

MARK E. FERRARIO (1625)
GREENBERG TRAUIG, LLP
3773 Howard Hughes Parkway
Suite 400 North
Las Vegas, Nevada 89136
Tel: (702) 792-3773
Fax: (702) 792-9002
Email: FerrarioM@gtlaw.com
Counsel for Appellant SHAC, LLC

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Elizabeth A. Brown
Clerk of Supreme Court

WILLIAM H. BROWN (7623)
LAMBROSE | BROWN PLLC
300 S. Fourth St., Ste. 700
Las Vegas, Nevada 89101
Tel: (702) 816-2200
Fax: (702) 816-2300
Email: WBrown@LambroseBrown.com
*Counsel for all Petitioners
except SHAC, LLC*

**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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STATE OF NEVADA
NEVADA TAX COMMISSION

In 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 Live Entertainment Tax Refund Requests

STIPULATION FOR SUBMISSION ON THE RECORD

NOW COME the Taxpayers, 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; Deja Vu Showgirls of Las Vegas, LLC dba Deja Vu; and Little Darlings of Las Vegas, LLC dba Little Darlings, by and through counsel, and the Nevada Department of Taxation, by and through counsel and hereby state as follows:

1. After considering the matter and the additional evidence on remand, the Administrative Law Judge (hereinafter "ALJ") issued her Findings of Fact, Conclusions of Law and Decision (hereinafter "Decision on Remand")¹, dated August 27, 2013, which denied Taxpayers' request for additional discovery and affirmed the Nevada Tax Commission's Findings of Fact, Conclusions of Law and Decision dated October 12, 2007²;

2. On September 24, 2013, Taxpayers appealed the ALJ's Hearing Officer's Order on Remand by correspondence addressed to Lezlie Helget, Supervising Auditor II, Nevada Department of Taxation.

3. Taxpayers and the Department of Taxation desire to expedite this matter, so that it may return to the Clark County Nevada District Court Case No. A-11-648894-J (Dept. No. 30) for further proceedings. The Parties have agreed that further oral argument or hearing before the Commission is not necessary to assist the Commission in addressing the Hearing Officer's Order on Remand affirming the Commission's prior decision.

¹ A copy is attached hereto as Exhibit A.

² A copy is attached hereto as Exhibit B.

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5. By submitting the matter to the Commission, the parties do not intend to waive any arguments appropriately raised in the underlying proceedings or in any other proceedings related to these Taxpayers' challenges to the tax at issue in this matter.

IT IS SO STIPULATED AND AGREED.

By: William H. Brown, Esq.
6029 S. Ft. Apache Rd.
Las Vegas, NV 89148
Attorneys for Plaintiffs

CATHERINE CORTEZ MASTO
Attorney General

By: Blake A. Doerr
Senior Deputy Attorney General
555 E. Washington Ave., Ste. 3900
Las Vegas, NV 89101
Attorneys for the Department
of Taxation

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WHEREFORE, IT IS HEREBY STIPULATED AND AGREED:

4. The present matter shall be submitted to the Nevada Tax Commission for Decision on the entire record and without additional briefing, oral argument or hearing.

5. By submitting the matter to the Commission, the parties do not intend to waive any arguments appropriately raised in the underlying proceedings or in any other proceedings related to these Taxpayers' challenges to the tax at issue in this matter.

6. Following the decision of the Commission, this matter shall be returned for further proceedings in Clark County Nevada District Court Case No. A-11-648894-J (Dept. No. 30), as determined by the Court.

IT IS SO STIPULATED AND AGREED.

GREENBERG TRAURIG, LLP

By: William H. Brown, Esq.
6029 S. Ft. Apache Rd.
Las Vegas, NV 89148
Attorneys for Plaintiffs

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

CATHERINE CORTEZ MASTO
Attorney General

By: Blake Doerr
Blake A. Doerr
Senior Deputy Attorney General
555 E. Washington Ave., Ste. 3900
Las Vegas, NV 89101
Attorneys for the Department
of Taxation

EXHIBIT “A”

Appellants Appendix

Page 3762

SUPP.ROA03623

STATE OF NEVADA
DEPARTMENT OF TAXATION

In the Matter of:)
)
K-Kel, Inc., Olympus Garden, Inc.,) Live Entertainment Tax
Shac, LLC, The Power Company, Inc.,) Refund Requests
D. Westwood, Inc., D.I. Food & Beverage)
of Las Vegas, LLC,)
) HEARING OFFICER'S
Petitioners.) ORDER ON REMAND

K-Kel, Inc. dba Spearmint Rhino Gentlemen's Club, Olympus Garden, Inc. dba Olympic Garden, Shac, LLC dba Sapphire, The Power Company dba Crazy Horse Too Gentlemen's Club, D. Westwood, Inc. dba Treasures, and D.I. Food & Beverage of Las Vegas, LLC dba Scores (collectively as "Petitioners") operated exotic dancing establishments or adult entertainment venues in Las Vegas, Nevada. The businesses offered entertainment in the form of live dance performances and sold alcoholic beverages. Petitioners charged their patrons admission charges to enter the venues. Petitioners did not offer gaming and had occupancy ratings between 200 and 7400 persons. The businesses operated from January 2004 through April 2004.

Petitioners requested refunds of live entertainment taxes ("LET") paid to the Nevada Department of Taxation ("Department") for the periods January 2004 through April 2004.¹ Petitioners based their refund requests on claims that 1) the LET was a facially unconstitutional tax on First Amendment activities and 2) Petitioners were exempt from paying the tax pursuant to NRS 368A.200(5)(a) because they provided "live entertainment that the State is prohibited from taxing under the Constitution, laws or treatises of the United States or Nevada Constitutions."

¹ In lieu of reciting the tortured procedural history of this matter from its inception, only the relevant events leading to this review and order will be discussed.

1 The Department denied the refund requests and the matter proceeded on appeal
2 to the Nevada Tax Commission ("Commission"), where the denials were upheld.²
3 Petitioners then appealed to the District Court. In September 2011, Petitioners
4 requested the District Court grant them the opportunity to submit 1510 pages of
5 additional documents into the record. The District Court remanded the matter to the
6 Commission to review the additional documents and determine whether those
7 documents changed the Commission's October 12, 2007 decision.

8 During their June 25, 2012 presentation to the Commission regarding the District
9 Court remand and the additional documents, Petitioners requested the Commission
10 grant them the opportunity to depose three witnesses. Their request was denied. By its
11 decision letter dated September 6, 2012, the Commission referred this matter to the
12 undersigned "with the entire record including the additional documents obtained through
13 discovery in the District Court case which are identified as Bates Nos. DV00001 through
14 DV001510. The ALJ shall review the additional evidence, along with the original record,
15 and determine whether the findings of fact, conclusions of law and final decision issued
16 in 2007 should be amended, reversed or affirmed."

17 Upon learning that this matter had been referred to the undersigned, Petitioners
18 submitted a letter to the undersigned dated August 13, 2013 in which Petitioners
19 renewed their requests for depositions and requested further unspecified discovery.³
20 Petitioners also requested a hearing before the undersigned because Petitioners "would
21 not presume to impose such a task," the task of reviewing the additional 1510 pages of
22 documents, on the undersigned. Rather, Petitioners would use the hearing to "distill and
23

24 _____
25 ² Petitioners' Refund Requests have been consolidated on appeal.

26 ³ Petitioners based this request on an argument that the Commission's September 12, 2012 written decision did not accurately reflect the Commission's oral decision. Petitioners have had 11 months to challenge the September 12, 2012 order or to request clarification from the Commission. They have chosen not to do so and this is not the proper forum for that issue.

1 clarify exactly what portions of these documents are relevant, and why."

2 Notwithstanding Petitioners' attempt to avoid a review by the undersigned of the very
3 documents which Petitioners fought so hard to include in the record and despite
4 Petitioners' surprising admission that the documents are to some degree repetitious,
5 unclear, and irrelevant, the undersigned has reviewed the 1510 pages as ordered by
6 the Commission.

7 Petitioners' additional documents included extensive legislative and regulatory
8 histories surrounding the enactment and subsequent amendment of NRS 368A and the
9 corresponding provisions of NAC 368A. Petitioners also included legislative history
10 regarding SB 247 (2005), which was intended to amend 368A but was not enacted.
11 Finally, the production included documents generated by the Department: requests for
12 information from taxpayers concerning the LET, informational letters and educational
13 materials regarding the LET, various statistical breakdowns concerning non-gaming
14 LET revenue collected by the Department, and internal memoranda responding to
15 requests for statistical information regarding LET.

16 Petitioners have not offered any persuasive legal support for their argument that
17 this tax on admission charges and sales runs afoul of the First Amendment. Rather,
18 their arguments appear to be based upon the idea that the Department's application of
19 the tax discriminates against Petitioners' adult entertainment venues in some respect, or
20 that the tax itself is so burdensome to Petitioners as to imperil their freedom of speech
21 and expression. These new arguments indicate that sometime after filing their Refund
22 Requests, Petitioners shifted their focus from a facial challenge of the LET to an as-
23 applied challenge. A facial challenge is a "claim that a statute is always unconstitutional
24 on its face- that is, that it always operates unconstitutionally." Black's Law Dictionary
25 244 (8th ed. 2004). An as-applied challenge is a "claim that a statute is unconstitutional
26 on the facts of a particular case or in its application to a particular party." Id. When

1 Petitioners asked the court to examine factually how the LET impacts one business
2 versus another, Petitioners proposed an as-applied challenge to the LET.

3 In this regard, Petitioners alleged that they bore a disproportionate tax burden,
4 presumably because their adult entertainment venues paid more LET than did other
5 non-gaming entertainment venues. While they may have paid more LET in absolute
6 terms when compared to other non-gaming venues, Petitioners have failed to develop
7 any facts to show that this was unconstitutional in some respect.

8 LET is an excise tax which functions like a sales tax on the gross receipts from
9 admission charges and retail sales of prepared food, alcohol and merchandise. LET is
10 imposed as a fixed percentage of the gross receipts from admission charges and sales.
11 Therefore, a business with more revenue from admission charges and sales will
12 necessarily pay more LET than a business with less revenue from admission charges
13 and sales. If Petitioners paid more in LET, it was only because they generated more
14 revenue from sales and admission charges than did other entertainment venues. In
15 absolute terms, Petitioners' LET liability increased as their sales and admissions
16 revenue increased. In relative terms, Petitioners' LET liability was identical to that of the
17 next taxpayer.

18 Since LET is imposed upon gross receipts as opposed to net receipts, it may
19 disproportionately impact a business with narrow operating margins unless the tax is
20 passed on to or borne by patrons or consumers. Petitioners have not alleged that they
21 had narrow operating margins or that there were any practical or legal impediments that
22 prevented them from passing the tax burden on to their patrons as allowed by NRS
23 368A. To the contrary, their sales figures would suggest that their patrons happily
24 shouldered the burden of the tax.

25 In their efforts to show that they paid more LET than other entertainment venues,
26 Petitioners have actually undermined their own arguments that the LET is punitive or

1 discriminatory. If the LET were punitive or discriminatory toward Petitioners, one would
2 reasonably expect Petitioners' receipts from admissions and sales to have declined as
3 compared to the admissions and sales of competing entertainment venues. Petitioners
4 have not shown that their admissions and sales declined relative to those of competing
5 entertainment venues, nor have they attempted to show that such a decline will likely
6 occur in the future. Petitioners cannot demonstrate that the LET unconstitutionally
7 burdens adult entertainment because they cannot show that the application of the tax
8 puts their venues at a competitive or commercial disadvantage when compared with
9 other entertainment venues. Likewise, Petitioners cannot demonstrate that the tax is so
10 burdensome that it imperils free speech and freedom of expression at their venues. To
11 the contrary, the tax appears to have had no discernible impact upon Petitioners' ability
12 to conduct live dance performances at their venues.

13 Petitioner's also argued there was an illicit intent on the part of the legislature to
14 target the tax toward adult entertainment venues. The Commission's October 12, 2007
15 decision specifically addressed Petitioners' allegations of an illicit legislative motive and
16 held that "[m]ention by legislators of taxability of live entertainment under a proposed bill
17 that was subsequently enacted does not prove that the bill was enacted because of
18 disagreement with the message provided by live adult entertainment." Petitioners'
19 presentation of more pages of legislative history does not alter this conclusion. With
20 regard to the legislative history pertaining to SB 247 (2005) which was not enacted, the
21 Commission ruled that "[s]tatements by legislators with respect to a bill that would have
22 taxed live adult entertainment as a separate class, where the bill did not pass, does not
23 prove the intent of a separate bill that did not select live entertainment." Petitioners'
24 second presentation of the same information and argument does not change the
25 Commission's conclusion.

26 Neither Petitioners' documents nor their as-applied constitutional challenges

1 compel amendments to the Commission's October 12, 2007 decision. Petitioners failed
2 to allege or demonstrate incorrect application of the LET provisions to Petitioners or that
3 the Department applied a peculiar interpretation of the LET to Petitioners. Other than
4 the more expansive LET statistics presented, there are no additional facts to assist in
5 determining if Petitioners have been subjected to an unconstitutional application of LET.
6 And the few additional facts presented fail to establish Petitioners' claims. Frankly, it is
7 difficult to imagine that there might be facts to support Petitioners' assertions.
8 Petitioners' position that the Nevada legislature enacted the LET in an attempt to
9 suppress entertainment in Nevada, the lifeblood of this tourism-dependent state,
10 borders on the absurd.

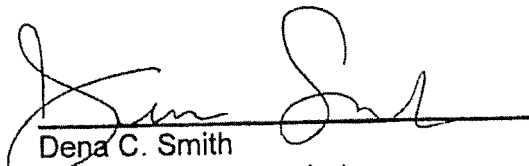
11 ORDER

12 Based upon the foregoing, and GOOD CAUSE APPEARING THEREFORE, IT IS
13 HEREBY ORDERED, ADJUDGED AND DECREED that:

14 1. Petitioners' August 13, 2013 requests that the undersigned exceed the scope
15 of the Commission's September 6, 2012 decision by: 1) convening a hearing in this
16 matter, 2) allowing Petitioners to depose three witnesses, and 3) allowing Petitioners to
17 engage in additional unspecified discovery are denied.

18 2. Petitioner's additional documents Bates DV000001 through DV001510 are
19 insufficient to change the October 12, 2007 decision of the Commission. The
20 Commission's October 12, 2007 decision is hereby affirmed.

21
22 DATED this 27th day of August, 2013.

23
24 
25 Dena C. Smith
26 Administrative Law Judge

APPEAL RIGHTS

You may appeal this decision to the Nevada Tax Commission provided that you file a notice of appeal within thirty (30) days after the date of service of this decision upon you. Although notice of the appeal need not be in any particular format, it must be in writing, must clearly state your desire to appeal this decision, and must be filed with the executive staff of the Department of Taxation within thirty (30) days after the date of service of this decision. In this regard, you are advised to mail or personally deliver any notice of appeal to the attention of

Lezlie Helget, Supervising Auditor II
Nevada Department of Taxation
1550 College Parkway, Suite 115
Carson City, Nevada 89706

Pursuant to NRS 360.245, this decision will become final thirty (30) days after service upon you unless you file a notice of appeal within those thirty (30) days.

All the above general information is provided to you pursuant to NRS 360.2925 and as a matter of courtesy only. You, or your counsel, should ascertain with more particularity the regulatory or statutory requirements pertinent to your further appeal rights.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing Hearing Officer's Order on Remand in the matter of K-Kel, Inc. et. al. Live Entertainment Tax Refund Request, upon all parties of record in this proceeding as follows:

By mailing a copy thereof via certified mail, properly addressed, with postage prepaid to:

Certified Mail: 7011 2000 0001 5246 0539

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

Certified Mail: 7011 2000 0001 5246 0546

Mark E. Ferrario, Esq.
Greenberg Traurig, LLP
3773 Howard Hughes Pkwy., Ste. 400 N.
Las Vegas, NV 89169

By electronic mail to:

William H. Brown, Esq. at wbrown@lambrosebrown.com

Mark E. Ferrario, Esq. at ferrariom@gtlaw.com

Vivienne Rakowsky, Deputy Attorney General, Counsel for Nevada Department of Taxation, at VRakowsky@ag.nv.gov

Christopher G. Nielsen, Executive Director, Nevada Department of Taxation

Nevada Tax Commission Members

Dated at Henderson, Nevada, this 27th day of August, 2013.

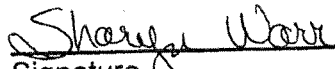

Signature

EXHIBIT “B”

Appellants' Appendix

Page 3771

SUPP.ROA03632



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

STATE OF NEVADA
DEPARTMENT OF TAXATION

Web Site: <http://tax.state.nv.us>
1550 College Parkway, Suite 115
Carson City, Nevada 89706-7937
Phone: (775) 684-2000 Fax: (775) 684-2020

LAS VEGAS OFFICE
Grant Sawyer Office Building, Suite 1300
555 E. Washington Avenue
Las Vegas, Nevada, 89101
Phone: (702) 486-2300 Fax: (702) 486-2373

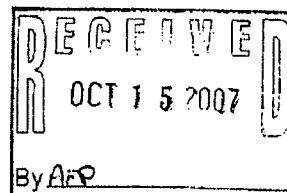
RENO OFFICE
4800 Kietzke Lane
Building L, Suite 235
Reno, Nevada 89502
Phone: (775) 688-1295
Fax: (775) 688-1303

HENDERSON OFFICE
2550 Paseo Verde Parkway Suite 180
Henderson, Nevada 89074
Phone: (702) 486-2300
Fax: (702) 486-3377

October 12, 2007

Bradley Shafer, Esq.
Shafer and Associates
3800 Capital City Blvd., Ste 2
Lansing, Michigan 48906

CERTIFIED MAIL 7003 1680 0001 3683 7108



Dianna L. Sullivan, Esq.
Ghanem & Sullivan
8861 W. Sahara Ave., Ste 120
Las Vegas, Nevada 89117

CERTIFIED MAIL 7003 1680 0001 3683 6538

IN THE MATTER OF:

The Appeal of Olymple 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.

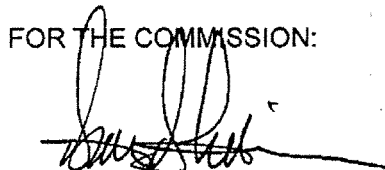
CONCLUSIONS OF LAW

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)



**STATE OF NEVADA
DEPARTMENT OF TAXATION**

Web Site: <http://tax.state.nv.us>

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

RENO OFFICE
4600 Kietzke Lane
Building L, Suite 235
Reno, Nevada 89502
Phone: (775) 687-9999
Fax: (775) 688-1303

BRIAN SANDOVAL
Governor
ROBERT R. BARENGO
Chair, Nevada Tax Commission
CHRISTOPHER G. NIELSEN
Executive Director

LAS VEGAS OFFICE
Grant Sawyer Office Building, Suite 1300
555 E. Washington Avenue
Las Vegas, Nevada 89101
Phone: (702) 486-2300 Fax: (702) 486-2373

HENDERSON OFFICE
2550 Paseo Verde Parkway, Suite 180
Henderson, Nevada 89074
Phone: (702) 486-2300
Fax: (702) 486-3377

November 22, 2013

William H. Brown Esq
Lambrose Brown
300 S 4th Street Suite 1020
Las Vegas, NV 89101

Mark E Ferrario Esq
Greenberg Traurig LLP
3773 Howard Hughes Pkwy Ste 400 N
Las Vegas, NV 89169

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, Déjà vu Showgirls of Las Vegas, LLC dba Déjà vu; and Little Darlings of Las Vegas, LLC dba Little Darlings**

**NEVADA TAX COMMISSION
NOTICE OF HEARING**

Taxpayer's opportunity pursuant to District Court Order dated January 24, 2012 to amend, reverse or affirm the NTC's Findings of Fact, Conclusions of Law dated October 12, 2007, after remand to hearing officer, who, after review of Taxpayer's additional evidence affirmed the NTC's Findings of Fact, Conclusions of Law dated October 12, 2007, affirmed the NTC's September 6, 2012 Decision denying the Taxpayer's request to issue subpoenas, conduct additional discovery and depositions, and denied the Taxpayer's request to convene a hearing has been placed on the agenda of the Nevada Tax Commission meeting which is to be held Monday, December 9, 2013 at the Nevada Gaming Control Board, 1919 College Pkwy, Suite 100, Carson City, Nevada and the Nevada Gaming Control Board, Grant Sawyer State Office Building, 555 E. Washington Ave, Room 2450, Las Vegas, Nevada, commencing at 9:00 a.m. A copy of the posted agenda will be sent to you as soon as it is available

While an appeal to the Nevada Tax Commission concerning the liability of tax must be heard in open session, a taxpayer may request that a portion of the hearing be closed to the public so that the Tax Commission can receive proprietary or confidential information pursuant to NRS 360.247. The request must be in writing, be made no later than fourteen (14) calendar days prior to the date of hearing, contain a list or summary of the information that the taxpayer believes is proprietary or confidential, and include a short statement explaining how the information alleged by the taxpayer to be proprietary or confidential qualifies pursuant to NRS 360.247. All requests for closed hearings will be noted as such on the Commission's written agenda.

If a transcript of any hearing held before the Commission is desired by the petitioner, they may request a copy of the transcript from the Department or the Commission's court reporter. Additionally, in accordance with NAC 360.175, oral argument on behalf of the petitioner as well as the Department shall be limited to a period of time not to exceed 20 minutes for each, unless extended by the Commission.

The Commission requires that any materials in support of an appeal be received in the office of the Department at least 2 weeks prior to the scheduled meeting to allow the Department and the Commission an opportunity for review. The Commission further indicated that if the material is not received within this time frame, appeals may be postponed until the next meeting. Please send us any material you wish considered as soon as possible.

If you have any questions, please contact Erin Fierro, (775) 684-2096.

Sincerely,

Paulina T. Oliver
Deputy Executive Director

cc: Nevada Tax Commission
Blake Doerr, Deputy Attorney General



STATE OF NEVADA
DEPARTMENT OF TAXATION

Web Site: <http://tax.state.nv.us>

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

RENO OFFICE
4600 Kietzke Lane
Building L, Suite 235
Reno, Nevada 89502
Phone: (775) 687-9999
Fax: (775) 688-1303

BRIAN SANDOVAL
Governor
ROBERT R. BARENGO
Chair, Nevada Tax Commission
CHRISTOPHER G. NIELSEN
Executive Director

LAS VEGAS OFFICE
Grant Sawyer Office Building, Suite 1300
555 E. Washington Avenue
Las Vegas, Nevada 89101
Phone: (702) 486-2300 Fax: (702) 486-2373

HENDERSON OFFICE
2550 Paseo Verde Parkway, Suite 180
Henderson, Nevada 89074
Phone: (702) 486-2300
Fax: (702) 486-3377

November 22, 2013

William H. Brown Esq
Lambrose Brown
300 S 4th Street Suite 1020
Las Vegas, NV 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, Déjà vu Showgirls of Las Vegas, LLC dba Déjà vu; and Little Darlings of Las Vegas, LLC dba Little Darlings

The attached notice was not delivered in enough time available to provide a full 21 working day notice. Therefore, we would like to request your consideration of a waiver of the twenty-one working day notice requirement and that this notice is sufficient. Please let us know whether or not you agree to waive the twenty-one day notice, by signing and dating the signature block below and checking the appropriate box. Please sign and return the response to the Department by e-mail to efierro@tax.state.nv.us or facsimile transmission at 775-684-2020, as soon as possible.

☒ Yes, I agree to waive the 21-working day notice.

☐ No, I do not agree to waive the 21-working day notice by certified letter.

William H. Brown ATTORNEY 11-26-13
Signature Title Date

1 MR. NIELSEN: Mr. Chairman, members of the
2 Commission, the next agenda item up for your consideration
3 is under 4-G. This is Tax Commission's opportunity pursuant
4 to District Court Order dated January 24, 2012 to amend,
5 reverse or affirm the Commission's Findings of Fact,
6 Conclusions of Law dated October 12, 2007, after remand to
7 hearing officer, who, after review of Taxpayer's additional
8 evidence affirmed the Commission's Findings of Fact,
9 Conclusions of Law dated October 12, 2007; affirmed the
10 Commission's September 6, 2012 Decision denying the
11 taxpayer's request to issue subpoenas, conduct additional
12 discovery and depositions; and denied the taxpayer's request
13 to convene a hearing.

14 Number 1 is K-Kel, Inc. doing business as
15 Spearmint Rhino Gentleman's Club; Olympus Garden, Inc.,
16 doing business as Olympic Garden; SHAC LLC doing business as
17 Sapphire; The Power Company, Inc., doing business as Crazy
18 Horse Too Gentleman's Club; D Westwood, Inc. doing business
19 as Treasures; DI Food & Beverage of Las Vegas, LLC doing
20 business as Scores, Deja vu Showgirls of Las Vegas, LLC
21 doing business as Deja vu; and Little Darlings of Las Vegas,
22 LLC doing business as Little Darlings.

23 For the Department is Blake Dohr and there are
24 representatives of the taxpayer as well.

25 CHAIRMAN BARENGO: Good afternoon, gentlemen,

1 would you identify yourselves for the record?

2 MR. DOHR: Good morning, Mr. Chairman and members
3 of the Commision, Blake Dohr on behalf of the Department.

4 MR. BROWN: William Brown on behalf of all the
5 taxpayers except SHAC LLC, who is represented by Mr. Rootsy.

6 MR. ROOTSY: Good morning, Mr. Rootsy on behalf of
7 SHAC LLC.

8 CHAIRMAN BARENGO: Mr. Dohr?

9 MR. DOHR: I'll just give a brief overview here.
10 We're here today asking the Commission to affirm its
11 decision that it rendered on October 12th, 2007. That
12 decision was the collective plaintiffs in this matter, their
13 request for tax refunds, based on grounds the live
14 entertainment tax was unconstitutional.

15 At the time of that decision the plaintiffs had an
16 active Complaint in District Court which was really asking
17 the District Court to adjudicate the same matter.

18 And the District Court matter was stayed while the
19 Commission was entertaining the matter. The matter made its
20 way through District Court after this commission made its
21 ruling, with the District Court judge Elizabeth Gonzales
22 dismissing the matter on the grounds that the matter should
23 be filed as a petition for judicial review, and she based
24 that decision on the Southern Cal Edison case which this
25 Commission is familiar with.

1 Based on that action that the clubs filed their
2 petition for judicial review and the case has been with Judge
3 Wekks in the Eighth Judicial District. Judge Weeks said this
4 matter has been decided. However, four years have passed
5 and the clubs are alleging there is all this discovery that
6 that they should be considered.

7 The judge said I think that that's really for the
8 Commission to look at and make their own decision whether
9 they should re-look at the additional evidence and whether
10 they want to reverse, remand or affirm that original
11 decision.

12 That question came to the Commission, and the
13 Commission decided to remand it to its hearing officer to
14 look at some of the specific evidence that they had asked
15 about. The Commission also denied them the further
16 evidence.

17 So the matter went to the Department's hearing
18 officer, Judge James, and she looked at the evidence the
19 Commission asked her to to look at, and she rendered a
20 decision affirming that decision. We're here today asking
21 you to affirm, reaffirm your decision based on her findings
22 that the evidence that she looked at did not change this
23 decision.

24 MR. BROWN: Thank you, essentially what we're here
25 with is a much more complete factual record than we had when

1 the initial decision was entered. We've agreed with the
2 State in the interests of getting this matter back in front
3 of Judge Weeks to submit it to the Commission to either
4 amend, reverse or affirm, modify what is essentially a
5 decision it initially made.

6 Our request of course would be that the Commission
7 reverse that decision. The State of course thinks it should
8 be affirmed. Other than that, I think the procedure Mr.
9 Dohr laid out is pretty accurate and essentially it's before
10 the Commission now.

11 I'll be happy to answer any questions, of course,
12 but we've agreed not to belabor this matter here today.

13 CHAIRMAN BARENGO: Mr. Rootsby?

14 MR. ROOTSY: Nothing further.

15 CHAIRMAN BARENGO: Any questions of any of these
16 gentlemen? As I read the Court's order, it says to amend
17 the findings of fact and conclusions of law, reverse the
18 decision or affirm the decision. And our hearing officer
19 has affirmed it after reviewing the evidence, what is the
20 pleasure of the Commission?

21 MR. DOHR: May I just for the record, I want to
22 make sure we have stated, as I've said, the State would
23 submit this matter without additional briefing or argument.
24 I just want to make sure that that stipulation is part of
25 the record.

1 CHAIRMAN BARENGO: Yes, it was, or is.

2 Is there any discussion? Motions?

3 MEMBER MARVEL: I'll move to affirm the hearing
4 officer's decision.

5 CHAIRMAN BARENGO: It's been moved.

6 MEMBER DEVOLLD: Second.

7 CHAIRMAN BARENGO: There's a second by
8 Commissioner Devolld. It's been moved that we affirm the
9 hearing officer's decision in this matter. Any further
10 discussion?

11 MEMBER SHEETS: Mr. Chairman, do we also have to
12 affirm the Commission's original decision issued in October
13 of 2007 as well?

14 MS. CRANDALL: That would be my recommendation.

15 MR. DOHR: That would be my request as well.

16 CHAIRMAN BARENGO: And I would submit that we
17 amend the motion to include our affirmation of the
18 Commission's prior order issued in this case, dated October
19 12, 2007, if Commissioner Marvel will accept that.

20 MEMBER MARVEL: Yes, I accept that.

21 CHAIRMAN BARENGO: So we've all heard the motion.
22 All those in favor signify by saying "Aye." Any opposed?
23 The motion passes unanimously. Thank you, gentlemen, for
24 coming.

25 MR. NIELSEN: Mr. Chairman, I think the balance of



BRIAN SANDOVAL
Governor
ROBERT R BARENGO
Chair, Nevada Tax Commission
CHRISTOPHER G. NIELSEN
Executive Director

**STATE OF NEVADA
DEPARTMENT OF TAXATION**

Web Site: <http://tax.state.nv.us>

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

LAS VEGAS OFFICE
Grant Sawyer Office Building, Suite 1300
555 E. Washington Avenue
Las Vegas, Nevada 89101
Phone: (702) 486-2300 Fax: (702) 486-2373

RENO OFFICE
4600 Kietzke Lane
Building L, Suite 235
Reno, Nevada 89502
Phone: (775) 687-9999
Fax: (775) 688-1303

HENDERSON OFFICE
2550 Paseo Verde Parkway, Suite 180
Henderson, Nevada 89074
Phone: (702) 486-2300
Fax: (702) 486-3377

DECISION LETTER

February 12, 2014

Mr. William H. Brown CERTIFIED MAIL: 7012 3460 0003 1673 0427
Lambrose Brown, PLLC
300 S. 4th St., Ste. 1020
Las Vegas, Nevada 89101

Mr. Mark Ferrario CERTIFIED MAIL: 7012 3460 0003 1673 0434
Greenberg Traurig, LLP
3773 Howard Hughes Pkwy., Ste. 400 N
Las Vegas, Nevada 89169

**IN THE MATTER OF: K-KEL, ET AL.'S OPPORTUNITY, PURSUANT TO
DISTRICT COURT ORDER DATED JANUARY 24, 2012,
TO PRESENT ADDITIONAL EVIDENCE TO THE NEVADA
TAX COMMISSION SO THAT THE COMMISSION CAN
AMEND THE FINDINGS OF FACT, CONCLUSIONS OF
LAW AND DECISION DATED OCTOBER 12, 2007,
REVERSE THE DECISION OR AFFIRM THE DECISION,
AND CONSIDERATION OF TAXPAYER'S REQUEST FOR
SUBPOENAS FOR DEPOSITIONS, ADDITIONAL
DISCOVERY AND A HEARING.**

The above matter came before the Nevada Tax Commission ["Commission"] on December 9, 2013. Senior Deputy Attorney General Blake Doerr appeared on behalf of the Respondent, Department of Taxation ["Department"]. For the Petitioners, Brandon Roos, Esq. appeared on behalf of Shac, LLC and William H. Brown, Esq. appeared on behalf of K-Kel dba Spearmint Rhino, The Power Company dba Crazy Horse Too Gentlemen's Club, D. Westwood, Inc. dba Treasures, Olympus Garden, Inc. dba Olympic Garden, DI Food and Beverage of Las Vegas dba Scores, Déjà vu Showgirls of Las Vegas, LLC dba Déjà vu, and Little Darlings of Las Vegas, LLC, dba Little Darlings. The entire record considered on remand (including the additional 1,510 pages identified as Bates DV000001 through DV001510), was provided to and considered by the Commission in the proceeding, and form the basis of these findings of fact and conclusions of law.

Mr. William H. Brown
Mr. Mark Ferrario
February 12, 2014
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RELEVANT FINDINGS AND PROCEDURAL HISTORY

This matter is pending before the District Court for Judicial Review of the Commission's October 12, 2007 Findings of Fact, Conclusions of Law and Decision in the above entitled matter (Case No. A-11-648894-J). See October 12, 2007 Findings of Fact, Conclusions of Law and Decision, attached hereto as Exhibit "A". On or about September 26, 2011, the Petitioners requested leave of the District Court to present additional evidence to the Nevada Tax Commission in order to enlarge the Administrative Record. See District Court Order dated January 24, 2012, attached hereto as Exhibit "B".

On or about June 14, 2012, Petitioners requested that the Commission issue subpoenas and allow three depositions. On June 25, 2012, a hearing was held before the Nevada Tax Commission. See Transcript of Hearing, attached hereto as Exhibit "C". Following the hearing, the Nevada Tax Commission Ordered:

1. The requested subpoenas will not be issued and additional discovery and/or depositions will not be permitted.
2. The administrative record is supplemented with the additional evidence that was not considered by the Commission in 2007 but was thereafter obtained through discovery in the District Court case and existing on January 12, 2012 at the time that the Court made the decision to remand the matter to the Commission, i.e. Bates Nos.DV00001 through DV001510.
3. This matter is remanded to an ALJ with instructions to review the additional evidence and the original record and do one of the following: amend the Findings of Fact, Conclusions of Law and Decision dated October 12, 2007, reverse the decision or affirm the decision.
4. If a party is aggrieved by the decision of the ALJ, that party may appeal the decision to this Commission pursuant to NRS 360.245.

See Findings of Fact, Conclusions of Law and Order dated September 6, 2012 attached hereto as Exhibit "D".

Per the Commission's Order, the matter was submitted to Administrative Law Judge Dena Smith. On August 13, 2013, Petitioners requested that Judge Smith convene a hearing in the matter, allow Petitioners to depose three witnesses and allow the Petitioners to engage in additional unspecified discovery. The production of additional information identified as Bates DV000001 through DV001510, included legislative history, including legislative history pertaining to SB 247 (2005) which was not enacted, along with documents generated by the Department, such as, requests for information from taxpayers concerning the LET, informational letters and educational materials regarding the LET, various statistical breakdowns concerning non-gaming

Mr. William H. Brown
Mr. Mark Ferrario
February 12, 2014
Page 3

LET revenue collected by the Department, and internal memoranda responding to requests for statistical information regarding LET.

On August 21, 2013, after reviewing more than 1,500 documents submitted for review, and noting that the Petitioners had amended their claims to include an “as applied” challenge sometime after the initial decision was issued, Judge Smith issued the Hearing Officer’s Order on Remand and found:

The Petitioners waited 11 months to argue that the Commission’s written decision of December 12, 2012 did not accurately represent the Commission’s oral decision. Petitioners never made a request for clarification to the Commission. The Petitioners have waived their right to do so. Additionally, this Remand is not the proper forum to raise this issue.

The Petitioners’ attempt to avoid a review of the very documents which Petitioners fought so hard to include in the record, by stating that a hearing would be used to “distill and clarify exactly what portions of these documents are relevant, and why,” is an admission that the documents are to some degree repetitious, unclear, and irrelevant.

Petitioners have not offered any persuasive legal support for their argument that a tax on adult entertainment runs afoul of the First Amendment. Petitioners alleged that they bore a disproportionate tax burden, presumably because their adult entertainment venues paid more LET than did other non-gaming entertainment venues. While they may have paid more LET in absolute terms, Petitioners have failed to develop any facts to show that this was unconstitutional in some respect.

LET is an excise tax which functions like a sales tax on the gross receipts from admission charges and retail sales of prepared food, alcohol and merchandise. LET is imposed as a fixed percentage of the gross receipts from admission charges and sales.

A business with more revenue from admission charges and sales will necessarily pay more LET than a business with less revenue from admission charges and sales. If Petitioners paid more in LET, it was only because they generated more revenue from sales and admission charges than did other entertainment venues. Petitioners’ LET liability was identical to that of the next taxpayer.

Petitioners have not shown that their sales declined relative to those of competing entertainment venues. Accordingly, LET is not punitive or discriminatory.

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Mr. Mark Ferrario
February 12, 2014
Page 4

LET does not unconstitutionally burden adult entertainment. The application of the tax does not place the Petitioners' venues at a competitive or commercial disadvantage when compared with other entertainment venues.

The tax is not so burdensome that it imperils free speech and freedom of expression.

The Commission's October 12, 2007 decision specifically addressed Petitioners' allegations of an illicit motive by the Nevada Legislature to target the tax towards adult entertainment venues, and held that "[m]ention by legislators of taxability of live 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." Petitioners' presentation of more pages of legislative history does not alter this conclusion.

Neither Petitioners' documents nor their as-applied constitutional challenges compel any amendments to the Commission's October 12, 2007 decision.

There are no additional facts that show that Petitioners have been subjected to an unconstitutional application of LET. And the few additional facts presented fail to establish Petitioners' claims.

Petitioners' position that the Nevada legislature enacted the LET in an attempt to suppress entertainment in Nevada, the lifeblood of this tourism-dependent state, borders on the absurd.

Judge Smith ordered:

1. Petitioners' August 13, 2013 request that the Hearing Officer exceed the scope of the Commission's September 6, 2012 decision by: 1) convening a hearing in this matter, 2) allowing Petitioners to depose three witnesses, and 3) allowing Petitioners to engage in additional unspecified discovery are denied.
2. Petitioners' additional documents Bates DV000001-DV001510 are insufficient to change the October 12, 2007 decision of the Commission. The Commission's October 12, 2007 decision is hereby affirmed.

See Hearing Officer's Order on Remand, attached hereto as Exhibit "E"

On September 24, 2013, Petitioners' timely appealed the Hearing Officer's Order. In order to expedite the matter and in order to allow this matter to return to District Court, the parties entered into a Stipulation that further oral argument or a hearing

Appellants' Appendix

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SUPP.ROA03646

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before the Commission would not be necessary to assist the Commission in addressing the Hearing Officer's Order on Remand affirming the Commission's prior decision. The parties stipulated:

1. The matter shall be submitted to the Nevada Tax Commission for Decision on the entire record and without additional briefing, oral argument or hearing;
2. By submitting the matter to the Commission, the parties do not intend to waive any arguments appropriately raised in the underlying proceedings or in any other proceedings related to these Taxpayers' challenges to the tax at issue in this matter.
3. Following the decision of the Commission, this matter shall be returned for further proceedings in Clark County Nevada District Court Case No. A-11-648894-J (Dept. No. 30) as determined by the Court.

See Stipulation, attached hereto as Exhibit "F".

On December 9, 2013, the Commission considered the Hearing Officer's Decision and the aforementioned Stipulation. See Transcript of Hearing, attached hereto as Exhibit "G".

DECISION

The Commission hereby grants the Stipulation (Exhibit "E"), affirms its Findings of Fact, Conclusions of Law and Decision dated October 12, 2007 (Exhibit "A"), as well as all findings and conclusions of law contained in the Hearing Officers Order on Remand (Exhibit "E") in their entirety.

FOR THE COMMISSION



CHRISTOPHER NIELSEN
Executive Director
Nevada Department of Taxation

cc: Vivienne Rakowsky, Deputy Attorney General
David Pope, Senior Deputy Attorney General
Blake Doerr, Senior Deputy Attorney General

EXHIBIT “A”

Appellants' Appendix

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SUPP.ROA03648



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

STATE OF NEVADA
DEPARTMENT OF TAXATION

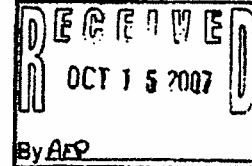
Web Site: <http://tax.state.nv.us>
1550 College Parkway, Suite 115
Carson City, Nevada 89706-7937
Phone: (775) 684-2000 Fax: (775) 684-2020

LAS VEGAS OFFICE
Grant Sawyer Office Building, Suite 1300
555 E. Washington Avenue
Las Vegas, Nevada, 89101
Phone: (702) 486-2300 Fax: (702) 486-2373

RENO OFFICE
4800 Kietzke Lane
Building L, Suite 236
Reno, Nevada 89502
Phone: (775) 686-1295
Fax: (775) 686-1303

HENDERSON OFFICE
2560 Paseo Verde Parkway Suite 180
Henderson, Nevada 89074
Phone: (702) 486-3300
Fax: (702) 486-3377

October 12, 2007



Bradley Shafer, Esq.
Shafer and Associates
3800 Capital City Blvd., Ste 2
Lansing, Michigan 48906

CERTIFIED MAIL 7003 1680 0001 3683 7108

Dianna L. Sullivan, Esq.
Ghanem & Sullivan
8861 W. Sahara Ave., Ste 120
Las Vegas, Nevada 89117

CERTIFIED MAIL 7003 1680 0001 3683 6538

IN THE MATTER OF:

The Appeal of Olympic Gardens, Inc., D.I. Food & Beverage of Las Vegas, Shac, LLC, D. Westwood, Inc., K-Kel, Inc., The Power Co., Inc. ("Appellants") from the Department of Taxation's Denial of their refund request pursuant to NRS 368A.260

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

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

FINDINGS OF FACT

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

CONCLUSIONS OF LAW

1. NRS 368A.200(5)(a) exempts from the live entertainment tax "(l)live 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”

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

1 evidence and do one of the following: Amend the Findings of Fact, Conclusions of
2 Law dated Oct. 12, 2007, Reverse the Decision, or Affirm the Decision.
3
4

5 **IT IS SO ORDERED.**

6 DATED this 24 day of January, 2012.
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9 _____
10 DISTRICT COURT JUDGE
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EXHIBIT “C”

CERTIFIED COPY

**STATE OF NEVADA
TAX COMMISSION
TELECONFERENCED OPEN MEETING
MONDAY, JUNE 25, 2012
CARSON CITY, NEVADA**

THE BOARD:

ROBERT BARENGO, Chairman
JOHN MARVEL, Member
JOAN LAMBERT, Acting Chairman
DAVID TURNER, Member
ANN BERSI, Member
ROBERT JOHNSON, Member
CRAIG WITT, Member

FOR THE DEPARTMENT:

CHRISTOPHER NIELSEN,
Executive Director

TERRY RUBALD Chief, Division
of Assessment Standards

ERIN FIERRO
Management Assistant

FOR THE BOARD:

JENNIFER CRANDALL,
Sr. Deputy Attorney General

REPORTED BY:

CAPITOL REPORTERS
BY: MICHEL LOOMIS,
Nevada CCR #228
515 W. Fourth St., Ste. B
Carson City, Nevada, 89703
(775) 882-5322

CAPITOL REPORTERS (775) 882-5322

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AGENDA/INDEX

AGENDA ITEM

PAGE

- F. Petition for reconsideration of
Department's denial of exemption status
for organization created for religious,
charitable or educational purposes
(sales/use tax):
1) National Association of School Resource
Officers, Inc. 52
2) Airborne Law Enforcement Association, Inc. 52
- G. Taxpayers' opportunity to district court
order dated January 24, 2012 to present
additional evidence to the NTC so that the
NTC can amend the findings of fact,
conclusions of law dated October 12, 2007,
reverse the decision, or affirm the
decision and consideration of taxpayers'
request for subpoenas:
1) 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; Déjà vu
Showgirls of Las Vegas, LLC, dba Déjà vu;
and Little Darlings of Las Vegas, LLC,
dba Little Darlings 66
- H. Taxpayer's appeal of Hearing Officer's
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decision upholding Department's denial of
use tax refund request/sales tax deficiencies
on complimentary meals and employee meals:
1) Harrah's Entertainment Inc. 123

CAPITOL REPORTERS (775) 882-5322

1 MEMBER WITT: Second.

2 ACTING CHAIRMAN LAMBERT: We have a motion and a
3 second to uphold the Department's denial of the exemption
4 status for the National Association of School Resource
5 Officers, Incorporated and the Airborne Law Enforcement
6 Association, Incorporated. Any discussion? Hearing none all
7 who approve signify by saying aye. Anyone who doesn't nay.
8 The motion passes. Thank you very much for your time,
9 Mr. Moreno.

10 MR. MORENO: Thank you, Commissioners, and thank
11 you, Jed, it was a pleasure meeting you by telephone.

12 CHAIRMAN BARENGO: Thank you.

13 (Motion carries.)

14 ACTING CHAIRMAN LAMBERT: Is anybody ready for a
15 break? How about we take a 15-minute break.

16 CHAIRMAN BARENGO: How long?

17 ACTING CHAIRMAN LAMBERT: 15 minutes. So we'll
18 come --

19 CHAIRMAN BARENGO: 15 minutes. Okay.

20 ACTING CHAIRMAN LAMBERT: We'll come back at
21 quarter to 11:00 by the clock in our room.

22 (Recess taken.)

23 ACTING CHAIRMAN LAMBERT: Okay. So we are back
24 on the record.

25 MR. NIELSEN: Madam Chair, again for the record

—CAPITOL REPORTERS (775) 882-5322—

1 this is Chris Nielsen. The next agenda item up for the
2 Commission's consideration today is again under item IV,
3 Compliance Division. G, which is taxpayers' opportunity
4 pursuant to District Court order dated January 24th, 2012 to
5 present additional evidence to the Nevada Tax Commission so
6 that the NTC can amend the findings of fact, conclusions of
7 law dated October 12th, 2007. Reverse decision or affirm the
8 decision in consideration of taxpayers' request for subpoenas.

9 The specific Case Number 1 is K-Tell, Inc. doing
10 business as Spearmint Rhino's Gentlemen's Club, Olympus
11 Garden, Inc. doing business as Olympic Garden, SHAC LLC doing
12 business as Sapphire, the Power Company, Inc. doing business
13 as Crazy Horse Too Gentlemen's Club, D Westwood, Inc. doing
14 business as Treasures, DI Food and Beverage of Las Vegas, LLC
15 doing business as Scores, Déjà Vu Girls of Las Vegas, LLC
16 doing business as Déjà Vu and Little Darlings of Las Vegas,
17 LLC doing business as Little Darlings.

18 And for the Department I believe we have
19 Blake Doerr and I believe also David Pope will be giving a
20 brief overview of this agenda item.

21 ACTING CHAIRMAN LAMBERT: Thank you. Having not
22 seen anything like this before, Jennifer, could you give us
23 some of the options we have, I mean, do we have to admit the
24 evidence because there's a court order or do we have options
25 on what we admit?

____CAPITOL REPORTERS (775) 882-5322____

1 MS. CRANDALL: No, I think the court was asking
2 you to make a determination as to whether the materials should
3 be admitted and considered by you. I think it was pretty well
4 briefed by the parties so I -- if you're looking for guidance
5 when we get to making a motion I can help with that if you'd
6 like.

7 ACTING CHAIRMAN LAMBERT: Thank you. I was
8 just -- wanted to be clear whether we did have any options to
9 consider and apparently we do. Thank you.

10 MS. CRANDALL: Yeah, I think you absolutely do.

11 ACTING CHAIRMAN LAMBERT: Thank you. Mr. Pope,
12 do you want to give us an overview and then the representative
13 from the taxpayers can talk to us for -- I think we'll keep it
14 to 15 minutes each.

15 MR. POPE: Thank you, Madam Chair, Commissioners.
16 Good morning, David Pope and Vivienne Rikowski for the
17 Department. First of all, this case has about a five-year
18 history and so we apologize for lengthy briefing, but we
19 wanted to give all the background and all the relevant
20 information.

21 Pursuant to the agenda there are two items for
22 your consideration, one is the District Court order remanding
23 this matter for you to consider additional information and the
24 request for subpoenas. And I believe that your determination
25 with regard to the scope of the additional evidence that

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1 you're going to review is going to have an impact on your
2 request for the subpoenas.

3 This matter is back before you because the
4 appellants have requested that if we remand it to you to look
5 at additional evidence pursuant to NRS 233B.131, that statute
6 provides that additional evidence can be presented to this
7 Commission provided that it is shown to the court that that
8 evidence is both material and that there was good reasons for
9 it not having been presented to the Commission during -- or
10 during the first appeal.

11 Considering the statute the judge, and this is in
12 the transcript of the hearing, the judge indicated that he had
13 to find materiality and good reasons.

14 And then the judge's order, it simply says that
15 petitioner's application for leave to present additional
16 evidence is granted so the administrative agency can look at,
17 and I quote, additional evidence. So, the District Court
18 order remanded this matter specifically for you to consider,
19 and I quote again, additional evidence. And to then determine
20 whether to affirm, reverse or modify your original decision
21 that was issued in '07.

22 The parties here disagree with regard to what the
23 scope of that additional evidence is. The Department's
24 position is that the District Court's findings with regard to
25 materiality and good cause had to do with the additional

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1 evidence that existed at the time of that hearing and that
2 would be essentially the discovery obtained through the
3 District Court proceedings.

4 The appellants on the other hand, they're
5 requesting that -- subpoenas so that they can do some
6 additional discovery.

7 We see your options -- we see that you have two
8 options, one, you can read the court's order as limiting you
9 to reviewing only that additional evidence that existed at the
10 time of the hearing on the motion for remand and that would be
11 Bates Numbers 1 through 1192 and then starting again at 1200
12 through 1510, which are provided by appellants on a CD.

13 The other option would be to read the court's
14 order to allow the appellants actually reopen discovery and
15 get subpoenas and possibly conduct depositions.

16 The Department's position is that no additional
17 evidence is going to change your original decision that you
18 issued in 2007 and we're asking that you deny those subpoenas
19 and affirm your original decision. If you do not believe that
20 the additional evidence is going to change your original
21 decision then you can affirm that decision. And that is the
22 end of the brief overview.

23 ACTING CHAIRMAN LAMBERT: Thank you. If the
24 taxpayers' attorneys would like to present for 15 minutes or
25 less if you can read everything that you've supplied us. We

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1 can't hear you if anyone is talking. Hello?

2 CHAIRMAN BARENGO: I don't hear anybody either.

3 MR. FERRARIO: That's something that rarely
4 happens when I speak, so is that better?

5 ACTING CHAIRMAN LAMBERT: Yes, if you could state
6 your name for the record and spell your last name for the
7 court reporter, please?

8 MR. FERRARIO: We'll start over. Members of the
9 Commission, Mark Ferrario appearing on behalf of SHAC, LLC.
10 To my left is Will Brown, he's appearing on behalf of the
11 remaining parties in this matter.

12 And I'm going to address the procedural posture
13 of this case because suffice to say we disagree with the
14 presentation made by the attorney general.

15 We're here for one reason and that is to finalize
16 a record in this matter so that you can make a final
17 determination based upon a complete record dealing with the
18 application of the LAT tax to my client and Mr. Brown's
19 clients.

20 The case has a rather tortured procedural history
21 and that is set out in the material that's in front of you.
22 I'm not going to go over all the -- the issues and the twists
23 and turns this case took. We were ready to go to trial in the
24 District Court when our Supreme Court came down with the
25 decision Southern California Edison versus First Judicial

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1 District, I'm sure everyone affiliated with the Commission is
2 aware of that decision.

3 That decision clarified the process that
4 taxpayers were to employ in challenging matters coming out of
5 the Commission. And what it basically said is that you have
6 to -- you don't get a de novo hearing in District Court, which
7 is how everyone was proceeding at that time.

8 The judge when the case was brought to her
9 attention recognized that it would have been patently unfair
10 to limit my client's ability to perfect a record. And
11 contrary to what the State said determined that there was a
12 need to come back and finalize the process. And that is why
13 we're here. We're here to complete a process that began in
14 '07 that was interrupted because of then understanding of the
15 law. The law has now been clarified and the judge has found
16 that there is a need to come back and perfect the record. And
17 I think the judge has already determined that there is good
18 cause and a necessity to do so.

19 So that's why we're here.

20 In furtherance of that we made a request to issue
21 subpoenas to three individuals that we believe can provide
22 valuable testimony and information relating to the enforcement
23 of the live entertainment tax scheme. And that is the first
24 issue that this Commission should address. And I find it
25 interesting that -- and I don't know that the attorney general

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1 meant what he said, but if I understood him correctly, you
2 can -- you can make a determination as to whether or not that
3 information would be valuable before you even know what it is.
4 And I don't know how that can happen.

5 So, what we -- what we have here is a situation
6 that really no one could have predicted until the Supreme
7 Court issued its opinion. A District Court judge after
8 hearing the same arguments made by the State because they
9 didn't want us to come back here, said no, there is good
10 reason to in effect start over, but we're not going to start
11 over.

12 We're not going to rehash what happened up to
13 '07. We supplemented the record with extensive briefing. We
14 have three subpoenas that we would like to see issued. And
15 what I think should occur is I think those subpoenas should
16 issue and we should set this matter now for a full and fair
17 evidentiary hear -- well, a full and fair hearing which will
18 embody evidence that we can elicit from those three witnesses.

19 So that's our position on the procedural posture
20 of the case.

21 ACTING CHAIRMAN LAMBERT: Thank you. I think
22 we'll keep our questions till everyone has made a
23 presentation. Mr. Pope or Ms. Rikowski?

24 MR. FERRARIO: I think Mr. Brown has some
25 comments. If you would allow him.

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1 ACTING CHAIRMAN LAMBERT: Oh, I'm sorry, please.
2 If you'd state your name for the record, please, Mr. Brown?

3 MR. BROWN: Thank you. William Brown on behalf
4 of the taxpayers, all the taxpayers except SHAC, LLC, who is
5 represented by Mr. Ferrario. Additionally, just a procedural
6 note, taxpayers Déjà Vu Show Girls of Las Vegas, LLC dba Déjà
7 Vu and Little Darlings of Las Vegas, LLC dba Little Darlings I
8 believe are not properly part of this. They didn't begin
9 requesting refunds until 2004. They were not parties to the
10 PJR action which brought us here today.

11 So with that procedural note, in the interest of
12 brevity I won't reiterate everything Mr. Ferrario said, rather
13 I would just join in those comments. And if I might I would
14 just like to read for the Commission what Judge Weiss said at
15 the hearing when we asked to have this matter remanded.

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

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1 So I'm not going to dismiss the case, what I'm
2 going to do is I'm going to remand it right now so the
3 administrative agency can look at the evidence that's
4 requested by the petitioners.

5 In preparing for this hearing I had the
6 opportunity to review the prior hearing and it was pretty
7 clear that at least at that time Commissioner Kelesis
8 expressed this specifically and I think it was the
9 Commission's -- the consensus of the Commission that they
10 wanted as full and complete a record as possible. Obviously,
11 that's exactly what we're asking for, we feel the more
12 information, the more facts that we're able to put in front of
13 the Commission the more informed the resulting decision would
14 be.

15 With that I would pass. Thank you.

16 ACTING CHAIRMAN LAMBERT: Thank you. Mr. Pope or
17 Ms. --

18 MR. POPE: Thank you, Madam Chair. Yeah, I
19 just -- I do have a few follow-up comments. First of all,
20 with regard to the procedure that followed final decisions of
21 the Tax Commission, the Malotne (Ph.) case was in existence
22 the last time this case was here and that case did say that as
23 applied challenges had to be decided by the administrative
24 body. So that is something to consider.

25 Second, with regard to, you know, the appellant's

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1 comments that -- that you can't make a decision on evidence
2 before you see it, that's exactly our point, they have it
3 backwards. The District Court is supposed to decide
4 materiality and good cause and cannot do so unless they have
5 the evidence, which is what we argued in our briefs, the
6 evidence that the District Court had was the discovery, which
7 is the Bates numbers that I mentioned earlier. To correct why
8 we're here, it is specifically to take additional evidence,
9 it's a limited remand pursuant to 233B.131. It is not a
10 remand pursuant to 233B.135.

11 So, this record was final, it's not a question of
12 whether we have a final record. Generally, there's no
13 discovery allowed in administrative cases and there's no
14 constitutional right to discovery in administrative cases,
15 that's the Duchess case, 124 Nevada 713; however, that case
16 also says that discovery in administrative cases is allowed to
17 the extent that regulations allow it.

18 In this case we have NAC 360.135 which allows
19 subpoenas and we have NAC 361.145 which allows depositions.
20 Depositions that can be done pursuant to instruction by the
21 hearing officer or by any party. So this party had the
22 ability to request depositions prior to coming here the first
23 time, failed to do so, waived their right and you have no
24 obligation to reinstate that right. It would not be a
25 violation of due process to deny additional discovery because

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1 they had the right to do it the first time.

2 With that, we'd request that you deny the request
3 for subpoenas and affirm your original decision issued in 2007
4 because this additional evidence just doesn't change it.
5 Thank you.

6 ACTING CHAIRMAN LAMBERT: Thank you, Mr. Pope.
7 Do the taxpayer's representative want a minute for rebuttal?

8 MR. FERRARIO: Certainly. I think it's a gross
9 misreading of the decision from -- can you hear me?

10 ACTING CHAIRMAN LAMBERT: Yes.

11 MR. FERRARIO: From two District Court judges.
12 These arguments were made by the attorney general in the lower
13 court to try to cut off our ability to present our case based
14 upon a complete record.

15 Judge Gonzales first realized that was unfair and
16 then Judge Weiss as Mr. Brown articulated when he quoted from
17 Judge Weiss's comments recognized the unfairness of the
18 approach being adopted by the State.

19 The State didn't talk about the -- the change in
20 the law that was occasioned as a result of the Southern
21 California Edison case. That's why we're here. Prior to that
22 time, and there's -- and we -- and we've got this in material
23 in front of you. Everybody believed that you would get a de
24 novo review on these issues at the District Court level. That
25 case changed that idea forever. The court clarified the

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1 process and two District Court judges presented with the same
2 arguments being made by the State disagreed. And so we're
3 here asking for nothing more than an opportunity to have a
4 fair hearing based upon a complete record. And in furtherance
5 of that we would like to subpoena the three witnesses that we
6 have requested in the letter that was sent to you by Mr. Brown
7 so that we can get testimony from them on issues that are very
8 important to my clients and to the state as a whole.

9 And going back to the comments made at the very
10 beginning of this process when this -- this Commission said we
11 want to make a decision based upon a complete record and all
12 the evidence.

13 So, with that, we think that the subpoena should
14 issue and we should continue this matter so that we can have a
15 hearing with the testimony from those three witnesses in
16 addition to the material that we previously submitted.

17 ACTING CHAIRMAN LAMBERT: Thank you. Mr. Brown,
18 do you have any comments?

19 MR. BROWN: Thank you. I just kind of want to
20 underscore the import of Southern California Edison. Prior to
21 Southern California Edison the law at the time as we construed
22 it allowed the taxpayers after the administrative hearing to
23 file an original action. What that meant was the full panoply
24 of discovery under NRCP, that meant request for production of
25 documents, admissions, interrogatories and depositions.

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1 And the depositions of three -- these three
2 individuals that we are seeking subpoenas for now were noticed
3 and the only reason they did not occur is because -- is
4 because Southern California Edison was handed down, that ended
5 our opportunity to conduct any kind of meaningful discovery.

6 The -- the significance and the result is that
7 this venue is the only opportunity that our taxpayers will
8 have for any meaningful factual discovery. After this hearing
9 everything will be appellate review. No new facts presumably
10 will be introduced, this is our one and only shot to present
11 factual evidence supporting our argument. So the import of
12 Southern California Edison was to substantially divest the
13 taxpayers of their ability to uncover facts and offer those
14 facts in support of their argument.

15 So I think both because our rights to conduct
16 discovery were curtailed by Southern California Edison and
17 simply in the interest as having as full and complete a record
18 as possible, the subpoenas are not only appropriate, I think
19 they're essential.

20 ACTING CHAIRMAN LAMBERT: Thank you. We'll now
21 bring it back to the Commission for discussion.

22 MR. POPE: Madam Chair, I'm sorry, may I
23 briefly -- just briefly make a few comments?

24 ACTING CHAIRMAN LAMBERT: Well, briefly.

25 MR. POPE: Thank you. Just -- just to correct I

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1 guess the overall view of the record is these appellants first
2 filed in Federal Court. And through those proceedings it's
3 clear that they knew of Chapter 233B, therefore, would have
4 known of the judicial review process. And after that case got
5 dismissed then they filed in State Court.

6 So this is really, you know, has to do with their
7 strategy and the way that they decided to go forward. They
8 had a chance to do this in 2007. They shouldn't get an
9 another bite at the apple.

10 MS. RIKOWSKI: Vivienne Rikowski from the --
11 deputy attorney general for the Tax Commission -- I'm sorry,
12 Department of Taxation. In 2007 when they appeared before
13 this Commission they appeared in July of 2007 and they said
14 that they did not take a discovery. And the Commission asked
15 them if they have anything else they'd like to present and
16 gave them a month to get together everything they had and they
17 said you want everything and the Commission -- I believe it
18 was Commissioner Kelesis said I want everything. If you don't
19 present in 2007 you're done. And that's exactly what the
20 transcript said. They appeared a month later and presented
21 their case and there was a full blown hearing.

22 We've got 90-something pages of transcript before
23 the Commission -- before the Commission made a decision in
24 2007. And what we're asking for is for the Commission to
25 uphold what it looked at in 2007 and -- and not allow them to

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1 reopen discovery and start a new case under a new idea.

2 MR. POPE: Thank you.

3 ACTING CHAIRMAN LAMBERT: Thank you. Now,
4 what's -- what's the Commission's pleasure.

5 CHAIRMAN BARENGO: Madam Chairman, can we have
6 Jennifer our legal counsel to kind of help us clarify this
7 matter? It is my recollection that when we had the hearings
8 on the -- on the comp food matters that the -- the -- the
9 petitioners wanted to present additional evidence to the Tax
10 Commission. And we were told at that time that they could --
11 that it was not in the best practice, I guess, maybe even not
12 correct to have additional evidence presented to us at a
13 hearing that we only could review the records ourselves. And
14 that procedure was to send the matter back to the ALJ to hear
15 any additional evidence.

16 Could Jennifer comment on -- on that, please?

17 MS. CRANDALL: Absolutely. Absolutely. Thank
18 you, Chairman. What Chairman Barengo is getting at is if this
19 body chooses to rule in favor of the taxpayers' position and
20 decide to reopen discovery, then what we -- I would recommend
21 to this Commission is that you would remand this back to the
22 ALJ to take that additional evidence and to reissue an
23 opinion. And then it would come up to this body for judicial
24 review standard.

25 So that's correct, Chairman Barengo, but that's

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1 if this Commission chooses to side with the taxpayer on this
2 issue.

3 CHAIRMAN BARENGO: Got you. Thank you.

4 ACTING CHAIRMAN LAMBERT: Any other comments?

5 MEMBER JOHNSON: Madam Chairman?

6 ACTING CHAIRMAN LAMBERT: Commissioner Johnson?

7 MEMBER JOHNSON: I have some questions for the
8 parties. What I'm looking at is we've got a request for a
9 deposition. And we've also got information in the record
10 regarding the court order additional evidence that was in
11 existence at the time the court order was issued.

12 Now, has that additional evidence that was in
13 existence at the time the court order was issued --

14 CHAIRMAN BARENGO: Could you speak up a little,
15 please?

16 MEMBER JOHNSON: I'm trying. Has that additional
17 evidence that was presented to the court been made available
18 to the Commission?

19 MS. RIKOWSKI: Yes, Commissioner, it has. Part
20 of the brief.

21 MEMBER JOHNSON: Part of the brief. But was
22 it -- but was it made available at the hearing, I mean, has it
23 been --

24 MR. POPE: In 2007?

25 MEMBER JOHNSON: In 2007.

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1 MR. POPE: It was -- it was discovered --

2 MR. FERRARIO: That was the whole --

3 ACTING CHAIRMAN LAMBERT: Excuse me, if you could
4 identify yourself for the court reporter?

5 MR. FERRARIO: Mark Ferrario. I'm sorry,
6 Mark Ferrario. The information was generated through the
7 discovery process in state court that both parties were
8 engaging in. And it -- the fact that we were doing that runs
9 counter to the very statements made by the attorney general
10 today. We were engaging in discovery at the state court
11 level. That information has been put in this record now.

12 What we didn't get to do was complete the
13 discovery process because Southern California Edison case came
14 down.

15 And so we now need to address the unique
16 circumstance we find ourselves in and we need to complete that
17 process. And the only avenue we have is to do it here. And
18 we would have no objection whatsoever to going back to an ALJ
19 to complete the record. We never had an ALJ in the first
20 instance I'd point out.

21 MR. POPE: Well, there again is a comment,
22 David Pope for the Department, is a comment about an
23 incomplete record. I have a case in front of me here that
24 talks about when -- when you can use discovery to complete a
25 record that is incomplete because of bad behavior on behalf of

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1 the government. This is not that case. This is Tasty Duty
2 case which is 530 F sub 786. You know, yes, we were engaged
3 in discovery and in the District Court after the
4 administrative revenues were exhausted.

5 The -- these -- the NACs that were available that
6 were law at the time allowed these appellants to request
7 depositions, issue subpoenas, obtain the same information,
8 most of this information is public information. I would say
9 the majority of it, I'm going to guess at three-quarters or at
10 least two-thirds is legislative history which is available to
11 everybody from LCB and regulation workshops. I mean, this
12 stuff could have been -- it should have been discovered before
13 they started their case.

14 MEMBER JOHNSON: Identify yourself.

15 MR. FERRARIO: Mark Ferrario again. You know,
16 with all due respect to Mr. Pope these are the same arguments
17 he made in court. Okay? They tried to cut us off, they want
18 to take advantage of the clarification enunciated by the
19 Supreme Court and stop us from getting a hearing on a complete
20 record. And two judges have considered that. And neither
21 judge bought their position.

22 And so for them to go back and say we should have
23 done something in '07 based upon the way the world was in '07
24 ignores the impact of Southern California Edison. That's what
25 I'm hearing from the State, those are the same arguments they

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1 made in court. And if they were correct, if this was such a
2 clear process why did the State engage in discovery right up
3 to the time we were getting ready to try this case?

4 ACTING CHAIRMAN LAMBERT: Thank you.

5 MR. FERRARIO: If there was no need to do so.

6 ACTING CHAIRMAN LAMBERT: We've heard your
7 arguments, if we could bring us back to the Commission,
8 please.

9 MEMBER BERSI: This is -- this is Ann, I'm -- I'm
10 interested in the competing orders that were presented to
11 Judge Weiss. Can one of the parties address those, please?
12 I -- I understand that the taxpayer is saying that the order
13 comes out the way it wants it to. So maybe Mr. Pope should
14 tell me about that.

15 MR. POPE: Thank you, Commissioner Bersi. I
16 guess in the big picture appellant's order wanted to open the
17 door to full blown discovery and ours was trying to limit it
18 to the evidence before the judge. And the judge took out both
19 of those references and sent it back to this Commission to
20 look at. And that's why I cornered it before additional
21 evidence.

22 Now, where we were in the discovery process is is
23 the judge had basically said that there is no more discovery.
24 I mean, we were at the end, the deadlines had ran a couple of
25 times, they had two depositions noticed, I believe it was

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1 Mr. Diciano and Michele Mujacobs. And that was all they were
2 going to be able to do. So we were -- we were just about done
3 with discovery. So to open it up again when there really is
4 no basis to do so, it wouldn't be fair, it would be unfair.

5 MEMBER BERSI: Thank you.

6 ACTING CHAIRMAN LAMBERT: Is there any other
7 questions from the Commissioners? I have one, just -- I -- I
8 thought I had this all clear. Let me just be sure. The
9 discovery that you did in the first case that was stopped by
10 Southern California Edison, is that part of the record in your
11 current case in addition to what was before the Tax
12 Commission, was that part of what was before the Tax
13 Commission?

14 MR. POPE: Madam Chair, the -- this additional
15 evidence that the appellants are trying -- or that this matter
16 was remanded for you to consider additional evidence that
17 which is the Bates numbers I referenced earlier, that
18 additional evidence is not in the administrative record as it
19 exists, it was not presented to the Commission.

20 ACTING CHAIRMAN LAMBERT: Okay. Thought so.
21 Thank you.

22 MEMBER JOHNSON: Madam Chair, are you ready to
23 take any motions?

24 ACTING CHAIRMAN LAMBERT: Since we don't seem to
25 have any more discussion, yes, make a motion and we can talk.

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1 MEMBER TURNER: Let me make a comment first for
2 the other Commissioners and the other Commissioners can
3 correct me if I'm wrong.

4 It seems to me like the taxpayers had a theory of
5 how they were going to approach this case when they came
6 before us in 2007. And they were sent back by a comment made
7 by Commissioner Kelesis, anything else they wanted us to
8 consider to get in we have 30 days to do that.

9 And it seems like they decided not to put certain
10 things before us, maybe not to pursue them at that time
11 because they were relying on a trial de novo to overturn us.
12 They could have put this information in front of us back in
13 2007, they could have pursued it at that time. And they chose
14 not to do so. And now we're being asked to give them another
15 bite of the apple. I'm uncomfortable with that.

16 ACTING CHAIRMAN LAMBERT: Commissioner Johnson?

17 MEMBER JOHNSON: Yes. Madam Chair, I would
18 recommend -- or my motion would be that the request for
19 depositions be denied and that the record as it existed at the
20 time the court remanded this matter back to us be presented to
21 an administrative law judge for consideration based on the
22 2007 decision.

23 ACTING CHAIRMAN LAMBERT: Could you do the last
24 part again after the --

25 MEMBER JOHNSON: The evidence that existed at the

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1 time the court made its decision to remand this matter back to
2 the Commission be presented to an administrative law judge for
3 consideration in light of the 2007 decision regarding
4 taxpayers' request.

5 ACTING CHAIRMAN LAMBERT: Thank you. We have a
6 motion from Commissioner Johnson. Is there a second?

7 CHAIRMAN BARENGO: Let me ask a question,
8 Commissioner Johnson, I'm not sure I understand it and maybe
9 it's because I didn't hear well fully. Are you saying that
10 the evidence as it existed at the conclusion of the matter
11 before the Tax Commission be sent to the ALJ -- no, first --
12 first that we deny the motion -- the motion asked for now,
13 that the record go back to the ALJ and she do what, she makes
14 the determination of whether there should be additional
15 evidence taken? What -- what are you intending for her to
16 do -- or him to do?

17 MEMBER JOHNSON: Mr. Chairman, what I'm
18 recommending is that the record that was presented as it
19 existed in the court, District Court, be considered by our
20 administrative law judge in light of our 2007 decision and
21 that the -- then that would be the complete record that we
22 would be asked to review and that no further depositions be
23 taken in this matter. And that record as it existed in
24 District Court be the only thing that -- together what with
25 the record that existed at the Commission be the only evidence

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1 that we would consider in looking at the -- the original
2 question.

3 CHAIRMAN BARENGO: So you're asking the ALJ to
4 take the District Court evidence and -- and -- and -- and
5 documents and things and our other documents to sign and
6 analyze that and make a decision and come back to us or uphold
7 her?

8 MEMBER JOHNSON: Yes, and make the decision and
9 come back to us, Mr. Chairman, whether the ALJ -- the original
10 decision be in any way amended or modified or sustained as it
11 originally was entered into.

12 CHAIRMAN BARENGO: And that -- further discussion
13 on my part that seems to support I think what Commissioner --
14 I'm losing my mind here.

15 MS. CRANDALL: Turner.

16 CHAIRMAN BARENGO: Turner just said, yes, Jen,
17 thank you. No, that the evidence before us was the evidence
18 before us and they said that's all we had, and so we were not
19 going to go -- we're just going to have a review of it, would
20 that be correct or am I wrong?

21 MEMBER JOHNSON: Mr. Chairman, I think that from
22 what the parties had said there is additional evidence that
23 was not considered by the Commission presented to the District
24 Court and that's the additional evidence that I would
25 recommend -- that recommend be addressed by us in the remand

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1 or the review.

2 CHAIRMAN BARENGO: And the ALJs would look at
3 that and say either it's in or out?

4 MEMBER JOHNSON: Not whether it's in or it's out,
5 it's the additional evidence that would modify the original
6 decision, 2007.

7 CHAIRMAN BARENGO: Okay. I'm just trying to
8 understand where you're going -- what your thinking is. Thank
9 you.

10 MEMBER TURNER: This may be a question for
11 Jennifer or anybody else that wants to jump in.

12 ACTING CHAIRMAN LAMBERT: Excuse me, can we get a
13 second before we discuss this motion? Whoops, I think I just
14 stopped a second, so maybe we just better have open
15 discussion.

16 MEMBER TURNER: Ultimately I believe what the
17 taxpayers are arguing is that the application of the live
18 entertainment tax to this industry is unconstitutional. I'm
19 not even sure that's a ruling this Commission is empowered to
20 make. I'm not sure this is the right forum for that argument
21 and that conclusion.

22 MS. CRANDALL: I don't think that issue is before
23 the Commission here today. I think the only issue is to
24 whether or not you want to reopen discovery and allow
25 additional subpoenas and depositions to go forward or

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1 whether -- and take into consideration Commissioner Johnson's
2 recent motion, whether you want to remand it back to the ALJ
3 for consideration of the additional material that came forward
4 before the District Court. Or whether you want to just cut it
5 off at this point and send it back up to the District Court as
6 being considered -- considering the material before you and --
7 and calling it good today.

8 ACTING CHAIRMAN LAMBERT: It appears -- the
9 motion is going to die for a lack of a second if I don't hear
10 one. Is there another motion?

11 MEMBER TURNER: I think --

12 CHAIRMAN BARENGO: Well, back on Commissioner
13 Turner's comment, I -- I somewhat agree with his position
14 that, you know, they weren't going to give it to us, they're
15 going to go up to the court and then use it against us. And
16 so they've kind of precluded themselves, but I don't know if
17 there is something that says that they have -- the judge
18 seemed to me to think that they maybe have some ability to add
19 additional evidence. And maybe that's the issue that should
20 be just that narrow issue is there under the rules some
21 evidence that could be introduce -- introduced even after they
22 said they were finished.

23 ACTING CHAIRMAN LAMBERT: Chairman Barengo, are
24 you asking if there's another avenue for them to present
25 additional evidence in the current District Court case?

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1 CHAIRMAN BARENGO: Yeah, because it's -- well,
2 now it's a de novo on the record, it's de novo. And, you
3 know, the court seem to want to make sure that we -- I'm not
4 clear what the court's rulings is and I don't really
5 understand what they were saying.

6 So I don't know what we're -- how to address it.
7 I've read and read and read -- reread and I don't just -- it
8 seems to me the court was just kind of saying, well, I don't
9 want to dismiss this case so I'll let you have -- you know,
10 maybe there's some additional evidence. I don't know what
11 that meant.

12 ACTING CHAIRMAN LAMBERT: Jennifer, could you
13 outline the various options that the Commission has and the
14 taxpayers' ability to provide more evidence if we don't allow
15 them to?

16 MS. CRANDALL: Okay. I -- and I hope the parties
17 will jump in here and help me, but the way I see it you really
18 have maybe three options. You can just consider the
19 material -- maybe four. You can consider the material that
20 was submitted in the briefs today, the new evidence that was
21 submitted, this was my -- my thinking was this was the
22 evidence that was submitted to the District Court judge and
23 it's the evidence that's before you today that -- that
24 Mr. Pope has outlined. You could look at that evidence and
25 see whether or not you think it materially changes the

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1 decision of the Commission. And if you think it doesn't
2 change the -- doesn't change the decision, then you could just
3 state that and send it back up to the District Court.

4 You could determine that new discovery is
5 warranted and reopen it for subpoenas and depositions. And I
6 would suggest you remand that back down to the administrative
7 law judge for that to happen and then she consider all the new
8 material or he and determine -- make a determination as to
9 whether or not the decision is materially changed or not.

10 So I don't know if there's another option you
11 guys see.

12 MR. FERRARIO: Mark Ferrario on behalf of the
13 taxpayers. I think one thing that's gotten lost here is Judge
14 Weiss's order so I -- Mr. Brown just handed it to me. I think
15 we should read this. We had an application for leave to
16 present additional evidence. That's what was in front of the
17 judge. The State objected to that. They didn't want
18 additional evidence. Here's what the judge said.
19 Petitioner's application, that's the application we had to
20 present additional evidence to the Nevada Tax Commission is
21 granted. Granted.

22 So look at our petition, look what we wanted to
23 do. And why was it granted? So this agency in light of the
24 change in the law, Southern California Edison, can look at the
25 additional evidence and do one of the following. Amend the

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1 findings of fact, conclusions of law dated October 12, 2007,
2 reverse that decision or affirm the decision.

3 Now, I don't know how you can read that any other
4 way than to -- that the District Court said come back here for
5 the opportunity to complete your record. And -- and if you
6 look at the entire record here that's based upon the change in
7 the law occasioned by Southern California Edison.

8 And the comments and the arguments being made by
9 the State basically negate and gut that judge's decision.

10 MS. RIKOWSKI: Can I -- Vivienne Rikowski for the
11 Department of Taxation. I'd like to just bring your
12 attention, I did submit it as an exhibit that they -- that the
13 petitioners put in a competing order which was not signed.
14 The competing order twice asks for discovery to be reopened.
15 The first time they say petitioners seek remand from this
16 court to allow the discovery and presentation of additional
17 evidence pursuant to 233B.131.2.

18 They asked for additional -- they asked for
19 additional discovery. Now, there at the conclusion of their
20 order they reiterated that they actually remanded to the Tax
21 Commission to permit the petitioner to take additional
22 discovery as they be permitted by the Nevada Tax Commission as
23 to additional evidence.

24 The judge did not sign the seven-page order. He
25 signed an order just allowing additional evidence. And

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1 additional evidence is -- in order for the judge to have found
2 that additional evidence to be both material and good cause
3 for not submitting it in 2007, the judge had looked at that
4 evidence. Additional evidence doesn't mean a new fishing
5 expedition. Additional evidence is to time.

6 MR. POPE: This is David Pope and I just -- I
7 agree with Jennifer's two options that she gave you. The
8 first one's going to be is that you agree with our argument
9 that you're limited to that additional evidence that existed
10 at the time of the hearing on the motion for remand and that
11 the -- that the judge's order because it's written pursuant to
12 that statute that requires the judge to make that finding
13 materiality and good cause, that your first option would be to
14 say yep, we're limited to that additional evidence that the
15 judge saw that's on the CD that was presented to you and then
16 consider that evidence and see if that changes your original
17 decision whether you want to affirm, reverse or modify.

18 The second option would be to read the judge's
19 order as opening the door to new discovery and as Ms. Rikowski
20 said for a fishing expedition.

21 MR. FERRARIO: Again, I've been doing this too
22 long and it's always funny when lawyers get in court and try
23 to speculate as to what a judge may or may not have done when
24 the judge saw competing orders. The judge rejected the
25 State's competing order which they're now trying to in effect

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1 get you to adopt. I'm going to read what the judge said. Our
2 application --

3 CHAIRMAN BARENGO: We heard that, we don't need
4 to hear it again. It's granted.

5 MR. FERRARIO: And if you look at the application
6 it will tell you what the judge said what he was granting.

7 MS. CRANDALL: Okay. Hold on just a second,
8 Mr. Ferrario. I heard -- Chairman Barengo, did you have
9 something -- I heard him say --

10 CHAIRMAN BARENGO: No, he's read that order three
11 times and I've got it myself, we don't need to have him
12 continue to read that.

13 MR. FERRARIO: I think I was just pointing out
14 that there's an order there that -- that eliminates any need
15 to go to the competing orders that were entered by the -- or
16 that were submitted by the parties.

17 MR. BROWN: And if I may, William Brown, Judge
18 Weiss granted the application. The application in part
19 specifically asks the taxpayers, this is a quote, be afforded
20 the opportunity to depose representatives of the State in
21 regard to these documents before either the Commission or this
22 court makes a final determination on the taxpayers'
23 constitutional claims.

24 The taxpayer specifically asked Judge Weiss to
25 remand this matter to allow us to present additional evidence.

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1 One of the specific pieces of evidence we asked him to allow
2 us to produce was deposition testimony. He granted that
3 application.

4 ACTING CHAIRMAN LAMBERT: Thank you.
5 Commissioner Johnson, would you like to make your motion
6 again?

7 MEMBER JOHNSON: Yes, I would. The motion -- my
8 motion consists of two things. First of all, to deny any
9 additional discovery or depositions. That's the first part of
10 my motion.

11 The second part of my motion is that all the
12 evidence that was presented to or made available or existed at
13 the time the court remanded the matter back to the Commission
14 be considered by the Commission in determining whether the
15 original decision should be amended, modified or sustained.

16 And following our practice of what we did in the
17 Harrah's matter, remanding or taking that additional evidence,
18 presenting it to an ALJ to review, have the parties
19 participate or make their presentation to the ALJ and then
20 have the ALJ come up with a proposed decision that either
21 amend, modifies or sustains our original decision.

22 ACTING CHAIRMAN LAMBERT: Thank you. Is there --

23 MEMBER JOHNSON: That's the second part of my
24 motion.

25 ACTING CHAIRMAN LAMBERT: Is there a second?

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1 MEMBER TURNER: I'll second to get it off the
2 table.

3 ACTING CHAIRMAN LAMBERT: Thank you. We have a
4 motion and a second and now we get to see what happens to it.
5 Is there any other discussion on this motion, is everybody
6 clear what it does?

7 CHAIRMAN BARENGO: I want to make just sure --
8 Commissioner Johnson, what you're intending is is that that
9 application to take leave of evidence, that material contained
10 in the application for additional evidence is all the ALJ will
11 be considering?

12 MEMBER JOHNSON: All of the -- all the new
13 evidence, whatever evidence existed at the time of the initial
14 decision's part of the record.

15 CHAIRMAN BARENGO: And what they'd asked, because
16 they outlined in -- what they were at in their petition, so
17 just those things?

18 MEMBER JOHNSON: That's correct. With no new
19 depositions.

20 CHAIRMAN BARENGO: Thank you.

21 ACTING CHAIRMAN LAMBERT: Is everybody ready to
22 vote? Let's start with Commissioner Marvel?

23 MEMBER MARVEL: Aye.

24 ACTING CHAIRMAN LAMBERT: Commissioner Turner?

25 MEMBER TURNER: Aye.

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1 ACTING CHAIRMAN LAMBERT: Commissioner Witt?
2 MEMBER WITT: Aye.
3 ACTING CHAIRMAN LAMBERT: Commissioner Bersi?
4 MEMBER BERSI: No.
5 ACTING CHAIRMAN LAMBERT: Commissioner Barengo?
6 CHAIRMAN BARENGO: No.
7 ACTING CHAIRMAN LAMBERT: Commissioner Johnson?
8 MEMBER JOHNSON: Aye.
9 ACTING CHAIRMAN LAMBERT: And acting chair votes
10 aye. Five to two, the motion passes. Thank you.
11 (Motion carries.)
12 ACTING CHAIRMAN LAMBERT: And thanks to all the
13 parties.
14 MR. FERRARIO: Thank you.
15 MR. POPE: Thank you.
16 MR. NIELSEN: Madam Chair, the next agenda item
17 up for the Commission's consideration is again under the
18 Compliance Division IV-H, this is taxpayer's appeal of hearing
19 officer's decision upholding Department's denial of use tax
20 refund request/sales tax deficiencies on complimentary meals
21 and Department's partial appeal on hearing officer's decision.
22 The first item under that agenda topic is Exber,
23 Inc./El Cortez. And this -- there has been a request for a
24 partial closed hearing in this matter.
25 ACTING CHAIRMAN LAMBERT: Okay. Thank you.

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1 STATE OF NEVADA,)
2 CARSON CITY.) ss.
3
4

5 I, MICHEL DOTY LOOMIS, Official Court Reporter for
6 the State of Nevada, Department of Taxation, do hereby
7 certify:

8 That on Monday, the 25th day of June, 2012, I was
9 present for the purpose of reporting in verbatim stenotype
10 notes the within-entitled closed session of the public
11 meeting;

12 That the foregoing transcript, consisting of pages 1
13 through 201, inclusive, includes a full, true and correct
14 transcription of my stenotype notes of said closed session of
15 the public meeting.
16

17 Dated at Carson City, Nevada, this 12th day of July,
18 2012.
19

20 
21

22 MICHEL LOOMIS, NV CCR #228
23
24
25

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EXHIBIT “D”



BRIAN SANDOVAL
Governor
ROBERT R. BARENGO
Chair, Nevada Tax Commission
CHRISTOPHER G. NIELSEN
Executive Director

**STATE OF NEVADA
DEPARTMENT OF TAXATION**

Web Site: <http://tax.state.nv.us>

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

LAS VEGAS OFFICE
Grant Sawyer Office Building, Suite 1300
555 E. Washington Avenue
Las Vegas, Nevada 89101
Phone: (702) 486-2300 Fax: (702) 486-2373

RENO OFFICE
4800 Kietzke Lane
Building L, Suite 235
Reno, Nevada 89502
Phone: (775) 687-9999
Fax: (775) 688-1303

HENDERSON OFFICE
2550 Paseo Verde Parkway, Suite 180
Henderson, Nevada 89074
Phone: (702) 486-2300
Fax: (702) 486-3377

DECISION LETTER

September 6, 2012

CERTIFIED MAIL 7012 1010 0001 5652 9354

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

CERTIFIED MAIL 7012 1010 0001 5652 9361

Mark E. Ferrario, Esq.
Greenberg Traurig, LLP
3773 Howard Hughes Pkwy., Ste. 400 N.
Las Vegas, NV 89169

IN THE MATTER OF: K-KEL, ET AL.'S OPPORTUNITY, PURSUANT TO DISTRICT COURT ORDER DATED JANUARY 24, 2012, TO PRESENT ADDITIONAL EVIDENCE TO THE NEVADA TAX COMMISSION SO THAT THE COMMISSION CAN AMEND THE FINDINGS OF FACT, CONCLUSIONS OF LAW DATED OCTOBER 12, 2007, REVERSE THE DECISION OR AFFIRM THE DECISION, AND CONSIDERATION OF TAXPAYER'S REQUEST FOR SUBPOENAS FOR DEPOSITIONS

Dear Messrs. Brown and Ferrario:

The above matter came before the Nevada Tax Commission ("Commission") for hearing on June 25, 2012. Senior Deputy Attorney General David Pope and Deputy Attorney General Vivienne Rakowsky appeared on behalf of the Respondent, Department of Taxation ("Department"). For the Petitioners, Mark E. Ferrario, Esq. appeared on behalf of Shac, LLC and William H. Brown, Esq. appeared on behalf of K-Kel dba Spearmint Rhino, The Power Company dba Crazy Horse Too Gentlemen's Club, D. Westwood, Inc. dba Treasures, Olympus Garden, Inc. dba Olympic Garden, DI Food and Beverage of Las Vegas dba Scores, Déjà vu Showgirls of Las Vegas, LLC dba Déjà vu, and Little Darlings of Las Vegas LLC, dba Little Darlings. The entire record of the administrative proceedings was provided to and considered by the Commission in the proceeding, and forms the basis of these findings of fact and conclusions of law.

The Commission hereby makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. This matter was before this Commission in July and August of 2007 and, on October 12, 2007, the Commission issued Findings of Fact, Conclusions of Law and a Decision.
2. Déjà vu Showgirls of Las Vegas, LLC dba Déjà vu and Little Darlings of Las Vegas LLC, dba Little Darlings stated that they are not part of this proceeding and are not part of the Petition for Judicial Review that is before the District Court (Case #A-11-648894-J). In fact, Déjà vu and Little Darlings did not appear before this Commission in 2007, are not parties to the administrative record, were not aggrieved by the final decision and, therefore, are not parties to this proceeding and shall be stricken from the caption. NRS 233B.130.
3. On or about September 23, 2011, following the dismissal of their District Court case (Case #08A554970), Petitioners filed a Petition for Judicial Review in District Court (Case #A-11-648894-J) pursuant to the relevant court order dated December 19, 2011.
4. On or about September 28, 2011, Petitioners filed a motion pursuant to NRS 233B.131 requesting the Court grant them permission to present additional evidence to the Commission in order to supplement the administrative record with information obtained through discovery in the District Court case (Case #06A533273), i.e. documents identified as Bates Nos. DV00001 through DV001510, which were not part of the administrative record.
5. The Court granted the motion to present additional evidence, stating that the matter is remanded to allow the Commission to "look at additional evidence and do one of the following: Amend the Findings of Fact, Conclusions of Law dated October 12, 2007, Reverse the Decision, or Affirm the Decision." *District Court Order dated January 24, 2012.*
6. On or about June 14, 2012, in anticipation of the matter being presented to this Commission on remand, the Petitioners requested that the Department issue subpoenas in order to allow them to question three witnesses and thereafter supplement the record with what would be newly obtained testimony.
7. Petitioners argued that their rights to discovery, which they waited to conduct during the District Court proceedings that were dismissed, were curtailed by the decision in *Southern Cal. Edison v. First Judicial Dist. Court*, 127 Nev. Adv. Op 22, 255 P.3d 231 (May 26, 2011) which clarified that appeals of final decisions of this Commission must proceed as petitions for judicial review.
8. During the administrative proceeding that took place in 2007, this Commission continued the hearing for one month to allow the parties to provide all evidence that they wanted considered by the Commission. The parties were told that this was their final opportunity to supplement the record.

9. Petitioners provided an additional 568 pages of evidence that was fully reviewed and considered by the Commission prior to rendering the administrative decision in October 2007.
10. Petitioners were or should have been aware of the provisions of the Nevada Administrative Procedures Act, NRS Chapter 233B.
11. In addition, NAC 360.135 and NAC 360.145 allowed Taxpayers to request subpoenas and depositions before this matter was presented to this Commission in 2007. Nonetheless, Petitioners failed to ask for subpoenas or depositions when this matter was before the Commission in 2007.
12. Pursuant to NRS 233B.131, when considering a motion to allow a party to present additional evidence to the Commission, a district court must determine whether the additional evidence is material and whether there are good reasons for the party to have failed to present the evidence to the Commission the first time.
13. In order to determine that the additional evidence is material and that there were good reasons for the failure to present the evidence to the Commission in 2007, it was necessary for the District Court Judge to have reviewed the proposed additional evidence existing at the time of the motion hearing.
14. At the hearing, the District Court Judge stated, "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." *Transcript from Motion Hearing Argued to District Court on December 9, 2011*, p. 5-6.
15. The Judge reasoned that, because he is limited to a review of the record of the administrative proceeding, if there is a question as to whether or not something should be in the record he is inclined to allow the administrative agency the opportunity to review it so that he has all the evidence when he performs judicial review. *Id.* at 11.
16. Both the Petitioners and Respondents provided competing proposed orders to the District Court Judge. Petitioners twice stated in their proposed order that discovery would be reopened and depositions allowed. The Judge did not sign the petitioner's proposed order which would have allowed the reopening of discovery and depositions.
17. The Judge signed an order which stated that the matter would be remanded to the Commission to allow the Commission to "look at additional evidence and do one of the following: Amend the Findings of Fact Conclusions of Law dated October 12, 2007, Reverse the Decision or Affirm the Decision." *District Court Order* dated January 24, 2012.
18. If any Finding of Fact is more properly classified as a Conclusion of Law, then it shall be deemed as such.

CONCLUSIONS OF LAW

1. Pursuant to NRS 233B.131, the District Court must find materiality in the additional evidence and good cause for the failure to present the evidence in order to allow a petitioner to supplement the administrative record with additional evidence.
2. The District Court found materiality with regard to Bates Nos. DV00001 through DV001510 and the administrative record shall be supplemented with these documents.
3. With regard to the request for additional discovery, in administrative matters discovery is allowed to the extent that the relevant regulations allow it. *Dutchess Business Servs., Inc. v. Nev. State Bd. of Pharmacy*, 124 Nev. 701, 713-714, 191 P.3d 1159 (2008).
4. Although NAC 360.135 allows subpoenas and NAC 360.145 allows depositions, during the administrative proceedings in 2007 the Petitioners failed to ask for subpoenas or depositions and therefore waived the right to pursue these methods of discovery.
5. There is no due process violation because the Petitioners had the right to ask for subpoenas and depositions in 2007 and failed to do so and nothing prohibited them from requesting such discovery regardless of how they may have later chosen to proceed after receiving a final decision from the Commission.
6. The Commission has no obligation to reinstate the right to request subpoenas and depositions.
7. Pursuant to NRS Chapter 233B.130(1), the remedy for a party aggrieved by a final agency decision is judicial review.
8. Pursuant to the Nevada Supreme Court's decision in *Malecon Tobacco, LLC v. Dept. of Taxation*, 118 Nev. 837, 840-842 (2002), "as applied" constitutional challenges requiring factual determinations must be decided by the administrative agency.
9. Pursuant to NRS 360.245 and NRS 233B.135(3), this matter is being remanded to an Administrative Law Judge (hereinafter "ALJ") with the entire record including the additional documents obtained through discovery in the District Court case which are identified as Bates Nos. DV00001 through DV001510. The ALJ shall review the additional evidence, along with the original record, and determine whether the findings of fact, conclusions of law and final decision issued in 2007 should be amended, reversed or affirmed.
10. Upon appeal of the decision of the ALJ, this Commission will either affirm, reverse or modify the decision. NRS 360.245; NRS 233B.135.
11. If any Conclusion of Law is more properly classified as a Finding of Fact, then it shall be deemed as such.

DECISION

1. The requested subpoenas will not be issued and additional discovery and/or depositions will not be permitted.
2. The administrative record is supplemented with the additional evidence that was not considered by the Commission in 2007 but was thereafter obtained through discovery in the District Court case and existing on January 12, 2012 at the time that the Court made the decision to remand the matter to the Commission, i.e. Bates Nos.DV00001 through DV001510.
3. This matter is remanded to an ALJ with instructions to review the additional evidence and the original record and do one of the following: amend the Findings of Fact, Conclusions of Law and Decision dated October 12, 2007, reverse the decision or affirm the decision.
4. If a party is aggrieved by the decision of the ALJ, that party may appeal the decision to this Commission pursuant to NRS 360.245.

FOR THE COMMISSION

Deonne E. Contine for:

CHRISTOPHER G. NIELSEN
Executive Director
Nevada Department of Taxation

cc: Vivienne Rakowsky, Deputy Attorney General
David Pope, Senior Deputy Attorney General
Blake Doerr, Senior Deputy Attorney General

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the forgoing document upon all parties of record in this proceeding by mailing a copy thereof, properly addressed, with postage prepaid to:

CERTIFIED MAIL 7012 1010 0001 5652 9354

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

CERTIFIED MAIL 7012 1010 0001 5652 9361

Mark E. Ferrario, Esq.
Greenberg Traurig, LLP
3773 Howard Hughes Pkwy., Ste. 400 N.
Las Vegas, NV 89169

Dated at Carson City, Nevada, the 6th day September 2012.


Erin Fierro

EXHIBIT “E”

STATE OF NEVADA
DEPARTMENT OF TAXATION

In the Matter of:)
)
K-Kel, Inc., Olympus Garden, Inc.,) Live Entertainment Tax
Shac, LLC, The Power Company, Inc.,) Refund Requests
D. Westwood, Inc., D.I. Food & Beverage)
of Las Vegas, LLC,)
) HEARING OFFICER'S
Petitioners.) ORDER ON REMAND

K-Kel, Inc. dba Spearmint Rhino Gentlemen's Club, Olympus Garden, Inc. dba Olympic Garden, Shac, LLC dba Sapphire, The Power Company dba Crazy Horse Too Gentlemen's Club, D. Westwood, Inc. dba Treasures, and D.I. Food & Beverage of Las Vegas, LLC dba Scores (collectively as "Petitioners") operated exotic dancing establishments or adult entertainment venues in Las Vegas, Nevada. The businesses offered entertainment in the form of live dance performances and sold alcoholic beverages. Petitioners charged their patrons admission charges to enter the venues. Petitioners did not offer gaming and had occupancy ratings between 200 and 7400 persons. The businesses operated from January 2004 through April 2004.

Petitioners requested refunds of live entertainment taxes ("LET") paid to the Nevada Department of Taxation ("Department") for the periods January 2004 through April 2004.¹ Petitioners based their refund requests on claims that 1) the LET was a facially unconstitutional tax on First Amendment activities and 2) Petitioners were exempt from paying the tax pursuant to NRS 368A.200(5)(a) because they provided "live entertainment that the State is prohibited from taxing under the Constitution, laws or treaties of the United States or Nevada Constitutions."

¹ In lieu of reciting the tortured procedural history of this matter from its inception, only the relevant events leading to this review and order will be discussed.

1 The Department denied the refund requests and the matter proceeded on appeal
2 to the Nevada Tax Commission ("Commission"), where the denials were upheld.²
3 Petitioners then appealed to the District Court. In September 2011, Petitioners
4 requested the District Court grant them the opportunity to submit 1510 pages of
5 additional documents into the record. The District Court remanded the matter to the
6 Commission to review the additional documents and determine whether those
7 documents changed the Commission's October 12, 2007 decision.

8 During their June 25, 2012 presentation to the Commission regarding the District
9 Court remand and the additional documents, Petitioners requested the Commission
10 grant them the opportunity to depose three witnesses. Their request was denied. By its
11 decision letter dated September 6, 2012, the Commission referred this matter to the
12 undersigned "with the entire record including the additional documents obtained through
13 discovery in the District Court case which are identified as Bates Nos. DV00001 through
14 DV001510. The ALJ shall review the additional evidence, along with the original record,
15 and determine whether the findings of fact, conclusions of law and final decision issued
16 in 2007 should be amended, reversed or affirmed."

17 Upon learning that this matter had been referred to the undersigned, Petitioners
18 submitted a letter to the undersigned dated August 13, 2013 in which Petitioners
19 renewed their requests for depositions and requested further unspecified discovery.³
20 Petitioners also requested a hearing before the undersigned because Petitioners "would
21 not presume to impose such a task," the task of reviewing the additional 1510 pages of
22 documents, on the undersigned. Rather, Petitioners would use the hearing to "distill and
23

24
25 ² Petitioners' Refund Requests have been consolidated on appeal.

26 ³ Petitioners based this request on an argument that the Commission's September 12, 2012 written decision did not accurately reflect the Commission's oral decision. Petitioners have had 11 months to challenge the September 12, 2012 order or to request clarification from the Commission. They have chosen not to do so and this is not the proper forum for that issue.

1 clarify exactly what portions of these documents are relevant, and why."

2 Notwithstanding Petitioners' attempt to avoid a review by the undersigned of the very
3 documents which Petitioners fought so hard to include in the record and despite
4 Petitioners' surprising admission that the documents are to some degree repetitious,
5 unclear, and irrelevant, the undersigned has reviewed the 1510 pages as ordered by
6 the Commission.

7 Petitioners' additional documents included extensive legislative and regulatory
8 histories surrounding the enactment and subsequent amendment of NRS 368A and the
9 corresponding provisions of NAC 368A. Petitioners also included legislative history
10 regarding SB 247 (2005), which was intended to amend 368A but was not enacted.
11 Finally, the production included documents generated by the Department: requests for
12 information from taxpayers concerning the LET, informational letters and educational
13 materials regarding the LET, various statistical breakdowns concerning non-gaming
14 LET revenue collected by the Department, and internal memoranda responding to
15 requests for statistical information regarding LET.

16 Petitioners have not offered any persuasive legal support for their argument that
17 this tax on admission charges and sales runs afoul of the First Amendment. Rather,
18 their arguments appear to be based upon the idea that the Department's application of
19 the tax discriminates against Petitioners' adult entertainment venues in some respect, or
20 that the tax itself is so burdensome to Petitioners as to imperil their freedom of speech
21 and expression. These new arguments indicate that sometime after filing their Refund
22 Requests, Petitioners shifted their focus from a facial challenge of the LET to an as-
23 applied challenge. A facial challenge is a "claim that a statute is always unconstitutional
24 on its face- that is, that it always operates unconstitutionally." Black's Law Dictionary
25 244 (8th ed. 2004). An as-applied challenge is a "claim that a statute is unconstitutional
26 on the facts of a particular case or in its application to a particular party." Id. When

1 Petitioners asked the court to examine factually how the LET impacts one business
2 versus another, Petitioners proposed an as-applied challenge to the LET.

3 In this regard, Petitioners alleged that they bore a disproportionate tax burden,
4 presumably because their adult entertainment venues paid more LET than did other
5 non-gaming entertainment venues. While they may have paid more LET in absolute
6 terms when compared to other non-gaming venues, Petitioners have failed to develop
7 any facts to show that this was unconstitutional in some respect.

8 LET is an excise tax which functions like a sales tax on the gross receipts from
9 admission charges and retail sales of prepared food, alcohol and merchandise. LET is
10 imposed as a fixed percentage of the gross receipts from admission charges and sales.
11 Therefore, a business with more revenue from admission charges and sales will
12 necessarily pay more LET than a business with less revenue from admission charges
13 and sales. If Petitioners paid more in LET, it was only because they generated more
14 revenue from sales and admission charges than did other entertainment venues. In
15 absolute terms, Petitioners' LET liability increased as their sales and admissions
16 revenue increased. In relative terms, Petitioners' LET liability was identical to that of the
17 next taxpayer.

18 Since LET is imposed upon gross receipts as opposed to net receipts, it may
19 disproportionately impact a business with narrow operating margins unless the tax is
20 passed on to or borne by patrons or consumers. Petitioners have not alleged that they
21 had narrow operating margins or that there were any practical or legal impediments that
22 prevented them from passing the tax burden on to their patrons as allowed by NRS
23 368A. To the contrary, their sales figures would suggest that their patrons happily
24 shouldered the burden of the tax.

25 In their efforts to show that they paid more LET than other entertainment venues,
26 Petitioners have actually undermined their own arguments that the LET is punitive or

1 discriminatory. If the LET were punitive or discriminatory toward Petitioners, one would
2 reasonably expect Petitioners' receipts from admissions and sales to have declined as
3 compared to the admissions and sales of competing entertainment venues. Petitioners
4 have not shown that their admissions and sales declined relative to those of competing
5 entertainment venues, nor have they attempted to show that such a decline will likely
6 occur in the future. Petitioners cannot demonstrate that the LET unconstitutionally
7 burdens adult entertainment because they cannot show that the application of the tax
8 puts their venues at a competitive or commercial disadvantage when compared with
9 other entertainment venues. Likewise, Petitioners cannot demonstrate that the tax is so
10 burdensome that it imperils free speech and freedom of expression at their venues. To
11 the contrary, the tax appears to have had no discernible impact upon Petitioners' ability
12 to conduct live dance performances at their venues.

13 Petitioner's also argued there was an illicit intent on the part of the legislature to
14 target the tax toward adult entertainment venues. The Commission's October 12, 2007
15 decision specifically addressed Petitioners' allegations of an illicit legislative motive and
16 held that "[m]ention by legislators of taxability of live entertainment under a proposed bill
17 that was subsequently enacted does not prove that the bill was enacted because of
18 disagreement with the message provided by live adult entertainment." Petitioners'
19 presentation of more pages of legislative history does not alter this conclusion. With
20 regard to the legislative history pertaining to SB 247 (2005) which was not enacted, the
21 Commission ruled that "[s]tatements by legislators with respect to a bill that would have
22 taxed live adult entertainment as a separate class, where the bill did not pass, does not
23 prove the intent of a separate bill that did not select live entertainment." Petitioners'
24 second presentation of the same information and argument does not change the
25 Commission's conclusion.

26 Neither Petitioners' documents nor their as-applied constitutional challenges

1 compel amendments to the Commission's October 12, 2007 decision. Petitioners failed
2 to allege or demonstrate incorrect application of the LET provisions to Petitioners or that
3 the Department applied a peculiar interpretation of the LET to Petitioners. Other than
4 the more expansive LET statistics presented, there are no additional facts to assist in
5 determining if Petitioners have been subjected to an unconstitutional application of LET.
6 And the few additional facts presented fail to establish Petitioners' claims. Frankly, it is
7 difficult to imagine that there might be facts to support Petitioners' assertions.
8 Petitioners' position that the Nevada legislature enacted the LET in an attempt to
9 suppress entertainment in Nevada, the lifeblood of this tourism-dependent state,
10 borders on the absurd.

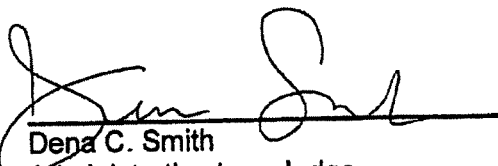
11 ORDER

12 Based upon the foregoing, and GOOD CAUSE APPEARING THEREFORE, IT IS
13 HEREBY ORDERED, ADJUDGED AND DECREED that:

14 1. Petitioners' August 13, 2013 requests that the undersigned exceed the scope
15 of the Commission's September 6, 2012 decision by: 1) convening a hearing in this
16 matter, 2) allowing Petitioners to depose three witnesses, and 3) allowing Petitioners to
17 engage in additional unspecified discovery are denied.

18 2. Petitioner's additional documents Bates DV000001 through DV001510 are
19 insufficient to change the October 12, 2007 decision of the Commission. The
20 Commission's October 12, 2007 decision is hereby affirmed.

21
22 DATED this 27th day of August, 2013.

23
24 
25 Dena C. Smith
26 Administrative Law Judge

APPEAL RIGHTS

You may appeal this decision to the Nevada Tax Commission provided that you file a notice of appeal within thirty (30) days after the date of service of this decision upon you. Although notice of the appeal need not be in any particular format, it must be in writing, must clearly state your desire to appeal this decision, and must be filed with the executive staff of the Department of Taxation within thirty (30) days after the date of service of this decision. In this regard, you are advised to mail or personally deliver any notice of appeal to the attention of

Lezlie Helget, Supervising Auditor II
Nevada Department of Taxation
1550 College Parkway, Suite 115
Carson City, Nevada 89706

Pursuant to NRS 360.245, this decision will become final thirty (30) days after service upon you unless you file a notice of appeal within those thirty (30) days.

All the above general information is provided to you pursuant to NRS 360.2925 and as a matter of courtesy only. You, or your counsel, should ascertain with more particularity the regulatory or statutory requirements pertinent to your further appeal rights.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing Hearing Officer's Order on Remand in the matter of K-Kel, Inc. et. al. Live Entertainment Tax Refund Request, upon all parties of record in this proceeding as follows:

By mailing a copy thereof via certified mail, properly addressed, with postage prepaid to:

Certified Mail: 7011 2000 0001 5246 0539

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

Certified Mail: 7011 2000 0001 5246 0546

Mark E. Ferrario, Esq.
Greenberg Traurig, LLP
3773 Howard Hughes Pkwy., Ste. 400 N.
Las Vegas, NV 89169

By electronic mail to:

William H. Brown, Esq. at wbrown@lambrosebrown.com

Mark E. Ferrario, Esq. at ferrariom@gtlaw.com

Vivienne Rakowsky, Deputy Attorney General, Counsel for Nevada Department
of Taxation, at VRakowsky@ag.nv.gov

Christopher G. Nielsen, Executive Director, Nevada Department of Taxation

Nevada Tax Commission Members

Dated at Henderson, Nevada, this 27th day of August, 2013.

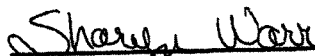

Signature

EXHIBIT “F”

STATE OF NEVADA
NEVADA TAX COMMISSION

In 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 Live Entertainment Tax Refund Requests

STIPULATION FOR SUBMISSION ON THE RECORD

NOW COME the Taxpayers, 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; Deja Vu Showgirls of Las Vegas, LLC dba Deja Vu; and Little Darlings of Las Vegas, LLC dba Little Darlings, by and through counsel, and the Nevada Department of Taxation, by and through counsel and hereby state as follows:

1. After considering the matter and the additional evidence on remand, the Administrative Law Judge (hereinafter "ALJ") issued her Findings of Fact, Conclusions of Law and Decision (hereinafter "Decision on Remand")¹, dated August 27, 2013, which denied Taxpayers' request for additional discovery and affirmed the Nevada Tax Commission's Findings of Fact, Conclusions of Law and Decision dated October 12, 2007²;

2. On September 24, 2013, Taxpayers appealed the ALJ's Hearing Officer's Order on Remand by correspondence addressed to Lezlie Helget, Supervising Auditor II, Nevada Department of Taxation.

3. Taxpayers and the Department of Taxation desire to expedite this matter, so that it may return to the Clark County Nevada District Court Case No. A-11-648894-J (Dept. No. 30) for further proceedings. The Parties have agreed that further oral argument or hearing before the Commission is not necessary to assist the Commission in addressing the Hearing Officer's Order on Remand affirming the Commission's prior decision.

¹ A copy is attached hereto as Exhibit A.

² A copy is attached hereto as Exhibit B.

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WHEREFORE, IT IS HEREBY STIPULATED AND AGREED:

4. The present matter shall be submitted to the Nevada Tax Commission for Decision on the entire record and without additional briefing, oral argument or hearing.

5. By submitting the matter to the Commission, the parties do not intend to waive any arguments appropriately raised in the underlying proceedings or in any other proceedings related to these Taxpayers' challenges to the tax at issue in this matter.

6. Following the decision of the Commission, this matter shall be returned for further proceedings in Clark County Nevada District Court Case No. A-11-648894-J (Dept. No. 30), as determined by the Court.

IT IS SO STIPULATED AND AGREED.

GREENBERG TRAURIG, LLP

By: William H. Brown, Esq.
6029 S. Ft. Apache Rd.
Las Vegas, NV 89148
Attorneys for Plaintiffs

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

CATHERINE CORTEZ MASTO
Attorney General

By: Blake Doerr
Blake A. Doerr
Senior Deputy Attorney General
555 E. Washington Ave., Ste. 3900
Las Vegas, NV 89101
Attorneys for the Department
of Taxation

EXHIBIT “G”

1 MR. NIELSEN: Mr. Chairman, members of the
2 Commission, the next agenda item up for your consideration
3 is under 4-G. This is Tax Commission's opportunity pursuant
4 to District Court Order dated January 24, 2012 to amend,
5 reverse or affirm the Commission's Findings of Fact,
6 Conclusions of Law dated October 12, 2007, after remand to
7 hearing officer, who, after review of Taxpayer's additional
8 evidence affirmed the Commission's Findings of Fact,
9 Conclusions of Law dated October 12, 2007; affirmed the
10 Commission's September 6, 2012 Decision denying the
11 taxpayer's request to issue subpoenas, conduct additional
12 discovery and depositions; and denied the taxpayer's request
13 to convene a hearing.

14 Number 1 is K-Kel, Inc. doing business as
15 Spearmint Rhino Gentleman's Club; Olympus Garden, Inc.,
16 doing business as Olympic Garden; SHAC LLC doing business as
17 Sapphire; The Power Company, Inc., doing business as Crazy
18 Horse Too Gentleman's Club; D Westwood, Inc. doing business
19 as Treasures; DI Food & Beverage of Las Vegas, LLC doing
20 business as Scores, Deja vu Showgirls of Las Vegas, LLC
21 doing business as Deja vu; and Little Darlings of Las Vegas,
22 LLC doing business as Little Darlings.

23 For the Department is Blake Dohr and there are
24 representatives of the taxpayer as well.

25 CHAIRMAN BARENGO: Good afternoon, gentlemen,

1 would you identify yourselves for the record?

2 MR. DOHR: Good morning, Mr. Chairman and members
3 of the Commision, Blake Dohr on behalf of the Department.

4 MR. BROWN: William Brown on behalf of all the
5 taxpayers except SHAC LLC, who is represented by Mr. Rootsy.

6 MR. ROOTSY: Good morning, Mr. Rootsy on behalf of
7 SHAC LLC.

8 CHAIRMAN BARENGO: Mr. Dohr?

9 MR. DOHR: I'll just give a brief overview here.
10 We're here today asking the Commission to affirm its
11 decision that it rendered on October 12th, 2007. That
12 decision was the collective plaintiffs in this matter, their
13 request for tax refunds, based on grounds the live
14 entertainment tax was unconstitutional.

15 At the time of that decision the plaintiffs had an
16 active Complaint in District Court which was really asking
17 the District Court to adjudicate the same matter.

18 And the District Court matter was stayed while the
19 Commission was entertaining the matter. The matter made its
20 way through District Court after this commission made its
21 ruling, with the District Court judge Elizabeth Gonzales
22 dismissing the matter on the grounds that the matter should
23 be filed as a petition for judicial review, and she based
24 that decision on the Southern Cal Edison case which this
25 Commission is familiar with.

1 Based on that action that the clubs filed their
2 petition for judicial review and the case has been with Judge
3 wekks in the Eighth Judicial District. Judge weeks said this
4 matter has been decided. However, four years have passed
5 and the clubs are alleging there is all this discovery that
6 that they should be considered.

7 The judge said I think that that's really for the
8 Commission to look at and make their own decision whether
9 they should re-look at the additional evidence and whether
10 they want to reverse, remand or affirm that original
11 decision.

12 That question came to the Commission, and the
13 Commission decided to remand it to its hearing officer to
14 look at some of the specific evidence that they had asked
15 about. The Commission also denied them the further
16 evidence.

17 So the matter went to the Department's hearing
18 officer, Judge James, and she looked at the evidence the
19 Commission asked her to to look at, and she rendered a
20 decision affirming that decision. We're here today asking
21 you to affirm, reaffirm your decision based on her findings
22 that the evidence that she looked at did not change this
23 decision.

24 MR. BROWN: Thank you, essentially what we're here
25 with is a much more complete factual record than we had when

1 the initial decision was entered. We've agreed with the
2 State in the interests of getting this matter back in front
3 of Judge Weeks to submit it to the Commission to either
4 amend, reverse or affirm, modify what is essentially a
5 decision it initially made.

6 Our request of course would be that the Commission
7 reverse that decision. The State of course thinks it should
8 be affirmed. Other than that, I think the procedure Mr.
9 Dohr laid out is pretty accurate and essentially it's before
10 the Commission now.

11 I'll be happy to answer any questions, of course,
12 but we've agreed not to belabor this matter here today.

13 CHAIRMAN BARENGO: Mr. Rootsy?

14 MR. ROOTSY: Nothing further.

15 CHAIRMAN BARENGO: Any questions of any of these
16 gentlemen? As I read the Court's order, it says to amend
17 the findings of fact and conclusions of law, reverse the
18 decision or affirm the decision. And our hearing officer
19 has affirmed it after reviewing the evidence, what is the
20 pleasure of the Commission?

21 MR. DOHR: May I just for the record, I want to
22 make sure we have stated, as I've said, the State would
23 submit this matter without additional briefing or argument.
24 I just want to make sure that that stipulation is part of
25 the record.

1 CHAIRMAN BARENGO: Yes, it was, or is.
2 Is there any discussion? Motions?
3 MEMBER MARVEL: I'll move to affirm the hearing
4 officer's decision.
5 CHAIRMAN BARENGO: It's been moved.
6 MEMBER DEVOLLD: Second.
7 CHAIRMAN BARENGO: There's a second by
8 Commissioner Devolld. It's been moved that we affirm the
9 hearing officer's decision in this matter. Any further
10 discussion?
11 MEMBER SHEETS: Mr. Chairman, do we also have to
12 affirm the Commission's original decision issued in October
13 of 2007 as well?
14 MS. CRANDALL: That would be my recommendation.
15 MR. DOHR: That would be my request as well.
16 CHAIRMAN BARENGO: And I would submit that we
17 amend the motion to include our affirmation of the
18 Commission's prior order issued in this case, dated October
19 12, 2007, if Commissioner Marvel will accept that.
20 MEMBER MARVEL: Yes, I accept that.
21 CHAIRMAN BARENGO: So we've all heard the motion.
22 All those in favor signify by saying "Aye." Any opposed?
23 The motion passes unanimously. Thank you, gentlemen, for
24 coming.
25 MR. NIELSEN: Mr. Chairman, I think the balance of