9.0 million. The remaining venues are minor (i.e. sporting events, etc.). ***By removing the seating capacity and eliminating the other venues you would ten capture all of the remaining gentlemen [sic] clubs that are currently not paying***. There is no question that they are a cash cow for LET. My best guess is that the fiscal impact of the revised SB 247 would be either a wash with a distinct possibility of a potential LET revenue gain.

DiCianno Email of April 24, 2004, Ex. 10 (emphasis added).

The documents preceding the 2003 tax are no different. In a 2003 email from Barbara Smith Campbell to Bill Bible, it was explained that:

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[7] The 2005 amendments to Chapter 368A reduced the seating capacity threshold (in order to subject a business to the LET), in order to capture a number of gentlemen's clubs that had escaped taxation through the initial iteration of the LET in 2003.

> The DAG has concerns about your recommended language in Ambient Entertainment #3. In summary, he feels the language ***may lead to the exemption of "entertainers" at the Gentlemen [sic] clubs. Therefore, we did not incorporate it in our draft.***

Memorandum, November 18, 2003, Ex. 11 (emphasis added).

Even additional legislative minutes produced in discovery (that the Petitioners were not able to obtain before the Commission proceedings[8]) further demonstrate the unconstitutional gerrymandering of Chapter 368A. For example, in discovery Petitioners obtained additional legislative minutes that state as follows:

> **Senator Coffin:**
>
> ***Where are the topless clubs in this bill?***
>
> **George W. Treat Flint (Nevada Brother Owners Association):**
>
> I have an intimate relationship with this bill and its verbiage since the last Session. On page 6 of A.B. 554, the topless clubs would be covered under lines 1 through 3, unless they have an occupancy capacity of less than 300. The major men's cabarets are covered under that section. I have been told by the Department of Taxation that the major places create approximately $7 million a year. ***Most of the smaller clubs could probably be brought into A.B. 554 if you amend the section to read a total occupancy of 200 rather than 300.*** To protect my client, I do not want you to bring the occupancy number down too much lower than 200 ***or you will have my clients back in this tax law.***
>
> **Senator Coffin:**
>
> It is my understanding that some of the topless clubs get out of being taxed by removing a few seats. We should consider the possibility of reducing the seating capacity so these highly profitable, legitimate businesses could help pay their share of the budget. Has there been any discussion about that?

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[8] Through the standard public document process, Petitioners obtained what they thought was the complete legislative history of the 2003 version of Chapter 368A and the 2005 amendments thereto (those modifications significantly contributing to the legislative gerrymandering of this content-based tax). However, Petitioners submitted formal discovery requests in Cases 1 and 2 for the complete legislative records, and thereby obtained additional materials that had not been previously disclosed by the State.

* * *

Senator Coffin:

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

Charles Chinnock (Executive Director, Department of Taxation):

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

Senator Coffin:

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

Mr. Chinnock:

Yes, it was in the interest of safety.

Senator Coffin:

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

Mr. Chinnock:

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

Senator Coffin:

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

William Bible (Nevada Resort Association):

> I really cannot assist you with this issue because the taxes would apply to venues associated with gaming. The seating capacity in A.B. 554 is for areas not on gaming premises.
>
> **Senator Townsend:**
>
> With regard to the 300 seating and the budget, the lower we make it, the more revenue we would generate as opposed to having an effect on ***them***. There should be no fiscal note. My limited knowledge of this corresponds with Senator Coffin. This puts our Department of Taxation and the auditors in a tough situation. We have to remember, at the end of the day. We have those individuals who will be responsible for implementing this law. ***Senator Coffin's proposal meets the original intent of what this Committee and the Assembly debated.*** Obviously, we do not want to create a problem for Mr. Flint's clients. That was never the issue.
>
> **Mr. Flint:**
>
> This is not official, but ***I spoke with someone in the Department of Taxation***, and I do not have Mr. Chinnock's permission to say this on the record. ***I was told if you brought this number down to 200, you may pick up those who are avoiding or evading this at the moment***. I have been in enough of ***these places*** to know there are very few with less than 200 seats. There is a wide area you would pick up at 200, and you will still keep me harmless at this number.

SENATE COMMITTEE ON TAXATION, June 5, 2005, pp. 4, 6-7, Ex. 12 (emphasis added).

All of these materials are obviously critically relevant to the constitutional issues that will have to be decided by this Honorable Court, but they were not available at the time of the Commission proceedings (and were only obtained after extensive motion practice). In addition, Petitioners should be afforded the opportunity to depose representatives of the State in regard to these documents before either the Commission or this Court make final determinations on the Petitioners' constitutional claims. Materiality has clearly been established.

D. The "Good Reasons" Why Such Materials Were Not Submitted to the Commission in the First Instance.

As discussed above, some of the documents that turn out to be extremely relevant to the

constitutional claims being made here were only obtained after extensive judicial proceedings before the Discovery Commissioner, before Judge Togliotti, and before Judge Gonzalez. It would be disingenuous to presume in these circumstances that even had the Petitioners requested written discovery in the Commission proceedings, they would have been able to unearth the proverbial "smoking guns" that the extensive judicial proceedings unveiled. In fact, when the Petitioners first received responses to written discovery in Cases 1 and 2, the full-page blackened redactions appeared to be a response to compel the production of the plans for the next generation stealth fighter.

Regardless, there are numerous "good reasons" why these materials were not presented to the Commission irrespective of the fact that, in reality, the Petitioners would not have been able to obtain such documentation in the administrative proceedings below in the first place.

1. Precedent Establishes that Administrative Tribunals are Not the Appropriate Forum to Litigate Sensitive Constitutional Claims.

In **Malecon Tobacco, LLC**, 118 Nev. 837, 840-841, 59 P.3d 474, 467-77 (2002), our State Supreme Court noted that the "United States Supreme Court has recognized that under federal administrative procedures, the 'adjudication of the constitutionality of congressional enactments has generally been thought to be beyond the jurisdiction of administrative agencies.'" **Id**. at 840 (*citing* **Thunder Basin Coal Co. v. Reich**, 510 U.S. 200, 215 (1994) (other citations omitted)). Indeed, the Supreme Court has observed that "[c]onstitutional questions obviously are unsuited to resolution in administrative hearing procedures and, therefore, access to the courts is essential to the decision of such questions." **Califano v. Sanders**, 430 U.S. 99, 109 (1977).

Due to this precedent, Petitioners were under the belief that the real determination of the constitutionality of the LET would occur at the District Court level, where they would entitled to

de novo review of the Commission's decision and to discovery. Under this precedent, there was no reason for the Petitioners to fight tooth-and-nail in the administrative proceedings below in order to obtain the discovery that has now been unearthed, in order to place a full and complete record with regard to the constitutional claims before the Commission.

2. Precedent at the Time of the Commission Proceedings Clearly Established that Judicial Redress From a Ruling of that Tribunal was to be by Way of an Original Action, Where De Novo Review Would Apply and Where Discovery Could be Obtained.

Edison modifies prior precedent of the Nevada Supreme Court with regard to the avenue of judicial redress from a decision of the Commission. Prior to **Edison**, the standards were articulated in **Saveway Super Serv. Stations, Inc. v. Cafferata**, 104 Nev. 402, 404 (1988). There, the taxpayer paid fuel excise taxes and penalties assessed by the Department, pursuant to NRS Chapter 365, and filed an appeal with the Commission. After receiving an adverse decision from the Commission, Saveway filed *a petition for judicial review* of the Commission's decision. The district court *dismissed* the petition as being improperly filed, and the Supreme Court *affirmed.* The Nevada Supreme Court later observed:

> This matter was last before us in February 1985. At that time, Saveway was appealing from a judgment entered in the Eighth Judicial District Court dismissing Saveway's complaint for ***lack of subject matter jurisdiction***. Under the provisions of the ***Administrative Procedure Act (NRS 233B.130)***, Saveway has sought judicial review of the Nevada Tax Commission's order requiring Saveway to pay $23,709.14 for loss of discount and interest. In our order ***dismissing Saveway's previous appeal, we stated that NRS 233B.130 is specifically limited to NRS 365.460, and under NRS 365.460 Saveway's remedy was to pay the excise tax under protest and bring an action against the state treasurer in the district court*** in Carson City to recover the amount paid under protest. Saveway has since taken that course of action.
>
> **Id.** at 403-04 (emphasis added).

NRS 365.460 uses the same "may bring an action" language as is found in NRS 372.680

(at issue in **Edison**), and in NRS 368A.290 (at issue here).[9] *Consequently, had these Petitioners filed a petition for judicial review, the Department would have moved to dismiss that action as being improperly filed under* ***Saveway***.

But **Saveway** was not the only precedent establishing entitlement to original judicial redress from a Commission ruling prior to the Commission proceedings below. *See also* **Sparks Nugget, Inc. v. Nevada ex rel. Dep't of Taxation**, 179 P.3d 570, 573 (Nev. 2008) ("Following the denial of its claim, the Nugget administratively appeal the Tax Department's decision to the tax commission. That appeal proved unsuccessful, however and having exhausted its administrative remedies, the Nugget then ***sued*** *the Tax Department* in district court, again seeking a refund of use taxes . . .") (emphasis added).

Hence, the ***existing case law*** at the time of the Commission proceedings below[10]

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[9] NRS 365.460 provides: "After payment of any excise tax under protest duly verified, served on the Department, and setting forth the grounds of objection to the legality of the excise tax, the dealer paying the excise tax may bring an action against the state treasurer in the district court in and for Carson City for the recovery of the excise tax so paid under protest."

[10] *Accord*, **Lohse v. Nevada ex rel. Dep't of Tax'n**, Case No. CV-05-00376 (Nev. 2 Jud. Dist., Jan. 18, 2007). There, the Department moved to prevent the taxpayer from presenting evidence at trial on its sales tax refund claim, arguing primarily that, because the taxpayer had failed to conduct discovery, the case should be limited to the record developed before the Department and Commission and should proceed in a manner similar to a petition for judicial review. The district court *rejected* the Department's argument. During the ensuing bench trial, both the taxpayer and the Department presented evidence and testimony. The district court's Findings of Fact, Conclusions of Law and Judgment expressly held:

> 1. Plaintiffs fully exhausted all administrative remedies prior to bringing this action under NRS 372.680;
>
> 2. An action brought pursuant to NRS 372.680 is an original proceeding, not an appeal from a final decision by an administrative agency. **State of Nevada v. Obexer & Sons, Inc.**, 99 Nev. 233, 237, 660 P.2d 981, 984 (1983). The Court is not limited to a review of the record before the administrative agency; the Court is free to take new evidence on issues of fact, and owes no deference to findings by the administrative agency on issues of fact or on issues of law.

provided for a direct suit in district court following a denial by the Commission where, obviously, de novo review and discovery could be obtained. More to the point, Petitioners should not be constitutionally penalized because the subsequent ruling in **Edison** "changed the game."

In this regard, it is important to recognize the State of Nevada's Taxpayers' Bill of Rights, which states that each taxpayer has the right "[t]o have statutes imposing taxes and any regulations adopted pursuant thereto ***construed in favor of the taxpayer*** if those statutes or regulations are of doubtful validity or effect, unless there is a specific statutory provision that is applicable." NRS 360.291(1)(o) (emphasis added). It further provides that the provisions of Title 32 (which include the taxes challenged in this Petition and in the previous lawsuit) "governing the administration and collection of taxes by the Department must not be construed in such a manner as to interfere or conflict with the provisions of this section [*i.e.*, the Bill of Rights] or any applicable regulations." NRS 360.291(2) (clarification added).

All of this dictates that the Petitioners' fundamental due process rights should be zealously protected, and that this Court should grant the application and permit additional evidence to be submitted to the Commission before this Court begins to engage in its judicial review.

3. The Judicial Redress Statute Under Chapter 368A Seemingly Provides for the Right to File an Original Action for Refund With Regard to an Adverse Decision by the Commission, as Opposed to the Submission of a Petition for Judicial Review.

NRS 368A.290, the statutory provisions pursuant to which the Petitioners filed Case 2,

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The district court's decision in favor of the taxpayer was *affirmed in an unpublished opinion* by the Supreme Court.

states, in part, that: "1. Within 90 days after a final decision upon a claim filed pursuant to this chapter is rendered by ... (b) [t]he Nevada Tax Commission, the claimant ***may bring an action against the department on the grounds set forth in the [administrative] claim.***" (Clarification and emphasis added). The statute goes on to state that ***"[a]n action*** brought pursuant to subsection 1 must be brought in a court of competent jurisdiction...***for the recovery of the whole or any part of the amount with respect to which the claim has been disallowed.***" NRS 368A.290(2) (emphasis added). "Failure to bring ***an action*** within the time specified constitutes a waiver of any demand against the State on account of alleged overpayments." NRS 368A.290(3) (emphasis added).

In addition to referencing the necessity of filing an ***action*** to obtain a refund, Chapter 368A is absolutely silent in regard to the requisite submission of a petition for judicial review (even though other portions of the tax code specify the filing for such relief). Moreover, the requirements of NRS 368A.290(1)(b) to bring an action "***against the Department***" facially conflict with the judicial review statutes at issue here found in NRS 233B.130(2)(a), where the Petitioner is to "***[n]ame as respondents the agency*** and all parties of record to the administrative proceeding...."

Consequently, Petitioners relied not only upon the legal precedent at that time, but also upon the statutory distinctions between the *specific* judicial redress statute for the LET (NRS 368A.290), as opposed to the more general (and conflicting) directives as contained in the Administrative Procedures Act (NRS 233B.130). This reliance was particularly appropriate in light of the fact that NRS 368A.290 was enacted ***after*** the general judicial review provisions found in NRS 233B.130 (and the amendments discussed in **Edison**), and precedent of this State establishes that a subsequently enacted specific statute controls over an earlier general

provision.[11] Petitioners, then, had a "good reason" to believe that they would not be constrained in court strictly to the record in the Commission, that they would be entitled to de novo judicial redress, that they could obtain discovery in any subsequent judicial proceeding, and that they did not have to ensure that they submitted "every last scrap of evidence" to the Commission in order to have a court be able to examine and consider the same.

4. The Representations and Action of the State in the Federal Proceedings and elsewhere Reasonably Lead the Petitioners to Believe that Their Avenue of Judicial Redress from an Adverse Decision of the Commission was by Way of an Original Action Subject to De Novo Review, as Opposed to a Petition for Review.

The State of Nevada, through the Department and the Commission, have taken inconsistent positions regarding the proper procedure to appeal an adverse decision of the Commission. Even in **Edison**, the Court began by noting that "[b]oth now and in the past, the Department has taken totally inconsistent positions in quasi-judicial administrative proceedings regarding the proper procedure for a taxpayer who wishes to challenge the Department's denial of a refund." **Id**. 127 Nev.Adv.Op. 22, at 14. Moreover, the Department had even taken inconsistent positions with regard to Edison itself, and in a brief submitted to the Commission stated that Edison "may file a law suit against the Department under NRS 372.680" and that "Edison would have an opportunity before the district court to more fully develop the facts, if appropriate." **Id**. *See also* Department Letter of Nov. 17, 2003, Ex. 13 hereto, p. 2 n. 1 ("the failure to conduct an evidentiary hearing at the administrative level does not prejudice the taxpayer at the district court level").

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[11] **Cauble v. Beemer**, 64 Nev. 77, 100, 177 P.2d 677 – 678, (1947) (clarification added). *See also* **Quilici v. Strosnider**, 31 Nev. 9, 115, 177, 179 (1911); and **Washoe Co. Water Conservation Dist. v. Beemer**, 56 Nev. 104, 45 P.2d 779, 784 (1935); and **Andersen Family Assocs. v. State Engineer**, 124 Nev. 182, 187, 179 P.3d 1201, 1204 (2008).

In addition to the Department taking inconsistent positions in numerous *other* cases as discussed in **Edison**, its conduct in the series of proceedings leading up to the dismissal of Case 2 aptly demonstrates that Petitioners reasonably believed that a de novo action was to be afforded, along with the opportunity for discovery.

As stated above, Case 1 was filed with the District Court after the Petitioners' federal action was dismissed by application of the federal Tax Injunction Act ("TIA"). *See* **Deja Vu Showgirls of Las Vegas, L.L.C., v. Nevada Dept. of Taxation**, 2006 WL 2161980 (D. Nev. July 28, 2006) (Ex. 14 hereto). Generally, the TIA divests the federal courts of jurisdiction over state tax matters when a "plain, speedy, and efficient remedy may be had in the courts of such State." In the federal action, the Department filed a motion to dismiss pursuant to the TIA, arguing that a "plain, speedy, and efficient" remedy existed in the Nevada courts because, if the plaintiffs there sought an administrative refund:

> ***Within ninety days*** of denial by the NTC of a taxpayer's appeal of a claim for refund, the taxpayer may ***bring an action in court. NRS 368A.290.***[12] By default, jurisdiction for such actions lies in the District Court. Nev. Const. art 6, § 6, NRS 4.370. Therefore, the Nevada Supreme Court has original appellate jurisdiction. Nev. Const., art. 6, § 4. *See also*, NRS 233B.150.[13]

Motion to Dismiss Amended Complaint, Document 12, U.S.D.C. Nevada, Case No. 2:06-cv-00480, filed May 10, 2006, Ex. 15 hereto, p. 7 (emphasis added).

Then, in its reply to its motion to dismiss filed in the federal court, the State noted that

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[12] Petitioners brought Case 2 in this Court directly pursuant to, and within the time constraints as set forth in, this very statute (NRS 368A.290) ***cited by the State to the federal district court as providing Petitioners their remedy for judicial redress.***

[13] While it is true that the State also cited NRS 233B.150, they did so as a "*see also,*" and therefore referred to that provision as providing an ***additional basis*** for the seeking of judicial redress. And, more importantly, however, in the Court of Appeals the State ***deleted*** this reference of additional relief.

State v Scotsman Mfg. Co. Inc., 109 Nev. 252, 849 P.2d 317 (1993), "[w]ould support the proposition that ***declaratory relief is available***[14] notwithstanding NRS 358A.290(1)." Reply to Motion to Dismiss Complaint, Document 17, U.S.D.C. Nevada, Case No. 2:06-cv-00480, filed June 14, 2006. Ex. 16 hereto, p. 3 n. 2 (emphasis added).

The district court ***agreed with the Department in this regard***, holding that NRS 368A.380(1) (the anti-injunction provision):

> . . . does not prevent a ***judicial challenge*** either to the collection of the tax or the constitutionality of the statute authorizing the tax. Indeed, the Nevada Supreme Court, in a case involving a statute which precluded any suit whatsoever unless an administrative claim had been filed, held that notwithstanding the statute, the California corporation could bring the suit to challenge the tax. **State v. Scotsman Mfg. Co. Inc.**, 109 Nev. 252, 849).2d [sic] 317 (1993). This decision strongly suggest that ***declaratory relief is available*** in State court notwithstanding NRS 368A.280(1).

Deja Vu Showgirls, 2006 WL 2161980 (Ex. 14 hereto), at *3 (emphasis added).

The Department got its way on its arguments, and the federal district court dismissed the Petitioners' action by concluding that, in light of the concessions made by the Department, a "plain, speedy and efficient" remedy existed in state court. **Id**. at pp. 5-6.

The Department took a similar position on appeal, arguing:

> ***Within ninety days*** of denial by the [Nevada Tax Commission] of a taxpayer's appeal of a claim for refund, the taxpayer may bring ***an action in court.***[15] ***Nev. Rev. Stat. § 368A.290.*** Jurisdiction for such action lies in the District Court. Nev. Const. art 6, § 6, [footnote omitted][16] Nev. Rev. Stat. § 4.370. Therefore,

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[14] Declaratory relief would not be permissible, of course, in a petition for judicial review.

[15] The State makes no reference whatsoever to the filing of a petition for judicial review.

[16] The omitted footnote to this comment stated: "This section of the Nevada Constitution provides in the pertinent part: 'The District Courts in the several Judicial Districts of the State have ***original jurisdiction*** in all cases excluded by law from the original jurisdiction of the

the Nevada Supreme Court has original appellate jurisdiction. Nev. Cost. art. 6 § 4.

Appellees' Answering Brief, 9th Cir., Docket No. 06-16634, filed January 5, 2007, Ex. 17 hereto, p. 12 (emphasis added; footnote in original).

Notably, the Department's argument to the Ninth Circuit ***omitted any*** reference to NRS 233B. In addition, the Department reiterated the reasoning of the federal district court (adopted with the urging of the State itself), arguing that the Nevada Supreme Court decision in **Scotsman** meant that the clubs could file their court action ***without even exhausting administrative remedies***:

> The District Court further noted that the Nevada Supreme Court had specifically recognized a judicial remedy in the face of parallel language in Nev.Rev.Stat. Chapters 372 and 374. **State, Nevada Dept. of Taxation v. Scotsman Mfg. Co., Inc.**, 109 Nev. 252, 849 P.2d 317 (1993), E.R. 48.
>
> **Scotsman** involved an action for declaratory relief by a taxpayer challenging application of the sales tax to it. ***The various components of the sales tax in Nevada are governed by procedures set forth in Nev. Rev. Stat. Chapters 372 and 374, which contained provisions substantially identical to those in Nev. Rev. Stat. Chapter 368A***. For example, Nev. Rev. Stat. § 372.670 and Nev. Rev. Stat. § 374.675, applicable to the sales taxes, ***and Nev. Rev. Stat. § 368A.280(1), applicable to the Live Entertainment tax***, are substantially identical:
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> * * *
>
> Applying the sales tax law to the matter before it, the Nevada Supreme Court in **Scotsman** found not only that the taxpayer was entitled to challenge the Constitutionality of the tax ***as applied to it***, but, under the circumstances, it could do so without having exhausted administrative remedies. **Id**. at 255-6, 849 P.2d at 320-1.

Appellees' Answering Brief, Ex. __ hereto, pp. 14-15 (emphasis added; footnote omitted).

The Department expanded its position in this regard in briefing to the Ninth Circuit after

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justices' courts'") (emphasis added). **Id**. Nowhere did the State reference jurisdiction to hear a petition for judicial review.

the Petitioners moved to supplement the record on appeal with a number of the Department's statements made before the Commission during the administrative appeals. The Department then "clarified" that it was ***not*** taking the position "that the administrative refund remedy stands by itself as a plain, speedy and efficient remedy." Appellees' Opposition to Motion for Leave to Supplement the Appellate Record, 9th Cir., Case No. 06-16634, filed April 24, 2008, Ex. 18 hereto, p. 6.

Rather, it asserted that even "[i]f Appellants are right in their contention that the administrative remedy is somehow futile, that would provide an additional basis for proceeding by ***direct refund action*** in Nevada courts under **Scotsman**, *supra*, at 225, 849 P.2d at 319." **Id**. at p. 7 (emphasis added). And, to make it clear to the Ninth Circuit that there existed a "plain, speedy, and efficient" remedy in the Nevada courts, the Department made sure to point out that the Petitioners "have brought two actions in the Eighth Judicial District Court for the State of Nevada to challenge the Constitutionality [sic] of the live entertainment tax. *See* Exhibits A and B (complaints in actions A533273 and A554970 ...)." **Id**. at p. 3. Of course the State later successfully moved to dismiss Case No. 2.

These representations, most of them being made ***before*** the proceedings in the Commission, certainly lead the Petitioners to reasonably believe that they would not be restricted to the limited redress provided for by way of a petition for judicial review, and that they would be able to develop a complete record in court.

5. The Deja Vu Petitioners Need to Protect Their Right to a Full Record.

Finally, the presentation of additional evidence is particularly important to the Deja Vu Petitioners, as they did not participate in the appeal considered by the Commission regarding the January through April 2004 requests for refund (since they were not subject to the LET until

later). However, since Department XI permitted the Deja Vu Petitioners to be added as plaintiffs in Case 2, dismissed their independent civil action along with the K-Kel Petitioners, and ordered them to submit a petition for judicial review within 30 days, justice would dictate that the Deja Vu Petitioners be afforded the opportunity to present evidence (and, indeed, a full record) to the Commission. While it would appear to be procedurally inappropriate to include the Deja Vu Petitioners in this petition, in an abundance of caution in light of the District Court's ruling, the Deja Vu Petitioners are making sure they are procedurally protected by being included in the petition and by seeking relief through this application.

III. CONCLUSION

Petitioners request this Honorable Court to immediately remand this matter to the Commission to allow Petitioners to present the materials obtained through discovery to the Commission (and to conduct any necessary additional discovery). A contrary result would unjustly prejudice Petitioners due to their reliance on the matters set forth above.

DATED this 26nd day of September, 2011.

Respectfully submitted,

BY: */s/ William H. Brown*

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CERTIFICATE OF SERVICE

I hereby certify that on the 26nd day of September, 2011, the foregoing **APPLICATION FOR LEAVE TO PRESENT ADDITIONAL EVIDENCE TO THE NEVADA TAX COMMISSION, AND MEMORANDUM OF POINTS AND AUTHORITES** was served on the party(ies) by faxing a copy and mailing of same in the United States mail, postage prepaid thereon, addressed as follows:

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EXHIBIT "F"

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DISTRICT COURT

CLARK COUNTY, NEVADA

K-KEL, INC., d/b/a Spearmint Rhino Gentlemen's Club; OLYMPUS GARDEN, INC., d/b/a Olympic Garden; SHAC, L.L.C., d/b/a Sapphire; THE POWER COMPANY, INC., d/b/a Crazy Horse Too Gentlemen's Club; D. WESTWOOD, INC., d/b/a Treasures; D.I. FOOD & BEVERAGE OF LAS VEGAS, LLC, d/b/a Scores, DÉJÀ VU SHOWGIRLS OF LAS VEGAS, LLC, d/b/a Déjà vu; and LITTLE DARLINGS OF LAS VEGAS, LLC, d/b/a Little Darlings, Petitioners, v. STATE OF NEVADA, ex rel. DEPARTMENT OF TAXATION and TAX COMMISSION, Respondents.	Case No.: A-11-648894-J Dept. No.: XXX **OPPOSITION TO PETITIONERS' APPLICATION FOR LEAVE TO PRESENT ADDITIONAL EVIDENCE TO THE NEVADA TAX COMMISSION**

COMES NOW Respondents, STATE OF NEVADA, ex rel. DEPARTMENT OF TAXATION and TAX COMMISSION, by and through their attorney CATHERINE CORTEZ MASTO, Attorney General, DAVID POPE, Senior Deputy Attorney General, BLAKE A. DOERR, Senior Deputy Attorney General, and VIVIENNE RAKOWSKY, Deputy Attorney

General and hereby submits their Opposition to Petitioners' Application for Leave to Present Additional Evidence to the Nevada Tax Commission.

This Opposition is made and based on all pleadings and papers on file herein, the pleadings and papers incorporated by reference, the attached memorandum of Points and Authorities, and any oral argument that this Court may allow at the time of the Hearing in this matter.

I. FACTS AND PROCEDURAL HISTORY

Petitioners are the above-captioned exotic dancing establishments. Respondents are the Nevada Department of Taxation (hereinafter "Department") and the Nevada Tax Commission (hereinafter "Commission") who collect and administer the Live Entertainment Tax (hereinafter "LE Tax"). As background, there have been two Eighth Judicial District Court Cases commenced by all or some of the Petitioners (Case No. A533273 and Case No. A554970).

On December 19, 2006, all the Petitioners commenced Case #533273[1] (hereinafter "Case 1") seeking as their remedies: (1) an injunction enjoining the enforcement of the provisions of the LE Tax; (2) a refund of all LE Tax payments that have been "involuntarily" made; (3) a declaration that the LE Tax is unconstitutional; and, (4) an award for damages, costs and fees pursuant to 42 U.S.C. §1983. *See* Complaint filed in District Court Case No. 06A533273. Before filing the Complaint in District Court, none of the Case 1 Plaintiffs, i.e. Petitioners, had ever requested a refund from the Department of Taxation pursuant to NRS 368A.290.

. . .

. . .

. . .

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

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After filing the Complaint in Case 1, six of the Plaintiffs (hereinafter "Permissible Petitioners") requested refunds from the Department and pursued their administrative remedies. In January 2007, the six Permissible Petitioners[2] requested a refund of the LE Tax they remitted for January, February, March and April 2004. *See* Refund Requests contained in the Administrative Record and referenced as Nos. 1, 2, 4 and 6 on the Index to the Administrative Record attached hereto as Exhibit A (Bates Nos. 1-41; 42-84; 97-139; 146-188). The Department denied the refund requests. The six Permissible Petitioners appealed the Department's denial of the refunds to the Commission. *See* Notice of Appeal in the Administrative Record, Index No. 8 (Bates Nos. 195-273).

The appeals were originally scheduled to be heard by the Commission on July 9, 2007. See Transcript of Commission Meeting, July 9, 2007, in the Administrative Record, Index No. 22 (Bates Nos. 1219-1237). The hearing was continued to August 6, 2007. *See* Transcript of Commission Meeting, August 6, 2007, in the Administrative Record, Index No. 23 (Bates Nos. 1238-1332). Following the August 6, 2007 meeting over which it presided, the Commission upheld the Department's denials of the refunds and issued its final written decision dated October 12, 2007. *See* Commission Decision in the Administrative Record, Index No. 25 (Bates Nos. 1335).

On January 9, 2008, the Permissible Petitioners commenced District Court Case No. 08A554970 (hereinafter "Case 2"). See Complaint filed in District Court Case No. 08A554970. The Case 2 Complaint alleges that the LE Tax, established by Chapter 368A of the Nevada Revised Statutes (hereinafter "NRS"), is an impermissible state tax and requests the refund of LE Tax remitted for the tax periods at issue. The Complaint further alleges that the LE Tax is an unconstitutional infringement by the State of Nevada on constitutionally protected expression. As the remedy, the Complaint seeks: (1) an injunction enjoining the enforcement of the provisions of the LE Tax; (2) a refund of all LE Tax payments which they remitted for

[2] The six Permissible Petitioners include: K-KEL, INC.; OLYMPUS GARDEN, INC.; SHAC, LLC; THE POWER COMPANY, INC.; D. WESTWOOD, INC.; and D.I. FOOD & BEVERAGE OF LAS VEGAS, LLC. The other two Petitioners, DÉJÀ VU SHOWGIRLS OF LAS VEGAS, LLC and LITTLE DARLINGS OF LAS VEGAS, LLC, did not file claims for a refund with the Department pursuant to NRS 368A.260 until after the Commission meetings in 2007.

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January, February, March and April 2004; and (3) a declaration that the LE Tax is unconstitutional.

On or about January 28, 2009, an Amended Complaint was filed in Case 1 in order to add an "as applied" cause of action to the facial challenge to the LE Tax contained in the initial Complaint.

On or about December 19, 2010, an Amended Complaint was filed in Case 2 enlarging the caption to include all eight Petitioners without leave of the Court.[3]

On August 23, 2011, following a motion hearing, the Eighth Judicial District Court, Dept. XI, among other things, dismissed Case 2, granted 30 days for the filing of a Ch. 233B petition for judicial review and denied Petitioners' request to remand the case to the Commission. *See* Court Minutes and Proposed Order attached hereto as Exhibit B.

II. ARGUMENT

A. Petitioners cannot Meet the Requirements of NRS 233B.131(2)

Petitioners have requested leave to present additional evidence to the NTC. NRS 233B.131(2) provides:

> If, before submission to the court, an application is made to the court for leave to present additional evidence, and it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the proceeding before the agency, the court may order that the additional evidence and any rebuttal evidence be taken before the agency upon such conditions as the court determines.

(Emphasis added). The statute requires: (1) that Petitioners show that the additional evidence is material; and, (2) that there were good reasons for failure to present the additional evidence in the proceeding before the agency. *Id.* If Petitioners are able to meet these requirements, this Court "may order that the additional evidence and any rebuttal evidence be taken before the agency . . .." *Id.* (Emphasis added). Thus, remand is within this Court's discretion and is not mandatory.

. . .

[3] This may have been an inadvertent mistake on the part of the Petitioners, since two of the parties listed on the Amended Complaint have never even asked for refunds (Little Darlings of Las Vegas, LLC and Déjà Vu Showgirls of Las Vegas, LLC) and the parties listed in the Amended Complaint list only the original six Case 2 Plaintiffs. *See* Case 2 Amended Complaint, pp. 3-4, paras. 6–11.

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This Court should deny the Petitioners' Application for Leave to Present Additional Evidence to the Nevada Tax Commission and for remand (Application for Leave, p. 10, ll. 13-15) in its entirety because: 1) the new evidence that Petitioners have proffered goes to the same arguments considered by the Commission in 2007 and Petitioners cannot show that the new evidence is material to the outcome of the case; 2) Petitioners have failed to show good reasons for the failure to present the evidence to the Commission in the 2007 proceeding; and 3) another District Court has already denied the Petitioners' request for remand.

As will be shown below, the Administrative Record is more than sufficient for this Court to perform judicial review pursuant to NRS 233B.135.[4] The record will show that the Commission reviewed all of the documents, the briefs and the voluminous case law submitted by both sides, and also gave the parties an additional opportunity to submit more evidence prior to the August 9, 2007 hearing. *See* Tr. July 9, 2007 p. 24, ll. 24-25; p. 25, ll. 1-12; p. 32, ll. 24-25; pp. 33-36 ("Let's just continue it today and they can put together whatever they have to put together, like in the past, they have seven days before the hearing to get it to us, and if you don't have it here, don't submit anything supplement, you're done.") (Bates Nos. 1221-1222; 1230-1233).

On July 9, 2007, the time originally scheduled for the hearing, the Commission stated that they wanted all issues fleshed out during the hearing because they wanted to consider everything while the parties were present so they could ask questions. Tr. July 9, 2007, p. 33 ll. 1-4 (Bates No. 1230). Petitioners' counsel asked if the commissioners wanted the case law, and was told that "[they] want the whole thing." Tr. July 9, 2007, p. 36, ll. 3-6 (Bates No. 1233). Chairman Sheets stated "We'll read whatever you send to us." *Id.* at l. 21 (Bates No.

[4] To perform judicial review, pursuant to NRS 233B.135 the reviewing court makes a determination as to whether the Nevada Tax Commission acted:
(a) In violation of constitutional or statutory provisions;
(b) In excess of the statutory authority of the agency;
(c) Made upon unlawful procedure;
(d) Affected by other error of law;
(e) Clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or
(f) Arbitrary or capricious or characterized by abuse of discretion.

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1233). It is noteworthy that Petitioners didn't request any discovery during the proceedings before the Commission.

The Parties were then given adequate time to submit the documents and, after extensive discussions on the matter and a four week continuance in order to allow the parties to provide all of the additional information that the parties wanted considered, the administrative hearing took place on August 6, 2007. The hearing transcript from August 6, 2007 along with the questions asked by members of the Commission and the deliberations during the open meeting unequivocally show that the Commission read and considered all of the evidence and testimony submitted by the parties.

Accordingly, Petitioners' Application for Leave should be denied in its entirety.

B. <u>There is No Need to Supplement the Record with Additional Evidence because Petitioners cannot Show that the Additional Evidence is Material or that they Weren't given Additional Time to Supplement the Record before the Commission Heard the Matter</u>.

Judicial review of a final decision of an agency must be confined to the record. NRS 233B.135(1)(b). The court performing judicial review is to show deference to the judgment of the agency as to the weight of the evidence with respect to the questions of fact. NRS 233B.135(3). With respect to questions of law, deference should also be shown when the agency's conclusions of law are closely related to the agency's view of the facts. *See Department of Motor Vehicles and Public Safety v. Jones-West Ford, Inc.,* 114 Nev. 766, 772, 962 P.2d 624, 628 (1998) ("the agency's conclusions of law which will necessarily be closely related to the agency's view of the facts, are entitled to deference, and will not be disturbed if they are supported by substantial evidence.").

Notwithstanding, in very limited circumstances, NRS 233B.131(2) provides that the district court *may* order that the additional evidence and any rebuttal evidence be taken before the agency. NRS 233B.131(2) (emphasis added). The determination as to whether to grant or deny a request to remand a matter for the consideration of additional evidence is reviewed for an abuse of discretion. *Garcia v. Scolari's Food and Drug*, 200 P.3d 514, 518 (2009). In order to be successful in a motion pursuant to NRS 233B.131(2) there are two principal

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inquiries. The first is whether the evidence sought to be added is material and the second is whether "good reasons" exist for the failure to present the evidence to the administrative agency. NRS 233B.131(2); *see also Consolidated Municipality of Carson City v. Lepire*, 112 Nev. 363, 365, 914 P.2d 631 (1996) (explaining that NRS 233B.131(2) requires that before a court may consider evidence beyond what was presented to the agency, there must be a showing that the "additional evidence is material and that there were good reasons for failure to present it in the proceeding before the agency."). If both prongs are met, the court "may *then* order that the additional evidence ... be taken before the agency." *Id.* (emphasis added).

Here, Petitioners have made the same arguments in their Application for Leave in October 2011 as they did in July and August of 2007. The Administrative Record, which is being filed concurrently with this Opposition, or shortly thereafter, confirms that nothing has changed, and no new evidence is necessary to perform judicial review of the Commission's findings contained in the final decision.[5] *See* full Administrative Record, Bates Nos. 1 through 1335, to be filed herein and a copy of the Index to the Administrative Record attached hereto as Exhibit "A".[6]

As the record shows, in August 2007, Petitioners argued the same case law, the same constitutional issues, the same legislative history, and the same arguments that the LE Tax is unconstitutional facially and as applied to them. In 2007, Petitioners made the following arguments: 1) The LE Tax singles out first amendment activities for special taxation; 2) The LE Tax targets a narrowly defined group of speakers; 3) The LE Tax singles out facilities

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[5] Contrary to the Petitioners' assertion in their Application for Leave at p. 18, ll. 19-20, this reviewing Court is to determine whether the Commission acted in violation of constitutional or statutory provisions, acted in excess of the statutory authority of the agency, made the determination upon unlawful procedure, made a decision which was affected by other error of law, made a decision that was clearly erroneous in view of the reliable, probative and substantial evidence on the whole record, or acted arbitrary or capricious or characterized by abuse of discretion when it made its determination that the LE Tax was not Unconstitutional either facially or as applied to the Petitioners.

[6] Petitioners claim that based on the acrimonious history of the discovery motions, they "unearth[ed] proverbial smoking guns...." Petitioners' Application for Leave, p. 19, ll. 4-9. Petitioners' statement is nonsense. The discovery issues occurred because the Petitioners wanted the Department to reveal confidential and privileged information regarding non-party taxpayers which is prohibited pursuant to NRS 368A.180 and NRS 49.025. As a compromise, pursuant to a Court Order, Defense counsel prepared a spread sheet showing the general categories and how much tax is paid by each. This is not "smoking gun" discovery, it is not part of the Defendants records, it is an intentionally prepared spreadsheet for litigation purposes.

under 7500 seats for the most burdensome 10% tax on admissions, food, refreshments and merchandise; 4) LE Tax excludes most types of live entertainment so that adult cabarets pay virtually all of the non gaming taxes; 5) LE Tax is content based- the numerous exceptions, which now leave adult cabarets as the near sole non-gaming payee, demonstrate that the purpose of the tax was to burden a specific form of live entertainment of which the legislature disapproved; and, 6) The legislative history demonstrates that it was enacted and amended with the illicit intent to burden adult cabarets. In addition, Petitioners state that it is the State's burden to prove that the tax is necessary to serve a compelling governmental interest that cannot be accomplished without differential taxation. Petitioners' Power Point presentation at p. 37 (Bates No. 786). In summary, Petitioners argued that: 1) The LE Tax unconstitutionally directly taxes the engagement of First Amendment protected activities; 2) the LE Tax targets a narrowly defined group of speakers (gerrymandering), and, 3) The LE Tax is a content based tax.

Four years later, in Petitioners' October 2011 Application for Leave, Petitioners still contend that the LE Tax is unconstitutional "both facially and as applied" (Application for Leave at p. 9, ll. 10-11) and make the same arguments as they did before the Commission: 1) LE Tax unconstitutionally directly taxes the engagement of First Amendment protected activities; 2) the LE Tax targets a narrowly defined group of speakers (gerrymandering), and, 3) the LE Tax is a content based tax. *See* Application for Leave, p. 11, ll. 9-26; p. 12, ll. 1-28; p. 13, ll. 26.

Material evidence has an effect or bearing on the question in issue. Evidence is material if its introduction would be likely to change the outcome. *See* BLACKS LAW DICTIONARY 7th ed., at p. 793 (of such a nature that knowledge of the item would affect a persons decision-making process). Material evidence has "an effective influence or bearing on the question at issue." *Barr v. Dolphin Holding Corp*, 141 NYS 2d 906, 908 (NY 1955). The evidence must be material to the question in controversy. To be material, the evidence "must necessarily enter into the consideration of the controversy and by itself, or in connection with the other evidence, . . .

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be determinative of the case." *Camurati v. Sutton*, 342 S.W.2d 732, 739 (Tenn. 1960). A fact may seem "material" but become immaterial when taken in connection with other facts. *Id.*

Plaintiffs confuse the term materiality with relevance. Plaintiffs state in their Application for Leave that "all of these materials are obviously critically *relevant* to the constitutional issues that will have to be decided by this honorable court..." Plaintiffs' Application for Leave at p. 18, ll. 18-25 (emphasis added). Evidence is relevant if the evidence has any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. NRS 48.015. Nevada Revised Statutes 233B.131(2) does not provide for additional materials because they are *relevant*, only if the additional evidence is *material.* Materiality is a much higher standard then relevance.

> Relevant, as applied to evidence, must be understood as touching upon the issue which the parties have made by their pleadings, so as to assist in getting at the truth of the disputed facts. Evidence is material when it has an effective influence or bearing on the question in issue."

Barr v. Dolphin Holding Corp, 141 NYS.2d 906, 908 (internal quotations omitted).

For example, the Legislative history that the Plaintiffs seek to add to the record is not material to this matter. The testimony of a particular legislator is not material to the facial challenge of the Live Entertainment Tax. "It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." *U.S. v. O'Brian*, 391 U.S. 367, 383, (1968). The Supreme Court went on to say that they may look at statements of legislators for guidance on the purpose of the legislature, but when they are asked to void a statute on the basis of "what fewer than a handful of Congressmen said about it" that is different. *O'Brian*, 391 U.S. at 383-84. The inquiry into "congressional motives or purposes are a hazardous matter." *O'Brian*, 391 U.S. at 383. To "resort to legislative history is only justified where the face of the Act is inescapably ambiguous..." *Garcia v. United States*, 469 U.S. 70 (1984). The Supreme Court has "eschewed reliance on the passing comments of one Member and casual statements from the floor debates." *Garcia*, 469 U.S. at p. 76 (internal cites omitted).

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The Court wisely recognized that what motivates one legislator to make a speech about a statute is not necessarily the same as what motivates scores of others to enact the legislation. *O'Brian*, 391 U.S at 384. Finally, the Court stated that they would not void a statute on the grounds of comments made by individual legislators when the same statute could be reenacted in its exact form "if the same or another legislator made a 'wiser' speech about it." *O'Brian*, 391 U.S at 184; *see also Texas Dep't of Public Safety v. Kreipe*, 29 S.W.3dd 334 (2000) ("the individual legislator's intent is not legislative history controlling the construction to be given a statute."). The Nevada Supreme Court has stated:

> In construing a statute we do not consider the motives or understandings of individual legislators who cast their votes in favor of it. Nor do we carve an exception to this principle simply because the legislator whose motives are proffered actually authored the bill in controversy; no guarantee can issue that those who supported his proposal shared his view of its compass.

A-NLV Cab Co. v. State of Nev., 108 Nev. 92, 95, 825 P.2d 585 (1992).

Thus, the comments from the legislators that the Plaintiffs seek to admit are not material to this matter because none of the comments had an affect on the decision of the Nevada Tax Commission. *See* Decision Letter, Bates Nos. 1333-1334, Conclusions of Law No. 11 ("Statements by legislators with respect to a bill that would have taxed live adult entertainment as a separate class, where the bill did not pass, does not prove the intent of a separate bill that did not select live adult entertainment."). Nevertheless, Plaintiffs continue to argue comments made by legislators taken out of context or comments made during discussions on bills which were never passed show some hidden agenda against gentlemen's clubs. Specifically, Plaintiffs seek to expand the record with transcripts of legislative comments made during discussions on SB 247 and a draft of SB 247—the bill that was *never enacted*.[7] Tr., August 6, 2007, p. 34, ll. 14-15. In addition, this never- enacted bill

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[7] The bill that was passed, A.B. 554, is more streamlined and condensed than S.B. 247. AB 554 is a generally applicable tax, SB 247 was not. *See* Senate Committee on Taxation, June 5, 2004 at p. 45; Tr. August 6, 2007 at pp. 34-35; Defendant's power point at pp. 10-13.

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which the Plaintiffs are attempting to use to expand the record was discussed during the Administrative hearing and considered by the Tax Commission, so there is nothing material here!

The Commission has already heard these arguments and reviewed all the case law, the Commission considered the evidence and the Commission made findings of fact and conclusions of law and a final decision with regard to Petitioners' claims, and this Court can properly conduct a judicial review of the Commission's final decision pursuant to NRS 233B.135 without supplementing the record with additional immaterial evidence.

The following table is based on the transcript of the August 6, 2007 Commission hearing in order to illustrate the depth of the evidence and arguments presented, and the Commission's consideration of Petitioners' arguments. The table references places in the August 6, 2007 hearing transcript where these same arguments were made and the evidence and testimony were considered by the Commission in order to make its determination of the issues. This reference does not include every reference in the transcript, but is provided to show that all Petitioners' arguments were made and all of the evidence provided was considered and discussed. As a result, the Petitioners are not providing anything new through the Application for Leave, but based on the adverse decision, simply want to change strategy in order to get a second bite of the apple.

Plaintiffs same Arguments in 2007 as in the 2011 Motion for Leave	**Plaintiffs Power point, and Case Law**	**Transcript August 6, 2007**	**Defendants response during hearing**
Impermissible for a direct tax on first amendment activities	*Murdock v. Commonwealth of PA.* p. 5 *Minneapolis Star v. Minnesota Commissioner of Revenue* pg 6 *Leathers v. Medlock* pp. 6,7	p. 28, ll. 10–23 p. 56, ll. 21-25 p. 57,ll. 1-25 p. 58, ll. 1-25, pp. 59, ll. 1-2.	p. 33, ll. 6-25 p. 34, ll. 1-11 p. 44, ll. 17-3 p. 45, ll. 17-25 p. 46, ll. 1-17 p. 59, ll. 23-25 p. 60, ll. 1-25 p. 73, ll. 14-25 p. 74, ll. 1-24

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Government may not single out activities protected by the First Amendment for special taxation	*Murdock* p. 8 *Minneapolis Star* p. 9 *Arkansas Writers Project* p. 10 *Clark v. City of Lakewood* p. 10	p. 39, ll. 12-25 p. 40, ll. 1-16 p. 69, ll. 4-12	p. 37, ll. 20-25 p. 38, ll. 1-8, 11-18 p. 61, ll. 3-15
Matter Subject to Strict Scrutiny	*US. v. Lee* p. 11 *Minneapolis Star* p. 11 *Minneapolis Star* p. 12 *Leathers* p. 25	p. 16, ll. 6-18	p. 7, ll. 2-10 p. 29, ll. 22-25 p. 30, ll. 1-25 p. 33, ll. 1-25
Gerrymandering and Exemptions to Live Entertainment Tax	*Arkansas Writers Project* p. 13 *Leathers v. Murdock* p. 13 *City of Ladue v. Gilleo* p. 14 Church of Lukimi v. *Hialeah* p. 14 *U.S. v. Eichman* p. 14	p. 12, ll. 8-13, pp. 15-16 pp. 17-20 p. 17, ll. 15-25 p. 18, ll. 1-25 p. 19, ll. 1-25 p. 20, ll. 1-25 p. 21, ll. 1-9 p. 56, ll. 10-12 p. 75, ll. 13 -25 p. 76, ll. 1-22 p. 17, ll. 6-9 pp. 10-14	p. 35, ll. 19-25 p. 36, ll. 1-25 p. 37, ll. 1-14 p. 38, ll. 19-24 p. 44, ll. 24-25 p. 45, ll. 1-16 p. 71, ll. 2-25 p. 72, ll. 1-22 p. 79, l. 25 p. 80, ll. 1-11 p. 83, ll. 7-13
Legislative history	pp. 21- 22	p. 21, ll. 1-21 p. 22, ll. 1-25 p. 31, ll. 6-7	p. 34, ll. 12-25 p. 35, ll. 1-18 p. 76, ll. 24-25 p. 77, ll. 1-18
Content based (Exclusions)	p. 23 p. 24 *Leathers v. Medlock* pp. 25, 27 *Jimmy Swaggart* p. 25 *Minneapolis Star* p. 26 *Arkansas Writers Project* p. 26	p. 23, ll. 1-25 p. 24, ll. 1-25 p. 24, ll. 1-14 p. 27, ll. 19-25 p. 28, ll. 1-3 p. 41, ll. 2-25 p. 42, ll. 1-19 p. 85, ll. 2-25	p. 37, ll. 15-23 p. 89, ll. 18-25 p. 90, ll. 1-25 p. 91, ll. 1-4
Major U.S. Supreme Court First Amendment tax cases	*Grosjean* *Murdock* *Minneapolis Star* p. 35 *Arkansas writer project* *Jimmy Swaggart* *Leathers* p. 36	p. 13, ll. 8-25 p. 14, ll. 1-25 p. 15, ll. 1-25 p. 16, ll. 1-5 p. 25, ll. 21-25 p. 26, ll. 1-25 p. 27, ll. 1-24	

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Respondents agree that no discovery was performed prior to the Commission hearings. In fact, Petitioners never requested the Commission to allow discovery and didn't pursue any discovery until more than two and one-half (2-1/2) years after the Petitioners filed the Case 1 Complaint in District Court. Moreover, the Petitioners neglect to state that it was their tactical decision not to conduct discovery. In their Application for Leave, Petitioners state that they "placed *only a limited constitutional challenge* before the administrative Tribunal." *Application for Leave* at p. 9, l. 20 (emphasis added). Respondents do not agree that Petitioners presented a "limited challenge" since the arguments in 2007 are the same as in 2011. Furthermore, the October 2011 Application for Leave is the first time that the Petitioners used the term "limited constitutional challenge." If Petitioners' Constitutional challenge was only a "limited" one, it was the Petitioners' strategy to argue their case in that manner. Petitioners additionally claim that they provided legislative history stating "we submitted some legislative history showing the tailoring of this directly to our clients." Tr. July 9, 2007, p. 31, ll. 6-7 (Bates No. 1228).

Petitioners' July 20, 2007 letter to the Commission containing the supplemental materials states "[t]hese document packets include additional materials that the Taxpayers believe are necessary for the Commissioners to have a *full* understanding of these proceedings...." *See* Administrative Record Bates Nos. 747-749 (emphasis added). The Petitioners then highlighted portions of the supplemental materials in places that they believe "warrant[ed] particular attention by the Commissioners" and placed tabs on top of each page highlighted. *Id.* Petitioners also produced a power point presentation to dispute the power point presentation and case law produced by the Department at the prior Commission Hearing on July 9, 2007. *See* Administrative Record, Bates Nos. 750-787.

Petitioners included an explanation of the supplemental materials which consisted of: 1) "various legal decisions that have ruled upon (or discussed) the constitutionality of taxes that are applied to First Amendment protected activities...that discuss the inability to tax First Amendment Rights;" 2) "Supreme Court cases that discuss how neutral laws can be gerrymandered in such a fashion as to demonstrate that they are actually directed at First

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Amendment Activity, and are therefore subject to strict constitutional scrutiny;" 3) cases cited by the Department highlighted to "demonstrate why they are not applicable to the circumstances at issue here;" 4) various Nevada statutes, proposed legislation, excerpts of certain legislative history, portions of the Department's annual reports for the last two years, amendments to the statute, adopted regulations, proposal for a specific tax that was not enacted along with other amendments that were enacted "to demonstrate the targeting of this tax to adult cabarets; and 5) a specimen copy of a request for refund along with all of the various denials issued by the Department. The supplemental materials produced by the Petitioners consist of 568 pages.

A review of the materials provided to the Commission by Petitioners in 2007 in preparation for the administrative hearing show that Petitioners never planned a "limited constitutional challenge," as they now claim, and in fact planned and argued full facial and as applied constitutional challenges to the Commission.

In 2007, the Petitioners made tactical choices as to what they were going to provide to the Commission. The parties were given a second chance to supplement the record and additional time in the form of a hearing continuance in order to supplement the record. After receiving the supplemental materials, the Commission performed its job by considering the entire record and rendering a final decision.

As shown, Petitioners' exhibits to their Application for Leave are not material to the outcome of the case and Petitioners have no good reasons to expand the record.

C. Petitioners have not Presented a Single Good Reason which would Allow them to Supplement the Record.

Petitioners generally allege that they were confused by case law and led to believe that they would have a trial de novo in district court rather than a judicial review. Again, Petitioners state that they have unearthed the proverbial smoking gun through extensive judicial proceedings. *Application for Leave*, p. 19, l. 6. The alleged booty of the odyssey is said to include additional legislative history and the amounts paid by different categories of LE Tax taxpayers.

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Provided Petitioners actually requested legislative history from the Nevada Legislature, they should have at that time received what was later provided by the Case 1 Defendants through discovery; the Case 1 Defendants produced what was available to them from the Legislature. It appears however that Petitioners are alleging that the Department did not attach all of the legislative history to its briefs filed with the Commission. There simply was no requirement for the Department to provide all of the legislative history especially when the Department argued that comments of individual legislators are not relevant. See Department's Power Point presentation at p. 8 (Bates No. 400). *A-NLV Cab Co. v. State of Nev.*, 108 Nev. 92, 825 P.2d 585 (1992) Because anybody can request legislative history at any time, as evidenced by Petitioners own alleged request prior to discovery, and because comments of legislators are not relevant, as set forth above, the alleged smoking gun must be the amounts paid by the various categories of LE Tax taxpayers.

The spreadsheet of amounts paid by the different categories of taxpayers is nothing more than a break down of information that was reviewed by the Commission at the hearing in 2007. The Commission reviewed information indicating that the strip clubs remitted a greater portion of the approximately $9 million collected by the Department in 2006 and the same amount of the approximately $117 million total LE Tax collected by both the Department and the Gaming Control Board in 2006. *See* Department's Power Point Presentation, Administrative Record, Index No. 17 (Bates Nos. 393-415). The information showed that the non-gaming collections collected by the Department amounted to about 7.4% of the total LE Tax collected and that Petitioners remitted a portion of the 7.4%. *Id.* Petitioners did not request the categorical break down of the 7.4% (the spoils of the odyssey) prior to, or during, the hearing before the Commission. Therefore, there is no good reason for not having presented it to the Commission.

Moreover, had such information been presented to the Commission it wouldn't have made a difference because it is not material as established above. It is merely a break down of information that was presented to, and considered by, the Commission. Contrary to Petitioners attempts to drag this out, the information regarding the different categories actually

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supports the Respondents' position that the tax is a generally applicable tax with exceptions and exceptions are properly a product of the Legislature's broad discretion with regard to reaching an equitable distribution of the tax burden. *See generally, Madden v. Kentucky*, 309 U.S. 83, 87-88, 60 S.Ct. 406, 408 (1940).

Petitioners alleged reasons for not presenting the information regarding the different categories of taxpayers to the Commission do not constitute the requisite "good reasons" for supplementing the record. NRS 233B.131(2).

1. Contrary to Petitioners Assertions, at the Time Petitioners were Developing their Litigation Strategies, Nevada precedent actually set forth that the Commission was the Appropriate Body to Decide Petitioners' Constitutional Claims

Petitioners actually cite the case that establishes that the Commission properly decided the constitutional issues. In *Malecon Tobacco, LLC v. Dep't of Taxation,* 118 Nev. 837, 840-841 (2002), the Nevada Supreme Court stated that the administrative body is the proper body to decide constitutional issues involving factual determinations because it can "utilize its specialized skill and knowledge to inquire into the facts of the case." In fact, not allowing the administrative body to make factual determinations would "usurp" the administrative body's role as well as "contravene the Supreme Court's directive to give deference to an agency's reasonable interpretation of the law and facts at issue." *Id.* at p. 841, n. 15.

Through its decisions in *Malecon* and *Scotsman*, the Nevada Supreme Court explained that facial constitutional challenges can go directly to district court without exhausting administrative remedies and that "as applied" challenges requiring factual determinations must first be decided by the regulatory body. 118 Nev. 837 (2002); 109 Nev. 252 (1993). In this case, the Permissible Petitioners, i.e. the petitioners of record,[8] presented both the facial and "as applied" challenges to the Commission. See Refund Claims, Notice of Appeal, briefing by the Permissible Petitioners before the Commission as well as their Power Point Presentation and the Transcripts of the Commission meetings all contained in the Administrative Record, Index Nos. 1, 2, 4, 6, 8, 15, 19, 20, 22 and 23 (Bates Nos. 1-1332). In

[8] The Respondents will be filing a motion to dismiss Déjà vu and Little Darlings as they are not parties to the administrative record and pursuant to NRS 233B.130 and NRS 233B.135 cannot be parties to this proceeding.

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addition, Petitioners have the facial challenge pending in Case 1 before Judge Gonzales in Department XI. Moreover, if this Court disagrees with the Commission's decision on the facial challenge it can reverse the decision, provided the issue has not already been decided in Department XI. NRS 233B.135.

Petitioners cite to *Thunder Basin Coal Co. v. Reich,* 510 U.S. 200, 114 S.Ct. 771 (1994) and *Califano v. Sanders,* 430 U.S. 99, 97 S.Ct. 980 (1977) in support of their argument that administrative bodies are not the appropriate bodies to decide constitutional issues. In *Califano,* the Court determined that the cases discussing the propriety of constitutional determinations through administrative hearings were not relevant to the matter they were deciding and therefore any comments are *dicta*. In *Thunder Basin Coal*, the Court, while discussing the rule regarding adjudication of the constitutionality of congressional enactments by administrative agencies, stated that the "rule is not mandatory, however, and is perhaps of less consequence where, as here, the reviewing body is not the agency itself but an independent commission established exclusively to adjudicate Mine Act disputes." 510 U.S. 200, 215, 114 S.Ct. 771, 780. Moreover, the *Thunder Basin Coal Co.* case was cited by the Nevada Supreme Court in the *Malecon* decision as authority for the recognition that under federal administrative procedures the adjudication of the constitutionality of congressional enactments has been thought to be beyond the jurisdiction of administrative agencies. 118 Nev. 837, 840, n.9 Yet, the Nevada Supreme Court still stated that the Department of Taxation was the proper body to decide constitutional issues involving factual determinations and did not want to "usurp the Department's role." *Id.* at 841 and n. 15. Apparently the Nevada Supreme Court agrees with the Nevada Legislature that the Department and Commission can decide constitutional issues. *Id.; see also* NRS 368A.200(5)(a) (stating that the Department cannot impose the LE Tax on "[l]ive entertainment that this State is prohibited from taxing under the Constitution, laws or treaties of the United States or the Nevada Constitution").

Based on the Nevada Supreme Court precedent, Petitioners were aware that the Commission was the appropriate body to decide the "as applied" challenge and they should

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have made the most of the hearing before the Commission. They also knew that by presenting the facial challenge to the Commission that the decision regarding the facial challenge would be reviewed pursuant to NRS 233B.135 and that the District Court could reverse or affirm the final decision of the Commission.

Therefore, the allegation that the Commission was not the proper tribunal to decide the constitutional issues does not constitute a "good reason" for not presenting the limited additional information to the Commission and is not a basis to supplement the record.

2. The Nevada Supreme Court Decided the *Campbell* case in 1992 and therefore Precedent at the Time of the Hearing before the Commission did not Show that Petitioners were Entitled to a Trial de novo. Moreover, statutory changes in 1999 caused the meaning of "action" contained in NRS 372.680 to mean that NRS 368A.290 provided Petitioners a petition for judicial review pursuant to Chapter 233B of the NRS.

a. In the *Campbell* decision, the Nevada Supreme Court held that trial de novo would not follow an administrative hearing.

In *Campbell v. Department of Taxation,* 108 Nev. 215, 217-219 (1992), the Nevada Supreme Court allowed the case to proceed as a petition for judicial review after summary judgment had been granted in favor of the Department based on application of administrative res judicata; administrative res judicata barred a judicial evidentiary hearing in district court. The Court noted that the three elements of administrative res judicata had been shown and stated, "while reaffirming the doctrine of administrative res judicata as pronounced in *Britton,* we conclude that the unique circumstances involved here justify a result different from that in *Britton." Id.* at 218. The Court went on to essentially explain that it believed the Campbells had been sandbagged into pursuing their administrative remedies and further sandbagged into paying the tax assessment by relying on a letter from the Attorney General's Office advising them to pay the tax to stop the accrual of further interest. *Id.* at 219. The Court determined that having paid the tax "the Campbells were left without means, under the Administrative Procedure Act, to reclaim the taxes they believed to be improperly collected." *Id.*

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The Court agreed that by application of administrative res judicata, the Campbells did not have a right to a second evidentiary hearing. *Id.* This however would have left the Campbells without district court review as a result of relying on direction from the Department. *Id.* at 218-219. In addition, the Campbells had apparently commenced the district court action within the time period provided in NRS 372.680. *Id.* at 217-218. Considering that the Court had noted the unique circumstances of the case, the Court presumably felt it was fair to allow the matter to proceed as a petition for judicial review. *Id.* at 219.

If the *Campbell* case says anything, it explains that administrative proceedings and a final decision from the Commission result in application of administrative res judicata which means there will be no evidentiary hearing in district court. 108 Nev. 217-219. Even if Petitioners argue that it appeared that trial de novo and judicial review were alternative remedies, the *Campbell* case instructed that exhausting administrative remedies leads to a petition for judicial review because trial de novo is barred by application of administrative res judicata.

Petitioners cite to *Saveway Super Serv. Stations, Inc. v. Cafferatta,* 104 Nev. 402 (1988) in support of their position that case law led them to believe that they were entitled to trial de novo. First, *Saveway* was decided before the statutory changes referenced in *Southern California Edison* were made (the changes were made in 1989 and 1999). Second, the statute at issue in *Saveway*, NRS 365.460, required the taxpayer to sue the state treasurer, a third party (the state treasurer would not have been a party to the administrative record). *Id.* at p. 403-404. Petitioners also cite to *Sparks Nugget, Inc. v. Dep't of Taxation,* 124 Nev. 159 (2008) with the belief that it to supports their position. The procedural posture of the case was not an issue that was raised in *Sparks Nugget, Inc.* and therefore the case is not precedent with regard to whether final decisions of the Commission regarding refund claims proceed as petitions for judicial review (the parties stipulated to facts and filed cross-motions for summary judgment). *Id.* at p. 162.

By commencing Case 1 and Case 2, Petitioners chose to try it both ways. Case 1 is said to be the path which is the exception to the requirement to exhaust administrative

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remedies. This path is limited to "facial" constitutional challenges and may include some "as applied" challenges which require no factual determinations. *See Malecon Tobacco, LLC v. Dep't of Taxation*, 118 Nev. 837, 840-842, 59 P.3d 474 (2002) (stating that "facial" challenges proceed directly to district court and "as applied" challenges require exhaustion of administrative remedies); *see also Scotsman*, 109 Nev. 252, 253-256 (allowing Scotsman to request a refund in district court without having requested administrative refunds because the Nevada Supreme Court had previously determined application of the tax to be unconstitutional in *Scotsman Mfg. Co., Inc. v. State,* 107 Nev. 127, 129 (1991) (hereinafter "*Scotsman I*")). Case 1 is currently proceeding as a facial challenge in Department XI.

Case 2 is the administrative remedies path which led to this petition for judicial review. Petitioners had notice that judicial review followed a final decision from the Commission and should have made the most of the hearing in 2007 because the case is proceeding, if at all, as a petition for judicial review.

b. In *Southern California Edison* the Nevada Supreme Court clarified existing precedent and explained how statutory changes made during the 1999 Legislative Session caused the meaning of "action" as used in NRS 372.680 to mean petition for judicial review.

In *Southern California Edison v. First Judicial Dist. Court of Nevada,* 127 Nev.Adv.Op. 22 (2011), the Nevada Supreme Court clarified that the remedy following a final decision from the Commission on a tax refund matter is a petition for judicial review. The *Southern California Edison* decision clarified that the "action" a taxpayer may bring against the Department pursuant to NRS 372.680 ("an action against the Department on the grounds set forth in the claim") is a petition for judicial review pursuant to NRS 233B.130. *Id.* at pp. 234-237. Because NRS 368A.290 uses the same language as NRS 372.680 ("an action against the Department on the grounds set forth in the claim"), the "action" a taxpayer may bring pursuant to NRS 368A.290 is also a petition for judicial review and not a trial de novo. *Nevada Attorney for Injured Workers v. Nev. Self-Insurers Ass'n,* 225 P.3d 1265, 1271 (Nev. 2010) ("Whenever possible, we interpret 'statutes within a statutory scheme harmoniously with one another to avoid an unreasonable or absurd result.' (citation omitted). We presume

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that the Legislature enacted the statute 'with full knowledge of existing statutes relating to the same subject.'").

The Nevada Supreme Court allowed the *Southern California Edison* case to proceed as a trial de novo only because they found a basis to apply judicial estoppel. The Court stated, "the APA and general tax statutes were subsequently amended in a manner demonstrating that judicial review under the APA is now the exclusive means of proceeding with a refund claim." *Southern California Edison v. First Judicial Dist. Court of the State of Nev.,* 127 Nev. Adv. Op. 22, 1 (2011). The *Southern California Edison* case was the exception because of judicial estoppel.

In *Southern California Edison,* the Court further explained that the changes to NRS 372.680 and Ch. 233B of the NRS made it clear that the Legislature intended for the "action against the Department on the grounds set forth in the claim," provided for in NRS 372.680, to be solely a petition for judicial review of the NTC's final decisions. *Id.* at 6. The Court noted a memorandum prepared by the Attorney General's Office for the Assembly Judiciary Committee Chairman regarding S.B. 362 during the 1999 Legislative Session and quoted the following:

> Prior to S.B. 362, refund claims had not been subject to the requirements of chapter 233B of the Nevada Revised Statutes . . .. In the event that S.B. 362 becomes law, . . . after a Tax Commission decision, the taxpayer may file a petition with a district court in a judicial review proceeding. It is this filing of a petition for judicial review which is the subject of the venue provisions in S.B. 362. Thus, S.B. 362 contemplates a change from past practice where refund claims upon passage of S.B. 362 will now be subject to the requirements of Chapter 233B of the Nevada Revised Statutes.

Southern California Edison, 127 Nev. Adv. Op. 22, 5 (2011) (quoting Memorandum dated May 7, 1999, to Assemblyman Bernie Anderson, Chairman, Assembly Committee on Judiciary, from Norm Azevedo, Senior Deputy Attorney General). This particular portion of S.B. 362 was effective July 1, 2000. S.B. 362, Sect. 54(3).

Plaintiffs did not commence Case 1 or Case 2 prior to July 1, 2000 and the statutory change is not being applied retroactively. Even if the statutes were being applied

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retroactively, it would be acceptable because the statutes have to do with remedies and procedures and not substantive rights. *See Madera v. State Indus. Ins. Sys.*, 114 Nev. 253, 956 P.2d 117 (1998) (stating that the presumption of prospective application of statutes does not apply when the statute addresses only remedies); see also *Friel v. Cessna Aircraft Co.*, 751 F.2d 1037, 1039 (9th Cir.1985) ("when a statute is addressed to remedies or procedures and does not otherwise alter substantive rights, it will be applied to pending cases"). Nevada's approach mirrors the general rule, which is that statutes addressing remedies or procedures are applied to pending cases. *Madera,* 114 Nev. at 257-258 (determining that the statute at issue affected only remedies because it supplanted a common-law tort remedy with an administrative remedy).

The Nevada Supreme Court stated it was taking "the opportunity to *clarify* the proper procedure when a taxpayer challenges a Commission decision in a refund action." *Southern California Edison,* 127 Nev.Adv.Op., 3 (emphasis added). The Court simply clarified that final decisions of the Commission regarding tax refunds must proceed as petitions for judicial review. This is what the Legislature intended when it made the changes to the statutes and therefore this is what the law has been since at least 1999. Furthermore, the *Campbell* case, decided in 1992, held that administrative res judicata will bar a judicial evidentiary hearing/trial de novo in district court. 108 Nev. 215, 219 (1992). Since the Nevada Supreme Court had stated that a taxpayer could not seek trial de novo after exhausting administrative remedies, the case law on this issue really hasn't changed since 1992 though it has been clarified. Therefore, the *Southern California Edison* decision did not pronounce a new rule of law and Petitioners have not been prejudiced by the granting of a judicial review and there is no basis to supplement the record or remand the matter.

3. The Taxpayer's Bill of Rights Does not Support Petitioners' Position or Mandate a Remedy other than Judicial Review.

Contrary to Petitioners' assertions, NRS 360.291, the Taxpayer's Bill of Rights, does not mandate an outcome different from that ordered by Judge Gonzalez. Petitioners cite to the Taxpayer's Bill of Rights and argue that NRS 368A.290 must be construed in their favor

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because it is of doubtful validity or effect. *Application for Leave to Amend*, p. 22, ll. 6-15. They apparently argue that because of existing case law NRS 368A.290 is of doubtful validity or effect. As has been established, prior case law either predated the statutory changes referenced in *Southern California Edison* or didn't address the issue. In addition, when it enacted NRS 368A.290, the Legislature was aware of the meaning of the similar language used in NRS 372.680 and therefore, by using the same language, intended NRS 368A.290 to have the same meaning, i.e. provide for a petition for judicial review. Therefore, the basis for Petitioners' argument that NRS 368A.290 is of doubtful validity or effect and must be construed in their favor is faulty and the argument must fail as it did in Department XI.

4. NRS 368A.290 does not Provide for a Trial de Novo

As established above, the Legislature had changed the meaning of NRS 372.680 by statutory changes made during the 1989 and 1999 legislative sessions. NRS 368A.290 was enacted in 2003. Because NRS 368A.290 was enacted after the meaning of the language used in NRS 372.680 was changed, it is presumed that NRS 368A.290 adopted the meaning of the borrowed language subsequent to the final changes in 1999. *Beazer Homes Nev., Inc. v. Eighth Judicial Dist. Court ex rel. County of Clark*, 120 Nev. 575, 580-581, 97 P.3d 1132, 1135-1136 (Nev. 2004) (stating, "[w]hen a legislature adopts language that has a particular [ ] meaning or history, rules of statutory construction also indicate that a court may presume that the legislature intended the language to have meaning consistent with previous interpretations of the language); *see also Nevada Attorney for Injured Workers v. Nev. Self-Insurers Ass'n,* 225 P.3d 1265, 1271 (Nev. 2010) ("Whenever possible, we interpret 'statutes within a statutory scheme harmoniously with one another to avoid an unreasonable or absurd result.'" (citation omitted). Therefore, NRS 368A.290 provides for a petition for judicial review. *Southern California Edison,* 255 P.3d 231, 237 (2011).

Petitioners also argue that naming as respondents the agency and all parties of record to the administrative proceeding in accordance with NRS 233B.130(2) is not that same thing as bringing an action against the Department pursuant to NRS 368A.290. To the contrary, it's brought against the Department as the Department is the respondent and not the petitioner.

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5. Petitioners' Specific Versus General Argument is Misplaced.

Petitioners' specific versus general argument is misplaced. The "action" language used in NRS 368A.290 had, upon its adoption in 2003, the meaning that NRS 372.680 has had since the last legislative changes were made in 1999. According to *Southern California Edison*, NRS 372.680 has provided for a petition for judicial review since 1999. *See Southern California Edison,* 255 P.3d 231, 237 (2011). Petitioners simply should have made the most of the NTC meeting over four years ago.

Plaintiffs argue that NRS 368A.290 is a specific statute and therefore must prevail over the general statute. In *Southern California Edison* the Nevada Supreme Court held that the "action against the Department on the grounds set forth in the claim" provided for in NRS 372.680 can only be a petition for judicial review. *Southern California Edison,* 255 P.3d 231, 237 (2011). Because NRS 368A.290 is identical to NRS 372.680, the "action against the Department on the grounds set forth in the claim" provided for in NRS 368A.290 has to likewise be a petition for judicial review. The statutes not only use the same language, they also require a final decision from the Commission before seeking review from the district courts. The cannons of construction noted in Beazer and *Injured* Workers and cited in section 4 above, apply here as well. The similar statutory language is telling of the Legislature's intent and the Legislature clearly intended for NRS 368A.290 to provide for a petition for judicial review.

Moreover, statutes are to be read as a whole and harmoniously. Chapter 372 (sales and use tax) of the NRS and Chapter 368A (LET) of the NRS are both in Title 32 of the NRS.

Here, Petitioners argument would lead to the result that sales and use tax refunds must proceed as petitions for judicial review whereas LET refunds would proceed as trials de novo. This is an absurd result and statutes are to be read to avoid absurd results. *Speer v. State,* 116 Nev. 677, 679 (2000).

NRS 368A.290 was enacted in 2003 and it uses the same language contained in NRS 372.680 which was last amended in 1999. It is presumed that the language borrowed from NRS 372.680 and contained in NRS 368A.290 has the same meaning as *Southern California*

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Edison decision says it has. Here, Plaintiffs' argument is misplaced as statutory construction principles dictate that the Legislature intended NRS 368A.290 to have the same meaning as NRS 372.680. *See Nevada Attorney for Injured Workers*, 225 P.3d at 1271 ("Whenever possible, we interpret 'statutes within a statutory scheme harmoniously with one another to avoid an unreasonable or absurd result.' (citation omitted). We presume that the Legislature enacted the statute 'with full knowledge of existing statutes relating to the same subject.'").

6. In the federal proceedings, Respondents argued that NRS 368A.290 provided a plain, speedy and efficient remedy for purposes of the Tax Injunction Act.

The crux of the argument before the federal courts was that NRS 368A.290 provides for review of all issues presented to the Commission by Petitioners. Pursuant to NRS 233B.135, all issues argued before the Commission are reviewed by the district courts. Contrary to Petitioner's assertions, Respondents arguments before the federal courts included references to Ch. 233B of the NRS and judicial review, as will be shown below, as well as references to the *Scotsman* case.

The *Scotsman* case does support the proposition that declaratory relief is available. Respondents argued the same in the federal court proceedings in opposition to Petitioners arguments that NRS 368A.380(1), the anti-injunction statute, would prohibit any challenge to the tax whatsoever. The *Scotsman* decision was followed by the *Malecon* decision which further explained that facial challenges go directly to the district courts while "as applied" challenges go to the agency first for factual determinations. 118 Nev. 837, 841. So, there is declaratory relief pursuant to *Scotsman* and *Malecon* but, because factual determinations must first be made by the regulatory body, there can be no trial de novo in an "as applied" challenge wherein factual determinations are made or need to be made.

Given that Petitioners, as the Case 1 Plaintiffs, later amended the Case 1 complaint to include an "as applied" challenge, Petitioners (the Case 1 Plaintiffs) must have originally filed a "facial" challenge for declaratory relief which is allowed pursuant to *Scotsman* and *Malecon.* Presumably, Petitioners were contemplating a facial challenge following the federal

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proceedings and at the time of the filing of the Case 1 complaint or they understood the case law to say what is explained directly above and acted in accordance therewith.

In this case, Petitioners pursued administrative remedies raising a facial, as well as an "as applied," challenge and the Commission made findings of fact. *See* Final Decision of Commission contained in the Administrative Record, Index No. 24 (Bates Nos. 1333-1334). Having commenced the facial challenge in district court, it's unclear as to why the Permissible Petitioners also raised the facial challenge in the administrative proceedings. Regardless, Petitioners are now requesting that the administrative record be supplemented with additional facts. If Petitioners hadn't made an "as applied" challenge before the Department and the Commission, they wouldn't be requesting that the record be supplemented with additional facts because they wouldn't need them. Thus, there should be no doubt that Petitioners raised an as "as applied" challenge before the Department and the Commission. Pursuant to *Malecon*, "as applied" challenges requiring factual determinations must first go to the regulatory body. 118 Nev. 837, 841. *Malecon* is a published decision that was available to Petitioners when they were developing their litigation strategies. The facts evidence that Petitioners knew that the "as applied" challenge had to go through the administrative process and therefore they should have known to make the most of the administrative hearing before the Commission.

It is hard to imagine that Petitioners were mislead when Respondents argued "if Appellants are right in their contention that the administrative remedy [i.e. a petition for judicial review] is somehow futile" *Scotsman* provides for declaratory relief – which it does if the remedy is futile and depending on whether you are bringing a facial challenge or an as applied challenge requiring factual determinations. *Malecon,* 118 Nev. 837, 841.

Plaintiffs point to Defendants' reply brief filed in the United States District Court, District of Nevada in which the Department is said to have stated that *State v. Scotsman Mfg. Co. Inc.,* 109 Nev. 252, 849 P.2d 317 (1993) "[w]ould support the proposition that declaratory relief is available notwithstanding NRS 358A.290(1)." *Application for Leave to Amend*, p. 25, l. 22 through p. 26, l. 2. In response to Plaintiffs' argument that NRS 368A.280(1), the anti

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injunction statute, barred any judicial remedy whatsoever, the Defendants in that case, i.e. Respondents, argued that *Scotsman* would support the proposition that declaratory relief is available notwithstanding NRS 368A.280(1). Following its decision in *Scotsman,* the Nevada Supreme Court decided *Malecon Tobacco, LLC v. Dep't of Taxation*, 118 Nev. 837, 840-842, 59 P.3d 474 (2002) which clearly states that facial challenges can proceed directly to district court without exhausting administrative remedies. The Court further clarified, however, that "as applied" constitutional challenges involving factual determinations require exhaustion of administrative remedies and affirmed the dismissal of the complaint for failure to exhaust administrative remedies. *Id.*

In *Scotsman,* the Court noted that the time for administratively requesting refunds had passed and that exhausting administrative remedies would be futile. 109 Nev. 252, 255-256. It is important to note that in *Scotsman,* the Nevada Supreme Court had already declared the application of the tax unconstitutional (*Scotsman I)* and remanded the case to the district court for entry of summary judgment in favor of Scotsman. *Id.* at 253-254. Scotsman was requesting refunds post-remand, i.e. after the declaration that the tax was unconstitutional, which is why exhaustion would have been futile. *Id.* The Court then stated, "under the circumstances," Scotsman could request and obtain a refund without having submitted administrative requests for refunds. *Id.* The circumstances were different in *Scotsman,* the Nevada Supreme Court had already declared the application of the tax unconstitutional in the prior case. In the case at hand, Petitioners could not argue that exhaustion was futile when they were before the federal courts because they still had time to request refunds administratively and the Commission had never issued a decision regarding the constitutionality of the LE Tax. In addition, following the administrative hearing factual determinations were made by the Commission.

Further, in *Scotsman Mfg. Co., Inc. v. State,* 107 Nev. 127, 129 (1991) ("*Scotsman I*"), Scotsman initiated a suit for declaratory relief in district court after first appealing the Department's decision to the Commission and being denied relief by the Commission. Though Scotsman had not submitted refund requests, Scotsman had appealed the

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Department's decision regarding application of the tax to the Commission before seeking relief in district court. *Id.* In addition, this case was decided before the 1999 changes were made to NRS 372.680 and before the *Campbell* case was decided in 1992 which clarified that a final decision from the Commission will bar a judicial evidentiary hearing via application of administrative res judicata. 108 Nev. 215, 217-219 (1992). Moreover, it appears the issue was a question of law, i.e. whether the "constituent part" analysis or "legal incident" analysis should have been applied, requiring no factual determinations. 107 Nev. at 133-134. The district court had decided, as a matter of law, that Scotsman was required to collect and remit sales tax on the transactions. *Id.* at 129. Pursuant to the rules set forth in *Malecon,* the *Scotsman I* declaratory relief action may have been allowed to proceed in district court because no factual determinations were necessary.

Because *Malecon* was decided after *Scotsman,* to the extent that it is different, *Malecon* limits the declaratory relief that is available without exhaustion of administrative remedies to facial challenges and some "as applied" challenges not requiring factual determinations. 118 Nev. 837, 840-842. Noting that the decision in *Scotsman* turned on special circumstances causing exhaustion to be futile, it appears the two decisions may be otherwise consistent.

Moreover, it is important to keep in mind what the Respondents had to show before the federal courts for purposes of the Tax Injunction Act. The Respondents had to show that there was a plain, speedy and efficiency remedy. *National Private Truck Council, Inc. v. Okla. Tax Com'n,* 515 U.S. 582, 586 (1995). The Respondents did not have to show that the remedy provided for by NRS 368A.290 was the best remedy, or even that it was equivalent to a remedy that may have been available in federal court. *Ashton v. Cory,* 780 F.2d 816, 820 (9th Cir. 1986). Essentially, Respondents had to show that Petitioners' issues would receive subsequent review by the district court and thereafter the Nevada Supreme Court. *California v. Grace Brethren Church,* 457 U.S. 393, 417 (1982) (stating, "because the appellees could seek a refund of their state unemployment insurance taxes, and thereby obtain state judicial

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review of their constitutional claims, we hold that their remedy under state law was "plain, speedy and efficient" within the meaning of the Tax Injunction Act . . .").

Respondents did so in the same brief mentioned above by arguing:

> As discussed at length in the moving papers, the provisions of NRS 368A.250-.320 afford taxpayers the opportunity to raise the constitutionality of the live entertainment tax in the context of a request for a refund in an administrative proceeding. That procedure is subject to judicial review. On judicial review, a district court may set aside the agency decision if it violates constitutional or statutory provisions. NRS 233B.135(3)(a). In the event of an adverse decision in district court, the taxpayer has a right to appeal to the Nevada Supreme Court. Nev. Const., art. 6, § 4, and NRS 233B.150. At that level, a taxpayer will get a declaration by an appellate court with regard to the Constitutionality of the tax, one way or another.

Defendant's Reply to Plaintiffs' Opposition to Motion to Dismiss (filed in the United States District Court, District of Nevada), p. 4, ll. 21-26 (emphasis added). Before the 9th Circuit Court of Appeals, Respondents argued that "[e]ven if NRS 368A.280(1) were construed to prohibit every remedy other than the refund procedures allowed under Nev. Rev. Stat. §§ 368A.250 – 368A.320, the refund procedures are efficient. There is no requirement that taxpayers be afforded more than that." Appellee's Answering Brief at 13, Déjà vu Showgirls, et al. v. Nevada Department of Taxation, et al., No. 06-16634 (9th Cir. Jan. 8, 2007). Respondents then cited to *California v. Grace Brethren Church,* 457 U.S. 393, 417, 102 S.Ct. 2498, 2512, 2513 (1982), wherein the U.S. Supreme court explained that a state law remedy allowing a taxpayer to seek a refund and obtain judicial review was an adequate remedy for purposes of the Tax Injunction Act. *Id.*

By raising the constitutionality of the LE Tax in the context of a request for refund in an administrative proceeding, the issue is part of the administrative record and the final administrative decision regarding the issue is reviewed pursuant to NRS 233B.135. Hence, by arguing the constitutional issues in the administrative proceedings they will necessarily be reviewed by the District Courts and the Nevada Supreme Court. *Id.* Had *Southern California Edison* been decided prior to the dismissal of the federal court proceedings, Respondents would have argued that *Southern California Edison* allows for a petition for judicial review,

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which is essentially what the Respondents argued, and the federal court proceedings would still have been properly dismissed by application of the Tax Injunction Act because post-deprivation relief through administrative refund procedures followed by judicial review is an adequate remedy and has survived due process attacks. *Nation Private Truck,* 515 U.S. at 587 (providing, "the States may determine whether to provide predeprivation process (*e.g.,* an injunction) or instead to afford postdeprivation relief (*e.g.,* a refund)") (citation omitted)); *Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 101 (1993)(providing that refund procedures satisfy due process requirements).

Petitioners further point to an argument by the Respondents wherein the Respondents essentially recited NRS 368A.290 indicating that a taxpayer may bring an "action" in court within 90 days of the Commission's final decision. *Application for Leave to Amend*, p. 25. ll. 16-17. Respondents did not state that NRS 368A.290 provided for a trial de novo. Respondents also pointed out that pursuant to *Scotsman* there were exceptions to the exhaustion requirement when seeking declaratory relief. *Reply to Plaintiffs' Opposition to Motion to Dismiss* at p. 8, ll. 8-10, Déjà vu Showgirls, et al. v. Nevada Department of Taxation, et al., No. 2:06-cv-00480-RLH-RJJ (Jun. 14, 2006). Respondents argued that the adequate remedy is that which is provided for by NRS 368A.290 and *Scotsman.* The "action" provided for in NRS 368A.290 is whatever action the law dictates it is and pursuant to *Southern California Edison* the "action" is a petition for judicial review and has been since at least 1999.

Pursuant to *Scotsman* and *Malecon,* declaratory relief is available, but "as applied" challenges involving factual determinations require exhaustion of administrative remedies. Before the federal courts, Respondents argued that Petitioners' remedy would be the remedy provided for by Nevada statutes and applicable case law and that is what Petitioners were granted by Judge Gonzales' order allowing 30 days for the filing of a petition for judicial review. Respondents' arguments before the federal courts provide no basis for supplementing the record or remanding this case.

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7. Déjà vu and Little Darlings are not Parties to the Administrative Record and Pursuant to NRS 233B.130 cannot be Petitioners in this matter and therefore Supplementing the Record on their Behalf is a Ruse.

Petitioners argue that adding additional evidence is particularly important for Déjà vu and Little Darlings because they did not participate in the administrative proceedings. This admission is a basis for granting Respondents' motion to dismiss Déjà vu and Little Darlings as impermissible petitioners which will be filed concurrently with this opposition or shortly thereafter. Because they are not parties to the administrative record and were not aggrieved by the final decision of the Commission which is the subject of this proceeding, Déjà vu and Little Darlings cannot be petitioners in this matter. NRS 233B.130. Respondents even seem to agree that allowing the same is procedurally impermissible. *Application for Leave*, p. 29., ll. 6-7 (stating, "While it would appear to be procedurally inappropriate to include [Déjà vu and Little Darlings] ...in this petition ...").

8. Petitioners Never Raised 42 U.S.C. §1983 Claims in the Administrative Proceedings and this Case should not Be Remanded Allowing them to Attempt to Raise 42 U.S.C. §1983 Claims

Having never raised 42 U.S.C. §1983 claims in the administrative proceedings, any such claims cannot be part of the administrative record. NRS 233B.135(1)(b). Petitioners never raised 42 U.S.C. §1983 claims in the Case 2 complaint or first amended complaint either. Petitioners have not pointed to anything indicating that they could have ever have been led to believe that such claims would be allowed without the need for raising them. Therefore, this case should not be remanded to allow Petitioners to attempt to raise 42 U.S.C. §1983 declaratory and injunctive relief claims in the administrative record.

9. Petitioners Simply do not have a good reason for Supplementing the Record.

The Nevada Supreme Court has provided guidance as to the "good reasons" standard set forth in NRS 233B.131(2). In *Garcia*, the Court determined that good reasons are not established when evidence is available at the time of the administrative hearing but apparently not presented based on a tactical decision. *Garcia v. Scolari's Food and Drug*, 200

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P.3d 514, 519 (Nev. 2009). In fact, regardless of why a party's attorney makes a "poor decision in regard to what evidence to present at an administrative proceeding [it] will not suffice to justify remand for consideration of additional evidence, especially after an adverse decision is issued... and when the evidence sought to be presented was available at the time of the administrative hearing." *Garcia*, 200 P.3d at 519. The Court held that a party cannot wait for the results of the administrative hearing, change strategies and then seek to expand the record. *Garcia*, 200 P.3d at 519; *See also Northern Ill. Gas co. v. Indus. Comm'n of Ill.*, 498 N.E. 2d 327, 332, (Ill. 1986) ("A party cannot choose one trial strategy and then, faced with an adverse decision, supply additional evidence on review, absent, for example, the need to prevent injustice by correcting the arbitrator's misunderstanding of the evidence, or other good cause.").

In this case, Petitioners have not shown good reasons for not producing the documents during the administrative process. Petitioners *never* requested the Commission to allow them to conduct discovery. In fact, Petitioners did not pursue discovery until two and one-half (2-1/2) years after Petitioners filed the original District Court Complaint. In *Pannoni v. Bd. of Trustees*, the Plaintiff sought to add additional evidence to the record after an adverse administrative decision. Pannoni claimed it was new evidence since the expert reports were prepared after the administrative hearing. The court stated:

> Good cause does not include the reports of new experts sought out after the hearing. The discovery of the evidence was not out of Pannoni's control, as occurs with the discovery of a new witness not known about until after a hearing has concluded.

Pannoni v. Bd. of Trustees, 90 P.3d 438, 450 (Mont. 2004) (internal quotations omitted).

Here, as in *Pannoni,* the Petitioners could have asked for discovery during the administrative proceedings. Plaintiffs made a tactical decision not to request discovery at that time. NRS Chapter 233B.123 allows for discovery along with a liberal evidentiary standard, but NRS 233B131(2) does not provide for additional evidence after receiving an adverse decision, when the Party proffering the evidence chose not to include other evidence available at the time of the administrative process for tactical reasons. The fact that the

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Petitioners' strategy did not work for them does not meet the good reason standard to expand the record.

Additionally, it cannot be overlooked that the Commission asked the parties for *everything* that was to be considered during the administrative process, and continued the hearing for a month in order to allow the parties to supplement the record.[9] Both sides supplemented the record as they chose. The Commission did not place any restrictions on the evidence to be presented.

The Legislative history is public record, and if the Petitioners did not perform a complete search of the public records in 2007, there is no reason for Petitioners to intimate that the Respondents had access to records that they did not,[10] nor does Petitioners incomplete search of public records constitute "good reasons" to allow the Petitioners to supplement the record four years later, especially with a draft of a bill and testimony regarding a bill that was never enacted.

During the August 6, 2007 hearing, the Petitioners argued both the facial challenge and as applied challenge using the same arguments presented in the instant Application for Leave. The Petitioners received an adverse decision on August 6, 2007 and a written final decision dated October 12, 2007, and never sought judicial review although judicial review is the process required under NRS 233B.130. Accordingly, the Petitioners have not shown a good reason to expand the administrative record.

D. <u>Petitioners are not entitled to a remand</u>.

Petitioners are not entitled to a remand to the Commission. Rule 19 of the Rules of the District Courts of the State of Nevada clearly states:

. . .

[9] The Petitioners averred to the 2006 case filed in Federal Court by the same Plaintiffs, i.e. Petitioners, on the same issues decided during the July 9, 2007 administrative hearing. Tr. July 9, 2007, p. 28, ll. 7-10 ("I've also been admitted pro hoc vice in both the federal and state court proceedings that are peripherally involved in this live entertainment tax matter."). Accordingly, although given the chance to supplement the record with this information, the Petitioners tactically decided not to include the record from Federal Court in the supplement. Now they wish to expand the record with cherry picked portions of the Federal Court record due to a change in strategy, and it should not be allowed.

[10] In fact during the discovery process, Respondents provided the websites where they obtained the legislative history, and for Petitioners to hint that public documents were somehow withheld is outrageous.

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> When an application or petition for any writ or order shall have been made to a district judge and is pending or has been denied by such judge, the same application or motion shall not again be made to the same of another district judge, except upon consent in writing of the judge to whom the application or motion was first made.

D.C.R.19.

Under the guise of requesting that this Court grant the Petitioners leave to supplement the record pursuant to NRS 233B.131, the Petitioners also request a second bite of the apple in the form of a remand to the Commission. *See* Application for Leave at p. 10, ll. 13-16. A motion by Petitioners to remand to the Commission was already emphatically denied by Judge Gonzales. *See* Order attached hereto as Exhibit B (On August 23, 2011, the Plaintiffs, i.e. Petitioners, moved, in open court, for Judge Gonzales to remand this matter to the Commission. Judge Gonzales denied the motion in open court).

Although another District Court Judge has denied the motion to remand, Plaintiffs are asking this Court for a remand in violation of D.C.R. 19. Accordingly, this Court should deny the Petitioners' request for remand.

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CONCLUSION

Based on the foregoing, Respondents respectfully request that this Honorable Court Order the following:

1. Petitioners' additional information is not material;

2. Petitioners have not offered good reasons for not presenting the information to the Commission;

3. Petitioner's Application for Leave to Present Additional Evidence to the Nevada Tax Commission is hereby denied and the case will not be remanded;

4. The administrative record created through the administrative proceedings will not be supplemented; and,

. . .

. . .

. . .

5. Any further relief that the court deems just and fair.

DATED this 21st day of October, 2011.

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

CERTIFICATE OF SERVICE

I certify that I am an employee of the State of Nevada, Office of the Attorney General, and that on October 21, 2011, I deposited in the U.S. mail, postage prepaid, First Class Mail, a true and correct copy of the foregoing **OPPOSITION TO PETITIONERS' APPLICATION FOR LEAVE TO PRESENT ADDITIONAL EVIDENCE TO THE NEVADA TAX COMMISSION,** addressed as follows:

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/S/ TRACI PLOTNICK
An employee of the Office of the Attorney General

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EXHIBIT A

EXHIBIT A

ADMR
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DISTRICT COURT

CLARK COUNTY, NEVADA

NEVADA DEPARTMENT OF TAXATION, and NEVADA TAX COMMISSION

Respondents,

vs.

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

Petitioners,

Case No. A-11-648894-J
Dept. No. XXX

.....

.....

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ADMINISTRATIVE RECORD

Pursuant to NRS 233B.130(3), the STATE OF NEVADA DEPARTMENT OF TAXATION AND NEVADA TAX COMMISSION, hereby files the entire record of the administrative proceedings subject to review by this Court as a result of the Petition for Judicial Review filed by K-KEL, INC., et al, and in accordance with NRS 233B.135.

INDEX OF DOCUMENTS

Exhibit #	Document	Bates #
1.	Petitioners' Claims for Refund of Tax on Live Entertainment, February 27, 2007 (Tax Period: January 2004)	000000001 - 000000041
2.	Petitioners' Claims for Refund of Tax on Live Entertainment, March 28, 2007 (Tax Period: February 2004)	000000042 - 000000084
3.	Respondent's Response to Refund Requests, April 3, 2007	000000085 - 000000096
4.	Petitioners' Claims for Refund of Tax on Live Entertainment, April 26, 2007 (Tax Period: March 2004)	000000097 - 000000139
5.	Respondent's Response to Refund Requests, April 30, 2007	000000140 - 000000145
6.	Petitioners' Claims for Refund of Tax on Live Entertainment, May 30, 2007 (Tax Period: April 2004)	000000146 - 000000188
7.	Respondent's Response to Refund Requests, June 4, 2007	000000189 - 000000194
8.	Petitioners' Formal Notice of Appeal, May 1, 2007 (The following pages in this section were intentionally left blank	000000195 - 000000273
9.	Petitioners' Correspondence Regarding Amended Notice of Hearing, June 19, 2007	000000274 - 000000276
10	Respondents' Amended Notice of Hearing, June 8, 2007	000000277 - 000000280
11	Respondents' Notice of Hearing, June 7, 2007	000000281 - 000000284
12	Bradley J. Shafer Formal Notice of Appearance, June 8, 2007	000000285 - 000000286
13.	Petitioners' Correspondence Regarding Notice of Appeal of Denial of Claim for Refund, June 21, 2007	000000287 - 000000333
14.	Department's Brief and Exhibits in Support of the Department's Denial of Appellant's Refund Requests, June 15, 2007	000000334 - 000000351
15.	Appellants' Reply Brief and Exhibits in Opposition to the Nevada Department of Taxation's Denial of Appellant's Refund Requests	000000352 - 000000387
16.	Department's Supplemental Brief in Support of the Department's Denial of Appellant's Refund Requests	000000388 - 000000392
17.	Department's Power Point Presentation	000000393 - 000000415
18.	Department's Appendix of Cases, Statutes and Other Authorities	000000416 - 000000746

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19.	Petitioners' Correspondence Regarding Supplemental Material Submitted for Appeal	000000747 - 000000749
20.	Petitioners' Power Point Presentation	000000750 - 000000787
21.	Petitioners' Index to Supplemental Submission on Behalf of Taxpayers/Appellants	000000788 - 000001218
22.	Transcript of the State of Nevada Tax Commission Teleconferenced Open Meeting, Monday, July 9, 2007	000001219 - 000001237
23.	Transcript of the State of Nevada Tax Commission Teleconferenced Open Meeting, Monday, August 6, 2007	000001238 – 000001332
24.	Commission's Findings of Facts and Conclusions of Law and Decision, October 12, 2007	000001333 – 000001334
25.	Petitioners' Request for a Copy of the Nevada Tax Commission's Formal Written Ruling, August 22, 2007	000001335
	These Bates Numbered Pages Were Left Blank Intentionally	000000202 000000210 000000218 000000226 000000234 000000242 000000250 000000258 000000266 000000294 000000309 000000317 000000318 000000326

DATED this 21st day of October, 2011.

CATHERINE CORTEZ MASTO
Attorney General

By: /s/ DAVID J. POPE
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Nevada Bar No. 008617
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CERTIFICATION

I Erin Fierro, am a member of the staff of the Nevada Department of Taxation. I hereby certify that the entire record of the administrative proceedings, which are the subject of Case No. A-11-648894, currently pending in Department No. XXX of the Eighth Judicial District Court, are enclosed as Bates numbers 00000001 through 000001335.

NEVADA DEPARTMENT OF TAXATION

By: Erin Fierro
Erin Fierro, Executive Assistant

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

CERTIFICATE OF SERVICE

I, hereby certify that on the 21st day of October, 2011, I served the **Administrative Record** on CD, by causing to be delivered to the Department of General Services for mailing at Las Vegas, Nevada, a true copy thereof, addressed to:

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/s/ Debra Turman
An employee of Office of Attorney General

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EXHIBIT B

EXHIBIT B

REGISTER OF ACTIONS

CASE NO. 06A533273

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

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

PARTY INFORMATION

		Lead Attorneys
Defendant	Jacobs, Michelle	Blake A. Doerr *Retained* 702-486-3416(W)
Defendant	Nevada Dept Of Taxation	Blake A. Doerr *Retained* 702-486-3416(W)
Defendant	Nevada State Board Of Examiners	Blake A. Doerr *Retained* 702-486-3416(W)
Defendant	Nevada Tax Commission	Blake A. Doerr *Retained* 702-486-3416(W)
Doing Business As	Crazy Horse Too Gentlemen's Club	~~Dominic P. Gentile~~ ~~*Retained*~~ ~~7023860066(W)~~
Doing Business As	Deja Vu Showgirls	~~William H. Brown~~ ~~*Retained*~~ ~~702-385-7200(W)~~
Doing Business As	Little Darlings	
Doing Business As	Olympic Garden	~~Dominic P. Gentile~~ ~~*Retained*~~ ~~7023860066(W)~~
Doing	Scores	~~Dominic P. Gentile~~

Business As		~~*Retained*~~ ~~7023860066(W)~~
Doing Business As	Spearmint Rhino Gentlemen's Club	~~Dominic P. Gentile~~ ~~*Retained*~~ ~~7023860066(W)~~
Doing Business As	Treasures	~~Dominic P. Gentile~~ ~~*Retained*~~ ~~7023860066(W)~~
Plaintiff	D I Food And Beverage Of Las Vegas LLC	William H. Brown *Retained* 702-385-7280(W)
Plaintiff	D Westwood Inc	William H. Brown *Retained* 702-385-7280(W)
Plaintiff	Deja Vu Showgirls Of Las Vegas LLC	William H. Brown *Retained* 702-385-7280(W)
Plaintiff	K-Kel Inc	William H. Brown *Retained* 702-385-7280(W)
Plaintiff	Little Darlings Of Las Vegas LLC	William H. Brown *Retained* 702-385-7280(W)
Plaintiff	Olympus Garden Inc	William H. Brown *Retained* 702-385-7280(W)
Plaintiff	Power Company Inc	William H. Brown *Retained* 702-385-7280(W)
Plaintiff	Shac LLC	William H. Brown *Retained* 702-385-7280(W)

EVENTS & ORDERS OF THE COURT

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

Minutes

08/23/2011 9:00 AM

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

Parties Present
Return to Register of Actions

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DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiffs,

vs.

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

Defendants.

Case No. 06A533273
Dept. No. XI

Coordinated with:

Case No. 08A554970
Dept. No. XI

ORDER

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. . .

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

ORDER

DEFENDANTS' RE-NOTICED MOTION FOR PARTIAL SUMMARY JUDGMENT ON THE PLAINTIFFS' CLAIMS FOR REFUND AND MOTION TO DISMISS THE AS APPLIED CHALLENGE TO THE LIVE ENTERTAINMENT TAX AND THE CLAIMS FOR DAMAGES PURSUANT TO 42 U.S.C. §1983 and DEFENDANTS' MOTION TO COMPEL came on for hearing on August 23, 2011;

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

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

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. . .

Attorney General's Office
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Las Vegas, NV 89101

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

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

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

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

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

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. . .

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Las Vegas, NV 89101

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

IT IS SO ORDERED.

DATED this _____ day of October, 2011.

_____
DISTRICT COURT JUDGE

Respectfully submitted:

CATHERINE CORTEZ MASTO
Attorney General

By: _____
David J. Pope
Senior Deputy Attorney General

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

CASE NO. A648894

DEPT. NO. 30

DOCKET U

DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * *

K-KEL, INC., d/b/a Spearmint Rhino Gentlemen's Club: OLYMPUS GARDEN, INC., d/b/a Olympic Garden; SHAC, LLC, d/b/a Sapphire; THE POWER COMPANY, INC., d/b/a Crazy Horse Too Gentlemen's Club; D. WESTWOOD, INC., d/b/a Treasures; D.I. FOOD & BEVERAGE OF LAS VEGAS, LLC, d/b/a Scores, DEJA VU SHOWGIRLS OF LAS EGAS, LLC d/b/a Deja vu; and LITTLE DARLINGS OF LAS VEGAS, LLC, d/b/a Little Darlings,	)
Petitioners,	)
vs.	)
STATE OF NEVADA, ex rel. DEPARTMENT OF TAXATION and TAX COMMISSION,	)
Respondents.	)

REPORTER'S TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE JERRY A. WIESE, II

DEPARTMENT XXX

DATED FRIDAY, DECEMBER 9, 2011

REPORTED BY: KRISTY L. CLARK, RPR, NV CCR #708, CA CSR #13529

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BY: BLAKE DOERR, ESQ.
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* * * * * * *

LAS VEGAS, NEVADA, FRIDAY, DECEMBER 9, 2011;

8:49 A.M.

P R O C E E D I N G S

* * * * * * *

THE COURT: Yours is the K-Kel case?

MR. FERRARIO: Right.

THE COURT: I'll take care of it real fast. How about that?

MR. FERRARIO: Well, depends on which way you're going to rule.

THE COURT: Do we have both sides here?

MR. FERRARIO: Yes, but if you could --

THE COURT: I'll take care of your case real fast. Come on up.

K-Kel versus Nevada Department of Taxation.

THE BAILIFF: If the other counselors can have a seat for a few minutes, we'll get to you.

THE COURT: It's on page 9. You want this reported, Counsel?

MR. BROWN: Yes, Your Honor.

THE COURT: Case No. 648894. This is on for the plaintiffs' application for leave to present additional evidence to the Nevada Tax Commission. I'm

going to tell you what my inclination is.

Well, actually, is everybody checked in?

MR. FERRARIO: Yes.

THE COURT: You want to make appearances for the record?

MR. DOERR: Sure.

MS. RAKOWSKY: Vivienne Rakowsky for the Department of Taxation from the Attorney's General Office.

MR. POPE: David Pope also with the Attorney General's Office on behalf of the respondents.

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

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

MR. BROWN: William Brown, local counsel for the other plaintiffs.

MR. SHAFER: Your Honor, my name is Brad Shafer. I'm an attorney from Michigan, licensed in Michigan and Arizona. I filed a pro hac vice motion at some point in this matter.

THE COURT: Okay. Let me tell you what my inclination is, and if you want to argue and make a record, you can. I looked at the briefs. Based on

NRS 233B.133, subsection 2, if I want to -- to send this back down to the administrative agency, I have to find that there's good cause. As discussed in Garcia versus Scolari's Food and Drug case, I have to find additional evidence must be material.

I think it's close, but based upon the -- the issues as they are, and -- and the -- the status of -- there's one case going on. There's a second case that was going on that ended up getting dismissed because of the -- whatever that new case was, Edison case, I don't know that there was necessarily -- necessarily an obligation to do discovery under the -- in the administrative portion of the case. There is -- I -- I found some law that says that there's no state or federal constitutional right in an administrative proceeding to prehearing discovery. Nevada Rules of Civil Procedure do not apply to administrative proceedings, and the Nevada Administrative Procedure Act makes no provision for discovery. I think that there's probably a valid basis for the plaintiffs to have not discovered the things that they are now saying that they want to bring before the agency.

My inclination is that there is good cause and that the evidence is material, and I would prefer that the tax commission review everything before I

review it.

MS. RAKOWSKY: Your Honor, can I make two brief points?

THE COURT: You can make whatever record you want to make. I just want to let you know what my thoughts are, and you can try to convince me otherwise if you'd like to.

MS. RAKOWSKY: Well, the cases that -- that you referred to, which was Duchess, they did say that. But they also went on to say, and I quote, "Thus the extent to which a party engaged in an administrative hearing for the board of discovery is determined by the statutes governing the board and its adopted regulations." That was the next sentence. That was not included in their brief.

So if you go to the rules and regulations, the statutes and regulations for the Nevada Department of Taxation and the Nevada Tax Commission, you'll find under NAC 135 -- 360.135, there's rules on how you get a subpoena, that any party desiring to subpoena a witness must submit an application to the hearing officer stating the reason why the subpoena is requested.

The hearing officer may require that a subpoena requested by a party for the production of

books, waybills, papers, accounts or other documents be issued after the submission of an application in writing, which specifies as clearly as may be, the books, waybills, papers, accounts or other documents desired.

And -- and then the hearing officer shall grant and issue the -- grant the application and issue the subpoena.

They did not ask. They never asked for any discovery. In fact, during the administrative hearing in front of the tax commission, they said, we didn't ask for any discovery. And they were still given another month to present any kind of discovery that they wanted. And they -- and they submitted 500 to 1,000 pages of information that they wanted considered by the commission. When the commission told them this, they said, Do you want everything? And the commission said we want everything you want considered. If you don't have it in, there will be no -- there will be no additional evidence; you're done. They agreed.

They submitted the stuff. The hearing was postponed and took place a month later. There's 94 pages of hearing transcript, where 47 pages are devoted to questions to -- to these -- to them regarding the evidence that they submitted. They

looked at all the evidence. They looked at everything, and they came to a decision. There was substantial evidence.

And according to the latest case, which is -- which is the Cabinet case, Maskall Cabinet (phonetic) case, they say that the -- when you do a judicial review, the issue is was there substantial evidence? And the Department of Taxation says there was substantial evidence. There's no need to add to the record.

And the second point is that Judge Gonzalez when we had the hearing in front of her on August the 23rd stated -- they asked for a remand. And she said no, she is not going to give them a remand. Pursuant to Rule 19, for them to get a remand, there has to be an agreement between you and Judge Gonzalez that she's willing to forego that order.

THE COURT: It's a different case than Judge Gonzalez's case, isn't it?

MS. RAKOWSKY: But she said she's not remanding this case to the Nevada Tax Commission.

THE COURT: Is this the same case that's in front of Judge Gonzalez?

MS. RAKOWSKY: She -- she ended up going through the facial challenge, dismissing the as-applied

challenge and giving them 30 days to file for judicial review. Although they should have filed for judicial review in 2007, she extended that 30- or 45-day deadline to give them 30 days to now file for judicial review. It's the same case. It's -- with the exception of the plaintiff that they added that I understand that they're going to now dismiss, it's the same plaintiffs. It's the same issues. It's the same documents. It's -- it's -- everything is identical, except now it's judicial review.

MR. POPE: Your Honor, I just have two points. It's the same regulation. NAC 360.145 allows for depositions. It's under the section in the NAC for hearings, but the point is, is that petitioners never requested depositions from the -- from the commission. The commission could have granted or could have allowed it pursuant to that regulation or possibly remanded to a hearing officer for that to happen.

The next point is that petitioners have more or less agreed in their moving papers that this is the same type of evidence. Cumulative evidence is to be excluded both under 233B.123 and NAC 360.145, sub 4. So those are -- those are two other reasons not to supplement the record.

MR. DOERR: I'll just also add that -- that

the issue that's before you today is the issue that we've been conducting discovery on while the matters were still before Judge -- first Judge Togliatti and then Judge Gonzalez. So our -- the discovery that they're asking for is the period -- it's been open for three or four years now, five years running. And they're just trying to extend this, get more in, waste our time, waste our resources, and looking for something else, and they don't have anything.

And I think they have the opportunity to ask for all this in the administrative proceeding.

MR. ROITMAN: Your Honor --

MS. RAKOWSKY: And, finally, Your Honor, what they're asking you to admit is hearsay, and the regulations -- and the regulations to the Nevada Tax Commission and Nevada Department of Taxation are very specific in NAC 360.145. It says, "Hearsay evidence, as that term is used in civil actions, may be admitted for the purpose of supplementing or explaining other evidence, but it is not sufficient to support findings of fact unless it would be admissible over objection in civil actions."

They're looking to admit e-mails which are clearly hearsay. They're not -- they would not be admissible in any civil action, nor would any of the

other documents because it's inadmissible evidence, so ...

THE COURT: Mr. Roitman, give me a few minutes.

All right. Counsel, I understand your arguments with regard to whether or not things are admissible, whether it's duplicative, whether it's hearsay, if it's admissible evidence or not. I don't think that's in front of me at this point. I think that that's something that the administrative agency needs to take up first. I understand your arguments, and -- and I would be making the same arguments if I was sitting at your table.

The thing is, as a judge, I want to try to do the right thing, and if the right thing requires me to only look at the record on a petition for judicial review, I'm limited to review of the record. If there's a question whether or not something is in the record that should be or something's missing from the record that maybe should be in the record, I'm inclined to allow the administrative agency an opportunity to review that so that when it comes up to me, and I'm sure this will come back up to me, that I've got all the evidence.

So I'm not going to dismiss the case, but

what I'm going to do is I'm going to remand it right now for purposes -- so the administrative agency can -- can look at the evidence that's requested by the petitioners. And I'm guessing that as soon as that happens, they'll either come up with an amended decision or a different decision or they'll just say that the same decision applies.

Whatever happens, it will come back in front of me on a petition for judicial review. You have to let me know when that happens, and we'll probably have to set a status hearing to decide if the parties want to submit supplemental briefs to me based upon the additional evidence that's submitted to the tax commission.

MR. POPE: Your Honor, we haven't really gotten into briefing yet. They haven't done their --

THE COURT: So there's no briefs at all yet?

MR. BROWN: That's correct.

MR. FERRARIO: Your Honor, we'll prepare an order reflecting your ruling, run it by the State, and then working out briefing schedules after we come back or keeping you apprised of what's happening at the administrative level won't be a problem.

THE COURT: Appreciate that.

MR. FERRARIO: Thanks, Your Honor.

MS. RAKOWSKY: Thank you.

MR. BROWN: Judge, I also have an unopposed motion to withdraw if I could.

THE COURT: You have an unopposed motion to withdraw. Give me one second. Let's take care of Mr. Roitman real quick because he's anxious to get out of here.

MR. ROITMAN: I got to get over to probate court. Figueroa versus Green Valley Ranch.

MR. FERRARIO: Your Honor, thank you for the consideration. I appreciate it.

(Thereupon, the deposition concluded at Time)

CERTIFICATE OF REPORTER

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

I, Kristy L. Clark, a duly commissioned Notary Public, Clark County, State of Nevada, do hereby certify: That I reported the proceedings commencing on Friday, December 9, 2011, at 8:49 o'clock a.m.

That I thereafter transcribed my said shorthand notes into typewriting and that the typewritten transcript is a complete, true and accurate transcription of my said shorthand notes.

I further certify that I am not a relative or employee of counsel of any of the parties, nor a relative or employee of the parties involved in said action, nor a person financially interested in the action.

IN WITNESS WHEREOF, I have set my hand in my office in the County of Clark, State of Nevada, this 19th day of December, 2011.

_____
KRISTY L. CLARK, CCR #708

EXHIBIT “G”

Law Offices of
WILLIAM H. BROWN
A Limited Liability Company

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Will@whbesq.com

June 14, 2012

William Chisel, Executive Director
Nevada Department of Taxation
1500 College Pkwy., Ste. 115
Carson City, Nevada 89706

William Chisel, Executive Director
Nevada Department of Taxation
Grant Sawyer Bldg., Ste. 1300
Las Vegas, Nevada 89101

Re: K-Kel, Inc. dba Spearmint Rhino Gentlemen's Club; Olympus Garden, Inc., dba Olympic Garden; SHAC LLC dba Sapphire; The Power Company, Inc. dba Crazy Horse Too Gentlemen's Club; D Westwood, Inc. dba Treasures; DI Food & Beverage of Las Vegas, LLC dba Scores, Deja Vu Showgirls of Las Vegas, LLC dba Deja Vu; and Little Darlings of Las Vegas, LLC dba Little Darlings

NAC 360.135 Request for Subpoenas to Dino DiCianno, Michelle Jacobs, and Tesa Wanamaker.

Dear Mr. Chisel:

Pursuant to NAC 360.135(2), the above-named Taxpayers hereby request that the Tax Commission via its Hearing Officer issue subpoenas for the following individuals: Dino DiCianno, Michelle Jacobs, and Tesa Wanamaker to appear and testify at the Nevada Tax Commission hearing to be held on Monday June 25, 2012.

As you are certainly aware, Dino DiCianno is the former Executive Director of the Nevada Department of Examination. Mr. DiCianno was the Executive Director during the period of 2003 to 2005, when Nevada's Tax on Live Entertainment was drafted, passed, and subsequently amended.

Mr. Dicianno's testimony is relevant for a number of reasons. However, first a bit of background information is in order, which will be greatly summarized. The current action was originally filed as a *de novo* action in the Eighth Judicial District Court for Clark County (Case No. 08A554970, which has come to be known as "Case 2")

following the Tax Commission the Department of Taxations denial of certain claims for refund filed by the Taxpayers for amount paid under Nevada's Tax on Live Entertainment, NRS 368A.010 *et seq.* (the "Live Entertainment Tax" or "LET"). The court coordinated and partially consolidated the action with a direct action (Case No. 08A554970, or "Case 1"; collectively with Case 2 the "Coordinated Cases") previously filed by the Taxpayers, which raised similar challenges to the validity and the applicability of the LET.

Ultimately, the District Court ruled that the challenge in Case 1 could only proceed on a facial basis and, following our Supreme Court's ruling in Southern California Edison v. First Judicial Dist. Court, 255 P.3d 231 (Nev. 2011), that Case 2 must refilled and proceed as a petition for judicial review. Hence, Case 2 represents the Taxpayers as-applied challenge and is now the Petition for Judicial Review that has been remanded and is presently before the Commission.

I provide you with this history because the events of the consolidated/coordinated cases firmly establish the relevance and basis for the testimony. Specifically, prior to Case 2 being remanded to the Commission, Petitioners had set the depositions of Dino DiCianno and Michelle Jacobs (Tax Examinor II), which were ultimately set to occur following the hearing at which the Court ruled that Case 2 must be refilled as a petition for judicial review and that only the facial and not as-applied constitutional challenges to the LET would be considered in Case 1. Having ruled that there was no as-applied challenge before it, the Court additionally ruled that further discovery inappropriate and the depositions were canceled.

However, the testimony Taxpayers seek is relevant to the as applied constitutional challenges this Commission will again be asked to consider. Over the course of discovery in the Coordinated Cases, and in response to interrogatories submitted to Department of Taxation (the "Department") and answered by the Department under Nev. R. Civ. P. 33 (attached as Exhibit A), the Department identified DiCianno as the person most knowledgeable regarding:

- the introduction, drafting, consideration of, revising, adopting and/or amending the Live Entertainment Tax;

- the introduction, drafting, consideration of, revising, adopting and/or amending any and all regulations relating to, or promulgated under, the Live Entertainment Tax;

- the persons or business entities meant to be taxed by the Live Entertainment Tax;

- the purposes for any and all legislative changes to the exceptions to the definition of "live entertainment" set forth in NRS § 368A.090;

- the purposes for each and every one of the exceptions to the application of the Live Entertainment Tax or to the definition of "live entertainment" created by any regulation or policy of the Commission;

- the steps by which the proposed "5% across the board" tax on live entertainment was modified to, instead, tax certain live entertainment at the rate of 10%, as provided by NRS § 368A.200(1);

- the purpose(s) of modifying the proposed "5% across the board" tax on live entertainment to, instead, tax certain live entertainment at the rate of 10%, as provided by NRS § 368A.200(1);

- the purpose(s) of changing the maximum seating capacity/maximum occupancy specified by (presently) NRS §§ 368A.200(5)(d) and (e) from 300 to 200;

- the effect(s) of changing the maximum seating capacity/maximum occupancy specified by (presently) NRS §§ 368A.200(5)(d) and (e) from 300 to 200;

- the purpose(s) of changing the language of (presently) NRS §§ 368A.200(5)(d) and (e) from referring to "maximum seating capacity" to "maximum occupancy";

Ms. Jacobs was identified as the person most knowledgeable regarding:

- the persons and entities who/which have paid the Live Entertainment Tax since the initial adoption of that statute;

- the purposes for each and every one of the exceptions to the definition of "live entertainment" set forth in NRS § 368A.090;

- the purposes for each and every one of the exceptions to the application of the Live Entertainment Tax set forth in NRS § 368A.200; and

- the purposes for each and every one of the exceptions to the application of the Live Entertainment Tax or to the definition of "live entertainment" created by any regulation or policy of the Department;

All of these categories of information are relevant to the Taxpayers as-applied challenges to the LET. Generally, a tax may violate the First Amendment three ways: (1) by directly taxing First Amendment freedoms; (2) by targeting a narrowly defined group of speakers; or (3) by taxing speech based on content. *See Murdock v. Commonwealth of Pennsylvania*, 319 U.S. 105, 108, 111 (1983); *Leathers v. Medlock*, 499 U.S. 439, 447-448 (1991). The legislative history demonstrates, and it anticipated that the testimony of the witnesses will confirm that the LET was drafted, amended; and enforced, to directly tax First Amendment Activity, to target a narrowly defined group of speakers, and to tax speech based on content.

Tessa Wanamaker previously held the position of "Revenue Officer II" with the Nevada Department of Taxation, Compliance division. Ms. Wanamaker left her business card with a Taxpayer following an inspection to determine whether the Taxpayer is subject to the LET and at what rate. Her testimony is relevant to how the department determines whether or not a particular business is subject to or exempted from taxation under the LET or Promulgated Regulations.

In addition, many of the relevant documents produced by the Department of the course of discovery in the Consolidated Cases, which I provided to the Commission by way of my letter of April 26, 2012, were either drafted by or submitted to Mr. DiCianno or Ms. Jacobs. *See, e.g.*, documents stamped DV000050-58, DV 000198, DV000202-205, DV 000575-586, DV000604-667, and DV000675-680. Hence, Mr. DiCianno's and Ms. Jacobs's testimony will be necessary to answer questions about the purpose and content of the documents, and to possibly authenticate the documents.

For all these reasons, the Taxpayers respectfully request that, pursuant to NAC 360.135(4), the Hearing Officer grant this request and issue subpoenas to appear and testify to Dino DiCianno, Michelle Jacobs, and Tessa Wanamaker and provide the same to the undersigned for service upon those individuals.

Sincerely,

/s/ *William Brown*

WILLIAM H. BROWN

cc: Brad Shafer, Esq.
Matt Hoffer, Esq.
Mark Ferrario, Esq.
David Pope, Esq.
Blake Doer, Esq.
Vivienne Rakowsky, Esq.

STATE OF NEVADA
OFFICE OF THE ATTORNEY GENERAL
555 East Washington Ave., Suite 3900
Las Vegas, Nevada 89101

CATHERINE CORTEZ MASTO
Attorney General

KEITH G. MUNRO
Assistant Attorney General

GREGORY M. SMITH
Chief of Staff

June 20, 2012

William Chisel
Executive Director
Department of Taxation
1550 East College Parkway
Carson City, Nevada 89703\6

Re: In the matter of K-Kel, et al.

Dear Director Chisel:

Please accept this Sur-reply in response to the June 19, 2012 letter from Mr. William Brown, Esq.

The Nevada Administrative Code, NRS Chapter 233B, governs the procedure at issue here. Pursuant to NRS 233B.131(2), additional evidence may only be considered if upon application to the court for leave to present the additional evidence, it is shown to the satisfaction of the court that the additional evidence is both material and that there are good reasons that the evidence was not presented at the time of the agency proceedings. Petitioners produced a series of documents to the District Court and Judge Weise granted them the opportunity to present additional evidence to the Commission, so that the Commission could amend the findings of fact, conclusions of law dated October 12, 2007, reverse the decision or affirm the decision. *See* Order, attached hereto as **Exhibit "A".** And, yes, contrary to the Petitioners contention, Judge Weise stated that he has to find good cause and he has to find that the additional evidence is material. *See* Transcript of Hearing, December 9, 2011, at p. 5, ll. 1-5, attached hereto as **Exhibit "B".**

Judge Weise did not state that that he has to speculate that the additional evidence *may be* material; he stated that if he wants to send this back to the agency that he must find that it *is* material. Tr. at p. 5, ll. 1-5 (emphasis added). Petitioners alleged in their Application for Leave that they had "unearth[ed] proverbial smoking guns...." during the extensive judicial proceedings. Petitioners' Application for Leave, p.

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19, ll. 4-9, attached as **Exhibit "C".** If the evidence is not in existence, how can the Petitioners have made an argument to the Judge that the "smoking guns" that were "unearthed" are material?

With respect to allowing the additional documents, Judge Weise stated that "I think it is close." Tr. at p. 5, ll. 6. The Judge stated he "would prefer that the tax commission review everything before [he] review[s] it" because he is limited to the record when he performs judicial review. Tr. at p. 5, ll.24-25; p. 11, ll. 17. The purpose of sending this matter back to the Commission is "so that the administrative agency [] can look at the evidence that's requested by the petitioners." Tr. at p. 12, ll.1-3. The Judge was aware that Chapter 233B does not permit the re-opening of discovery. Tr. at p. 5, ll. 16-19 (Nevada Rules of Civil Procedure do not apply to administrative proceedings, and Chapter 233B makes no provision for discovery).[1]

Interestingly, at the close of the hearing, the Petitioners were asked by the Judge to prepare an order and eventually sent a proposed, seven page order to Judge Weise. The Petitioners' proposed order was summarily rejected in its entirety. Plaintiffs proposed order contained allegations as true that were not even considered during the hearing. *See* Petitioners' Proposed Order and Transcript of December 9, 2011 hearing, attached hereto as **Exhibit "D" and Exhibit "B".** Petitioners state not once, but twice in the proposed order that discovery be re-opened. At p. 5, ll. 12-13 Petitioners state "Petitioners seek remand from this Court to the Commission *for discovery* and for the presentation of additional evidence pursuant to NRS 233B.131(2)..." (emphasis added), and again at p. 7, ll. 1-3 Petitioners proposed order states:

> The instant action is hereby remanded to the Tax Commission in order to permit the Petitioners *to take discovery* as may be permitted by the Nevada Tax Commission and to present additional evidence to the Nevada Tax Commission. (emphasis added).

The Judge obviously chose not include taking discovery in the signed Order. *See* **Exhibit "A"**.

[1] Although NAC 360.135 existed at the time of the administrative hearing, Petitioners chose not to request subpoenas for testimony or documents. This was Petitioners' strategy, and an adverse decision by the agency does not constitute good cause to allow subpoeas at this stage of the proceedings. *See* Garcia v. Scolari's Food and Drug, 200 P.3d 514, 519 (Nev. 2009) (Regardless of why a party's attorney makes a "poor decision in regard to what evidence to present at an administrative proceeding [it] will not suffice to justify remand for consideration of additional evidence, especially after an adverse decision is issued... and when the evidence sought to be presented was available at the time of the administrative hearing").

Petitioners' are attempting to lead this Commission down a road that was not intended by the District Court. There is a distinction between granting the Petitioners "leave to present additional evidence" in 233B, and "taking discovery." The Judge did not grant the Petitioners' requests to reopen discovery, or sign on to any of the seven pages of allegations and innuendos in the Petitioners' proposed order. Judge Weise adopted the Department's competing order, only taking out the statement limiting the additional evidence solely to the documents provided in the Petitioners' moving papers in its Motion for Leave, thus allowing the Petitioners to provide the unearthed "smoking guns" that the extensive judicial proceedings had unveiled. **Exhibit "C".**

For the above reasons and those stated in the Opposition dated June 15, 2012, and any oral argument that the Commission may allow at the time of the hearing on this matter, the Department respectfully requests that the Petitioners' application for subpoenas be denied.

Sincere regards,

CATHERINE CORTEZ MASTO
Attorney General

By: _____
Vivienne Rakowsky
Deputy Attorney General

VR:tap
cc: William H. Brown, Esq. (via facsimile)
Bradley J. Shafer, Esq. (via facsimile)
Mark E. Ferrario, Esq. (via facsimile)

EXHIBIT "A"

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DISTRICT COURT

CLARK COUNTY, NEVADA

***

CLERK OF THE COURT

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

Petitioners,

v.

STATE OF NEVADA, ex rel. DEPARTMENT OF TAXATION and TAX COMMISSION,

Respondents.

Case No.: A-11-648894-J
Dept. No.: XXX

ORDER GRANTING PLAINTIFFS' APPLICATION FOR LEAVE TO PRESENT ADDITIONAL EVIDENCE TO THE NEVADA TAX COMMISSION

PETITIONERS' Application for Leave to Present Additional Evidence to the Nevada Tax Commission in the above-captioned matter came on for hearing on December 9, 2011.

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

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

The Court having considered the papers and pleadings as well as the oral argument, hereby ORDERS:

Petitioner's Application for leave to present additional evidence to the Nevada Tax Commission is GRANTED so the administrative agency can look at additional

evidence and do one of the following: Amend the Findings of Fact, Conclusions of Law dated Oct. 12, 2007, Reverse the Decision, or Affirm the Decision.

IT IS SO ORDERED.

DATED this 24 day of January, 2012.

DISTRICT COURT JUDGE

EXHIBIT “B”

CASE NO. A648894

DEPT. NO. 30

DOCKET U

DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * *

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

Petitioners,

vs.

STATE OF NEVADA, ex rel. DEPARTMENT OF TAXATION and TAX COMMISSION,

Respondents.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE JERRY A. WIESE, II

DEPARTMENT XXX

DATED FRIDAY, DECEMBER 9, 2011

REPORTED BY: KRISTY L. CLARK, RPR, NV CCR #708, CA CSR #13529

APPEARANCES:

For the Petitioners:

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* * * * * * *

LAS VEGAS, NEVADA, FRIDAY, DECEMBER 9, 2011;

8:49 A.M.

P R O C E E D I N G S

* * * * * * *

THE COURT: Yours is the K-Kel case?

MR. FERRARIO: Right.

THE COURT: I'll take care of it real fast. How about that?

MR. FERRARIO: Well, depends on which way you're going to rule.

THE COURT: Do we have both sides here?

MR. FERRARIO: Yes, but if you could --

THE COURT: I'll take care of your case real fast. Come on up.

K-Kel versus Nevada Department of Taxation.

THE BAILIFF: If the other counselors can have a seat for a few minutes, we'll get to you.

THE COURT: It's on page 9. You want this reported, Counsel?

MR. BROWN: Yes, Your Honor.

THE COURT: Case No. 648894. This is on for the plaintiffs' application for leave to present additional evidence to the Nevada Tax Commission. I'm

going to tell you what my inclination is.

Well, actually, is everybody checked in?

MR. FERRARIO: Yes.

THE COURT: You want to make appearances for the record?

MR. DOERR: Sure.

MS. RAKOWSKY: Vivienne Rakowsky for the Department of Taxation from the Attorney's General Office.

MR. POPE: David Pope also with the Attorney General's Office on behalf of the respondents.

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

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

MR. BROWN: William Brown, local counsel for the other plaintiffs.

MR. SHAFER: Your Honor, my name is Brad Shafer. I'm an attorney from Michigan, licensed in Michigan and Arizona. I filed a pro hac vice motion at some point in this matter.

THE COURT: Okay. Let me tell you what my inclination is, and if you want to argue and make a record, you can. I looked at the briefs. Based on

NRS 233B.133, subsection 2, if I want to -- to send this back down to the administrative agency, I have to find that there's good cause. As discussed in Garcia versus Scolari's Food and Drug case, I have to find additional evidence must be material.

I think it's close, but based upon the -- the issues as they are, and -- and the -- the status of -- there's one case going on. There's a second case that was going on that ended up getting dismissed because of the -- whatever that new case was, Edison case, I don't know that there was necessarily -- necessarily an obligation to do discovery under the -- in the administrative portion of the case. There is -- I -- I found some law that says that there's no state or federal constitutional right in an administrative proceeding to prehearing discovery. Nevada Rules of Civil Procedure do not apply to administrative proceedings, and the Nevada Administrative Procedure Act makes no provision for discovery. I think that there's probably a valid basis for the plaintiffs to have not discovered the things that they are now saying that they want to bring before the agency.

My inclination is that there is good cause and that the evidence is material, and I would prefer that the tax commission review everything before I

review it.

MS. RAKOWSKY: Your Honor, can I make two brief points?

THE COURT: You can make whatever record you want to make. I just want to let you know what my thoughts are, and you can try to convince me otherwise if you'd like to.

MS. RAKOWSKY: Well, the cases that -- that you referred to, which was Duchess, they did say that. But they also went on to say, and I quote, "Thus the extent to which a party engaged in an administrative hearing for the board of discovery is determined by the statutes governing the board and its adopted regulations." That was the next sentence. That was not included in their brief.

So if you go to the rules and regulations, the statutes and regulations for the Nevada Department of Taxation and the Nevada Tax Commission, you'll find under NAC 135 -- 360.135, there's rules on how you get a subpoena, that any party desiring to subpoena a witness must submit an application to the hearing officer stating the reason why the subpoena is requested.

The hearing officer may require that a subpoena requested by a party for the production of

books, waybills, papers, accounts or other documents be issued after the submission of an application in writing, which specifies as clearly as may be, the books, waybills, papers, accounts or other documents desired.

And -- and then the hearing officer shall grant and issue the -- grant the application and issue the subpoena.

They did not ask. They never asked for any discovery. In fact, during the administrative hearing in front of the tax commission, they said, we didn't ask for any discovery. And they were still given another month to present any kind of discovery that they wanted. And they -- and they submitted 500 to 1,000 pages of information that they wanted considered by the commission. When the commission told them this, they said, Do you want everything? And the commission said we want everything you want considered. If you don't have it in, there will be no -- there will be no additional evidence; you're done. They agreed.

They submitted the stuff. The hearing was postponed and took place a month later. There's 94 pages of hearing transcript, where 47 pages are devoted to questions to -- to these -- to them regarding the evidence that they submitted. They

looked at all the evidence. They looked at everything, and they came to a decision. There was substantial evidence.

And according to the latest case, which is -- which is the Cabinet case, Maskall Cabinet (phonetic) case, they say that the -- when you do a judicial review, the issue is was there substantial evidence? And the Department of Taxation says there was substantial evidence. There's no need to add to the record.

And the second point is that Judge Gonzalez when we had the hearing in front of her on August the 23rd stated -- they asked for a remand. And she said no, she is not going to give them a remand. Pursuant to Rule 19, for them to get a remand, there has to be an agreement between you and Judge Gonzalez that she's willing to forego that order.

THE COURT: It's a different case than Judge Gonzalez's case, isn't it?

MS. RAKOWSKY: But she said she's not remanding this case to the Nevada Tax Commission.

THE COURT: Is this the same case that's in front of Judge Gonzalez?

MS. RAKOWSKY: She -- she ended up going through the facial challenge, dismissing the as-applied

challenge and giving them 30 days to file for judicial review. Although they should have filed for judicial review in 2007, she extended that 30- or 45-day deadline to give them 30 days to now file for judicial review. It's the same case. It's -- with the exception of the plaintiff that they added that I understand that they're going to now dismiss, it's the same plaintiffs. It's the same issues. It's the same documents. It's -- it's -- everything is identical, except now it's judicial review.

MR. POPE: Your Honor, I just have two points. It's the same regulation. NAC 360.145 allows for depositions. It's under the section in the NAC for hearings, but the point is, is that petitioners never requested depositions from the -- from the commission. The commission could have granted or could have allowed it pursuant to that regulation or possibly remanded to a hearing officer for that to happen.

The next point is that petitioners have more or less agreed in their moving papers that this is the same type of evidence. Cumulative evidence is to be excluded both under 233B.123 and NAC 360.145, sub 4. So those are -- those are two other reasons not to supplement the record.

MR. DOERR: I'll just also add that -- that

the issue that's before you today is the issue that we've been conducting discovery on while the matters were still before Judge -- first Judge Togliatti and then Judge Gonzalez. So our -- the discovery that they're asking for is the period -- it's been open for three or four years now, five years running. And they're just trying to extend this, get more in, waste our time, waste our resources, and looking for something else, and they don't have anything.

And I think they have the opportunity to ask for all this in the administrative proceeding.

MR. ROITMAN: Your Honor --

MS. RAKOWSKY: And, finally, Your Honor, what they're asking you to admit is hearsay, and the regulations -- and the regulations to the Nevada Tax Commission and Nevada Department of Taxation are very specific in NAC 360.145. It says, "Hearsay evidence, as that term is used in civil actions, may be admitted for the purpose of supplementing or explaining other evidence, but it is not sufficient to support findings of fact unless it would be admissible over objection in civil actions."

They're looking to admit e-mails which are clearly hearsay. They're not -- they would not be admissible in any civil action, nor would any of the

other documents because it's inadmissible evidence, so ...

THE COURT: Mr. Roitman, give me a few minutes.

All right. Counsel, I understand your arguments with regard to whether or not things are admissible, whether it's duplicative, whether it's hearsay, if it's admissible evidence or not. I don't think that's in front of me at this point. I think that that's something that the administrative agency needs to take up first. I understand your arguments, and -- and I would be making the same arguments if I was sitting at your table.

The thing is, as a judge, I want to try to do the right thing, and if the right thing requires me to only look at the record on a petition for judicial review, I'm limited to review of the record. If there's a question whether or not something is in the record that should be or something's missing from the record that maybe should be in the record, I'm inclined to allow the administrative agency an opportunity to review that so that when it comes up to me, and I'm sure this will come back up to me, that I've got all the evidence.

So I'm not going to dismiss the case, but

what I'm going to do is I'm going to remand it right now for purposes -- so the administrative agency can -- can look at the evidence that's requested by the petitioners. And I'm guessing that as soon as that happens, they'll either come up with an amended decision or a different decision or they'll just say that the same decision applies.

Whatever happens, it will come back in front of me on a petition for judicial review. You have to let me know when that happens, and we'll probably have to set a status hearing to decide if the parties want to submit supplemental briefs to me based upon the additional evidence that's submitted to the tax commission.

MR. POPE: Your Honor, we haven't really gotten into briefing yet. They haven't done their --

THE COURT: So there's no briefs at all yet?

MR. BROWN: That's correct.

MR. FERRARIO: Your Honor, we'll prepare an order reflecting your ruling, run it by the State, and then working out briefing schedules after we come back or keeping you apprised of what's happening at the administrative level won't be a problem.

THE COURT: Appreciate that.

MR. FERRARIO: Thanks, Your Honor.

MS. RAKOWSKY: Thank you.

MR. BROWN: Judge, I also have an unopposed motion to withdraw if I could.

THE COURT: You have an unopposed motion to withdraw. Give me one second. Let's take care of Mr. Roitman real quick because he's anxious to get out of here.

MR. ROITMAN: I got to get over to probate court. Figueroa versus Green Valley Ranch.

MR. FERRARIO: Your Honor, thank you for the consideration. I appreciate it.

(Thereupon, the deposition concluded at Time)

CERTIFICATE OF REPORTER

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

I, Kristy L. Clark, a duly commissioned Notary Public, Clark County, State of Nevada, do hereby certify: That I reported the proceedings commencing on Friday, December 9, 2011, at 8:49 o'clock a.m.

That I thereafter transcribed my said shorthand notes into typewriting and that the typewritten transcript is a complete, true and accurate transcription of my said shorthand notes.

I further certify that I am not a relative or employee of counsel of any of the parties, nor a relative or employee of the parties involved in said action, nor a person financially interested in the action.

IN WITNESS WHEREOF, I have set my hand in my office in the County of Clark, State of Nevada, this 19th day of December, 2011.

KRISTY L. CLARK, CCR #708

EXHIBIT “C”

constitutional claims being made here were only obtained after extensive judicial proceedings before the Discovery Commissioner, before Judge Togliotti, and before Judge Gonzalez. It would be disingenuous to presume in these circumstances that even had the Petitioners requested written discovery in the Commission proceedings, they would have been able to unearth the proverbial "smoking guns" that the extensive judicial proceedings unveiled. In fact, when the Petitioners first received responses to written discovery in Cases 1 and 2, the full-page blackened redactions appeared to be a response to compel the production of the plans for the next generation stealth fighter.

Regardless, there are numerous "good reasons" why these materials were not presented to the Commission irrespective of the fact that, in reality, the Petitioners would not have been able to obtain such documentation in the administrative proceedings below in the first place.

1. Precedent Establishes that Administrative Tribunals are Not the Appropriate Forum to Litigate Sensitive Constitutional Claims.

In **Malecon Tobacco, LLC**, 118 Nev. 837, 840-841, 59 P.3d 474, 467-77 (2002), our State Supreme Court noted that the "United States Supreme Court has recognized that under federal administrative procedures, the 'adjudication of the constitutionality of congressional enactments has generally been thought to be beyond the jurisdiction of administrative agencies.'" **Id**. at 840 (*citing* **Thunder Basin Coal Co. v. Reich**, 510 U.S. 200, 215 (1994) (other citations omitted)). Indeed, the Supreme Court has observed that "[c]onstitutional questions obviously are unsuited to resolution in administrative hearing procedures and, therefore, access to the courts is essential to the decision of such questions." **Califano v. Sanders**, 430 U.S. 99, 109 (1977).

Due to this precedent, Petitioners were under the belief that the real determination of the constitutionality of the LET would occur at the District Court level, where they would entitled to

EXHIBIT "D"

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DISTRICT COURT

CLARK COUNTY, NEVADA

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

Petitioners,

vs.

NEVADA DEPARTMENT OF TAXATION, and NEVADA TAX COMMISSION,

Respondents.

Case No. A-11-648894-J

Dept. No. XXX

ORDER GRANTING PETITIONERS' APPLICATION FOR LEAVE TO PRESENT ADDITIONAL EVIDENCE TO THE NEVADA TAX COMMISSION

Petitioners' APPLICATION FOR LEAVE TO PRESENT ADDITIONAL EVIDENCE TO THE NEVADA TAX COMMISSION having come before the above-entitled Court on December 9, 2011, at the hour of 9:00 a.m. in Department XXX; K-Kel, Inc., Olympus Garden, Inc., The Power Company, Inc., D. Westwood, Inc., and D.I. Food & Beverage of Las Vegas, LLC, having appeared through counsel William H. Brown of the LAW OFFICES OF WILLIAM H. BROWN and Bradley J. Shafer of SHAFER & ASSOCIATES, P.C.; Plaintiff SHAC, LLC, having appeared trough counsel Mark E. Ferrario of GREENBURG TRAURIG, LLP; and all Defendants having appeared through Counsel David Pope, Blake Doerr, and Vivienne Rakowsky of the NEVADA ATTORNEY GENERAL, the Court having reviewed the papers and pleadings on file herein, having considered the arguments of counsel, and otherwise being duly advised; the Court hereby finds, concludes, and orders as follows:

FACTS AND PROCEDURAL BACKGROUND

Petitioners operate commercial entertainment establishments in the City of Las Vegas, which present on their business premises live performance dance entertainment to the consenting adult public. Respondents Nevada Department of Taxation (the "Department") and the Nevada Tax Commission (the "Commission") have taken the position that the Petitioners' establishments are subject to a new (in 2003) Live Entertainment Tax ("LET") enacted by the Nevada Legislature as NRS Chapter 368A.

Petitioners assert that the LET is unconstitutional under the First and Fourteenth Amendments to the United States Constitution, as well as Art. I, §§ 9 and 10, of the Nevada Constitution. Petitioners have filed claims for the period January, February, March, and April of 2004, for amounts paid under the LET by them during that time. The Department denied those claims for refund. Petitioners appealed to the Commission, which ultimately upheld the

Department's denial of the refund requests. On January 9, 2008, Petitioners filed a complaint for refund pursuant to NRS 368A.290(1)(b) and 368A.300(3)(b), which was assigned Case No. A554970 in Division XI of the Eighth Judicial District Court for Clark County ("Case 2").

In addition, prior to the state court action, Petitioners and others filed suit in federal court in 2005, shortly after the Nevada Legislature enacted certain amendments to the LET expanding the scope of that tax. That action was dismissed pursuant to a motion filed by the Respondents on the basis that, under the federal Tax Injunction Act (28 U.S.C. § 1341), a "plain, speedy, and efficient remedy" could be had in the courts of this state. Plaintiffs thereafter filed a complaint in this Court seeking essentially the same relief, which was assigned Case No. A533273 ("Case 1"). Case 1 and Case 2 were coordinated and later partially consolidated in Department XI.

After the parties litigated Case 2 for three years, and Case 1 for a longer period of time, and after substantial discovery was conducted, on January 28, 2011, Respondents moved to dismiss Case 2 on the grounds that the matter should have been filed as a petition for judicial review pursuant to NRS Ch. 233B. The district court initially denied that motion by an Order entered on April 6, 2011. However, after the Nevada Supreme Court decided **Southern California Edison v. First Judicial District**, 255 P.3d 231, 127 Nev. Adv. Op. 22 (Nev. 2011), the Court directed Respondents to refile their motion on the petition for judicial review issue. Respondents renewed their motion and on Nov. 1, 2011, the Court entered an order dismissing Case 2, and ordering the matter be re-filed as a petition for judicial review and randomly reassigned.

Before the Commission below, the Petitioners did not undertake discovery, and only placed a limited constitutional challenge to Chapter 368A before the Commission because: 1) precedent established that administrative agencies were not the appropriate forum in which to

litigate constitutional challenges; 2) precedent at the time established that the Petitioners would be afforded de novo judicial review where discovery would be permitted (and, in fact, established that the filing of a limited petition for judicial review was procedurally improper and would be subject to dismissal); 3) the judicial redress statute contained in Chapter 368A (that being NRS 368A.290) appeared to provide for the filing of an original action for refund following the denial by the Commission of appeals regarding administrative claims for refund, where de novo review would be provided and where discovery could be conducted; and 4) the conduct and representations of the Respondents in the federal proceedings led Petitioners to believe that, following an adverse ruling by the Commission, they could, in fact, initiate judicial redress by filing an original action for refund where de novo review would be provided and where discovery could be conducted.

Petitioners thus filed the present petition for judicial review on September 23, 2011, and their APPLICATION FOR LEAVE TO PRESENT ADDITIONAL EVIDENCE TO THE NEVADA TAX COMMISSION (the "Application") was filed on September 28, 2011. The Application seeks to have the matter remanded to the Commission for the presentation of additional evidence pursuant NRS 233B.131(2).

Petitioners offer the following as examples of additional evidence they seek to present to the Commission:

- Charts by the Department showing LET Collections by Taxpayer Group illustrating that the gentlemen's clubs pay the vast majority of the 10% portion (the more oppressive portion) of the tax.
- A March 14, 2005, Department memo discussing the specific inclusion of gentlemen's clubs in the proposed amended version of Chapter 368A.
- An October 9, 2003, email to former Department Director Dino DiCianno from an attorney on behalf of the Bellagio hotel and casino discussing the constitutionality of the proposed amendments.

- An October 21, 2003, email to DiCianno with a transcript of the Nevada Gaming Commission discussing the importance of subjecting the gentlemen's clubs to the LET.

- The First Reprint of Senate Bill 247 which contains a counsel digest specifically referencing adult entertainment and what would happen if that proposed portion of the Bill were held unconstitutional.

- Minutes of the May 16, 2005, meeting of the Assembly Committee on Commerce and Labor which discusses what happens if the proposed live "adult" entertainment provisions are held unconstitutional.

- Minutes of the May 26, 2005, meeting of the Assembly Committee on Ways and Means, which specifically references the Department's position on there being two distinct categories: live entertainment and live adult entertainment.

ANALYSIS AND CONCLUSIONS OF LAW

Petitioners seek remand from this Court to the Commission for discovery and for the presentation of additional evidence pursuant to NRS 233B.131(2), which states:

> If, before submission to the court, an application is made to the court for leave to present additional evidence, and it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the proceeding before the agency, the court may order that the additional evidence and any rebuttal evidence be taken before the agency upon such conditions as the court determines.

The Supreme Court recently addressed the standard for granting relief pursuant to NRS 233B.131(2) in **Garcia v. Scolari's Food & Drugs**, 125 Nev. 48, 50, 200 P.3d 514, 516 (2009) ("[w]e take this opportunity to provide guidance on the good reasons standard set forth in NRS 233B.131(2)"). The Court identified that there exists two "principle inquiries under NRS 233B.131(2): 1) "whether the evidence sough to be added is material"; and 2) "whether 'good reasons' exist for failure to present the evidence to the administrative agency." 125 Nev. at 53, 200 P.3d at 517-518. If both conditions are met, the district court has discretion to grant the request. **Id**.

In the instant case, Petitioner's challenge the constitutionality of the LET on the grounds that, *inter alia*; 1) the LET is an unconstitutional direct tax on First Amendment activity (*see, e.g.*, **Murdock v. Commonwealth of Pennsylvania**, 319 U.S. 105 (1943)); 2) the LET is an unconstitutional differential tax on First Amendment Activity (*see, e.g.*, **Minneapolis Star and Tribune Co. v. Minnesota Commissioner of Revenue**, 460 U.S. 575, 585 (1983)); and 3) the LET is an unconstitutional content-based tax on First Amendment activity (*see, e.g.*, **Leathers v. Medlock**, 499 U.S. 439, 447-448 (1991)).

The Court finds that the examples of additional materials the Petitioners seek leave to present are material to the constitutional challenges Petitioners assert against the LET.

In addition, having considered both the procedural history of this case, as explained above, and the inconsistencies in the law and in the positions of the Department regarding whether judicial relief from the rulings of the Nevada Tax Commission is to proceed by way of a petition for judicial review or an independent action in the district court, which led the Supreme Court to grant review on a petition for a writ of mandamus in **Southern California Edison**, 255 P.3d at 234 ("we take this opportunity to clarify the proper procedure when a taxpayer challenges a Commission decision in a refund action"), the Court find there exists good reasons for Petitioners to have not presented these materials to the Commission in their initial administrative appeals. Accordingly:

IT IS HEREBY ORDERED that, pursuant to NRS 233B.131(2), Petitioners' APPLICATION FOR LEAVE TO PRESENT ADDITIONAL EVIDENCE TO THE NEVADA TAX COMMISSION is hereby GRANTED, as follows:

The instant action is hereby remanded to the Tax Commission in order to permit the Petitioners to take discovery as may be permitted by the Nevada Tax Commission and to present additional evidence to the Nevada Tax Commission.

The Nevada Tax Commission shall consider such additional evidence presented to it by the Petitions, and shall render a written decision on the Petitioners' administrative appeals taking into account such additional evidence.

If Petitioners are aggrieved by the decision of the Commission, they shall file a petition for judicial review with this Court bearing the same case number above and within the specific 90 day deadline set forth in NRS 368A.290(1).

IT IS SO ORDERED

Dated: January ___, 2012

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Hon. Jerry A. Weise II
District Court Judge

Submitted by:

/s/ WILLIAM H. BROWN

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