

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

Electronically Filed
Oct 27 2016 04:43 p.m.
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
VOLUME 18, PAGES 3758 – 4006

INDEX TO APPELLANTS' APPENDIX

Filing Date	Description	Vol.	Page																
06/24/2016	Amended Notice of Appeal	19	4036-4038																
06/23/2016	Amended Order Denying Judicial Review of Administrative Decision	19	4021-4026																
09/28/2011	<p>Application for Leave to Present Additional Evidence to the Nevada Tax Commission</p> <p>Exhibit 13 (ONLY) – Department Letter of November 17, 20013 Re: Southern California Edison</p> <p>(This exhibit was erroneously omitted in the Supplement to the Record Filed on January 26, 2015)</p>	1	13-15																
01/26/2015	<p>Entire Record of Administrative Proceedings Filed with District Court via Compact Disc (District Court Case No. A-11-648894-J):</p> <table border="1" style="width: 100%; border-collapse: collapse;"> <tbody> <tr> <td style="width: 60%;">Application for Leave to Present Additional Evidence to the Nevada Tax Commission, dated 09/28/11</td> <td style="width: 10%;">1-30</td> <td style="width: 10%;">1</td> <td style="width: 20%;">140-169</td> </tr> <tr> <td>Ex. 1 – Charts by the Department showing LET Collections by Taxpayer Group.</td> <td>31-34</td> <td>1</td> <td>170-173</td> </tr> <tr> <td>Ex. 2 – March 14, 2005, Department memo discussing the specific inclusion of gentlemen’s clubs in the proposed amended version of Chapter 368A.</td> <td>35-37</td> <td>1</td> <td>174-176</td> </tr> <tr> <td>Ex. 3 – October 9, 2003, email to former Department Director Dino</td> <td>38-43</td> <td>1</td> <td>177-182</td> </tr> </tbody> </table>	Application for Leave to Present Additional Evidence to the Nevada Tax Commission, dated 09/28/11	1-30	1	140-169	Ex. 1 – Charts by the Department showing LET Collections by Taxpayer Group.	31-34	1	170-173	Ex. 2 – March 14, 2005, Department memo discussing the specific inclusion of gentlemen’s clubs in the proposed amended version of Chapter 368A.	35-37	1	174-176	Ex. 3 – October 9, 2003, email to former Department Director Dino	38-43	1	177-182		
Application for Leave to Present Additional Evidence to the Nevada Tax Commission, dated 09/28/11	1-30	1	140-169																
Ex. 1 – Charts by the Department showing LET Collections by Taxpayer Group.	31-34	1	170-173																
Ex. 2 – March 14, 2005, Department memo discussing the specific inclusion of gentlemen’s clubs in the proposed amended version of Chapter 368A.	35-37	1	174-176																
Ex. 3 – October 9, 2003, email to former Department Director Dino	38-43	1	177-182																

Filing Date	Description	Vol.	Page
	<p>DiCianno from an attorney on behalf of the Bellagio hotel and casino discussion the constitutionality of the proposed amendments.</p>		
	<p>Ex. 4 – October 21, 2003, email to DiCianno with a transcript of the Nevada Gaming Commission discussing the importance of subjecting the gentlemen’s clubs to the LET.</p>	44-67	1 183-206
	<p>Ex. 5 – First Reprint of Senate Bill 247 which contains a counsel digest specifically referencing adult entertainment and what would happen if that proposed portion of the Bill were held unconstitutional.</p>	68-92	1 207-231
	<p>Ex. 6 – Minutes of the May 16, 2005, meeting of the Assembly Committee on Commerce and Labor which discusses what happens if the proposed live adult entertainment provisions are held unconstitutional.</p>	93-110	1 232-249
	<p>Ex. 7 – Minutes of the May 26, 2005, meeting of the Assembly Committee on Ways and Means, which specifically references the Department’s position on there being two distinct categories: live entertainment and live adult entertainment. Exhibit E to the minutes is an email from DiCianno setting forth this distinction.</p>	111-118	2 250-257

Filing Date	Description	Vol.	Page
	Ex. 8 – Untitled Revenue Analysis.	119-121	2 258-260
	Ex. 9 – November 9, 2004, Memo to Chinnock, Executive Director of Department.	122	2 261
	Ex. 10 – April 24, 2004, DiCianno Email.	123	2 262
	Ex. 11 – November 18, 2003, Barbara Smith Campbell Email.	124-125	2 263-264
	Ex. 12 – Minutes of June 5, 2005, Meeting of Senate Committee on Taxation.	126-137	2 265-276
	Ex. 14 – <u>Deja Vu Showgirls of Las Vegas, L.L.C., v. Nevada Dept. of Taxation</u> , 2006 WL 2161980 (D. Nev. July 28, 2006) – dismissal of lawsuit.	138-141	2 277-280
	Ex. 15 – Motion to Dismiss Amended Complaint, Document 12, U.S.D.C. Nevada, Case No. 2:06-cv-00480, filed May 10, 2006.	142-153	2 281-292
	Ex. 16 – Reply to Motion to Dismiss Complaint, Document 17, U.S.D.C. Nevada, Case No. 2:06-cv-00480, filed June 14, 2006.	154-165	2 293-304
	8 th Judicial District Court Administrative Record, filed 10/21/11		
	(Index of Documents)	166-170	2 306-309

Filing Date	Description	Vol.	Page
	Petitioner's Claims for Refund of Tax on Live Entertainment, February 27, 2007 (Tax Period: January 2004)	1-41 171-211	2 310-350
	Petitioners' Claim for Refund of Tax on Live Entertainment, March 28, 2007 (Tax Period: February 2004)	42-84 212-254	2 351-393
	Respondent's Response to Refund Requests, April 3, 2007	85-96 255-266	2 394-405
	Petitioners' Claims for Refund of Tax on Live Entertainment, April 26, 2007 (Tax Period: March 2004)	97-139 267-309	2 406-448
	Respondent's Response to Refund Requests, April 30, 2007	140-145 310-315	2 449-454
	Petitioners' Claims for Refund of Tax on Live Entertainment, May 30, 2007 (Tax Period: April 2004)	146-188 316-358	2 455-497
	Respondent's Response to Refund Requests, June 4, 2007	189-194 359-364	3 498-503
	Petitioners' Formal Notice of Appeal, May 1, 2007 (The following pages in this section were intentionally left blank)	195-273 365-443	3 504-582
	Petitioners' Correspondence Regarding Amended Notice of Hearing, June 19, 2007	274-276 444-446	3 583-585

Filing Date	Description			Vol.	Page
	Respondents' Amended Notice of Hearing, June 8, 2007	277-280	447-450	3	586-589
	Respondents' Notice of Hearing, June 7, 2007	281-284	451-454	3	590-593
	Bradley J. Shafer Formal Notice of Appearance, June 8, 2007	285-286	455-456	3	594-595
	Petitioners' Correspondence Regarding Notice of Appeal of Denial of Claim for Refund, June 21, 2007	287-333	457-503	3	596-642
	Department's Brief and Exhibits in Support of the Department's Denial of Appellant's Refund Requests, June 15, 2007	334-351	504-521	3	643-660
	Appellants' Reply Brief and Exhibits in Opposition to the Nevada Department of Taxation's Denial of Appellant's Refund Requests	352-387	522-557	3	661-696
	Department's Supplemental Brief in Support of the Department's Denial of Appellant's Refund Requests	388-392	558-562	3	697-701
	Department's Power Point Presentation	393-415	563-585	3	702-724
	Department's Appendix of Cases, Statutes and Other Authorities				
	(Index of Appendix)	416-418	586-588	3	725-727

Filing Date	Description	Vol.	Page		
	Appendix 1 – Sheriff v. Burdg	419-426	589-596	3	728-735
	Appendix 2 – Cashman Photo Concessions and Labs v. Nevada Gaming Commission	427-432	597-602	3	736-741
	Appendix 3 – List v. Whisler	433-441	603-611	4	742-750
	Appendix 4 – Whitehead v. Comm’n on Judicial Discipline	442-482	612-652	4	751-791
	Appendix 5 – Murdock v. Commonwealth of Pennsylvania	483-493	653-663	4	792-802
	Appendix 6 – Jimmy Swaggart Ministries v. Board of Equalization	494-509	664-679	4	803-818
	Appendix 7 – Minneapolis Star v. Minnesota Comm’r of Revenue	510-530	680-700	4	819-839
	Appendix 8 – Adams Outdoor Advertising v. Borough of Stroudsburg	531-546	701-716	4	840-855
	Appendix 9 – Ward v. Rock Against Racism	547-568	717-738	4	856-877
	Appendix 10 – Leathers v. Medlock	569-586	739-756	4	878-895

Filing Date	Description	Vol.	Page		
	Appendix 11 – Madden v. Kentucky	587-596	757-766	4	896-905
	Appendix 12 – Forbes v. City of Seattle	597-612	767-782	4	906-921
	Appendix 13 – Simon & Schuster, Inc. v. Members of New York State Crime Victims Board	613-630	783-800	4	922-939
	Appendix 14 – City of Las Angeles v. Alameda Books, Inc.	631-651	801-821	4	940-960
	Appendix 15 – California Highway Patrol v. Superior Court	652-668	822-838	4	961-977
	Appendix 16 – Vermont Society of Assoc. Executives v. Milne	669-680	839-850	4	978-989
	Appendix 17 – Comptroller of the Treasury v. Clyde’s of Chevy Chase, Inc.	681-704	851-874	5	990-1013
	Appendix 18 – Chapter 368A	705-720	875-890	5	1014-1029
	Appendix 19 – IRC §§ 4231 through 4234	721-727	891-897	5	1030-1036
	Appendix 20 – Nevada State Attorney General Opinion No. 85-17	728-733	898-903	5	1037-1042

Filing Date	Description	Vol.	Page		
	Appendix 21 – Committee Notes regarding S.B. 497, June 6, 1995	734-746	904-916	5	1043-1055
	Petitioners’ Correspondence Regarding Supplemental Material Submitted for Appeal	747-749	917-919	5	1056-1058
	Petitioners’ Power Point Presentation	750-787	920-957	5	1059-1096
	Supplemental Submission on Behalf of Taxpayers/Appellants				
	Index	788-792	958-962	5	1097-1101
	1. Arkansas Writers Project, Inc. v. Charles D. Ragland	793-803	963-973	5	1102-1112
	2. Grosjean v. American Press Co.	804-812	974-982	5	1113-1121
	3. Jimmy Swaggard Ministries v. Board of Equalization of California	813-826	983-996	5	1122-1135
	4. Leathers v. Medlock	827-843	997-1013	5	1136-1152
	5. Minneapolis Star and Tribune Company v. Minnesota Commissioners of Revenue	844-863	1014-1033	5	1153-1172
	6. Murdock v. Commonwealth of Pennsylvania	864-872	1034-1042	5	1173-1181

Filing Date	Description	Vol.	Page		
	7. Regan v. Taxation with Representation of Washington and Taxation with Representation of Washington v. Donald T. Regan	873-884	1043-1054	5	1182-1193
	8. City of Las Angeles v. Alameda Books, Inc.	885-907	1055-1077	5	1194-1216
	9. TK's Video, Inc. v. Denton County, Texas	908-935	1078-1105	6	1217-1244
	Theresa Enterprises, Inc. v. United State of America	936-949	1106-1119	6	1245-1258
	10. Festival Enterprises, Inc. v. City of Pleasant Hill	950-954	1120-1124	6	1259-1263
	11. United Artists Communications, Inc. v. City of Montclair	955-960	1125-1130	6	1264-1269
	12. Vermont Society of Association Executives v. James Milne	961-982	1131-1152	6	1270-1291
	13. Church of the Lukumi Babalu Ave, Inc. v. City of Hialeah	983-1017	1153-1187	6	1292-1326
	14. City of LaDue v. Margaret Gilleo	1018-1029	1188-1199	6	1327-1338
	15. United States v. Eichman	1030-1039	1200-1209	6	1339-1348

Filing Date	Description	Vol.	Page		
	16. Adams Outdoor Advertising v. Borough or Stroudsburg	1040-1052	1210-1222	6	1349-1361
	17. Forbes v. City of Seattle	1053-1066	1223-1236	6	1362-1375
	18. NRS 360.291	1067-1070	1237-1240	6	1376-1379
	19. NRS Chapter 368 A	1071-1086	1241-1256	6	1380-1395
	20. Excerpts of Minutes of Senate Committee on Taxation – May 26, 2003	1087-1090	1257-1260	6	1396-1399
	21. Excerpts of Senate Bill No. 8 – 2003 Nevada Laws 20 th Sp. Sess. Ch. 5 (S.B. 8)	1091-1109	1261-1279	6	1400-1418
	22. Adopted Regulation of the Nevada tax Commission – R212-03	1110-1122	1280-1292	6	1419-1431
	23. Excerpts of the Legislative History of A.B. 554-2005	1123-1146	1293-1316	6	1432-1455
	24. Excerpts of Minutes of the Assembly Committee on Commerce and Labor Meeting – May 16, 2005	1147-1162	1317-1332	7	1456-1471
	25. Senate Bill No. 3 – 2005 Nevada Laws 22 nd Sp. Sess. Ch. 9 (S.B. 3)	1163-1171	1333-1341	7	1472-1480

Filing Date	Description	Vol.	Page		
	26. Assembly Bill No. 554 – 2005 Nevada Laws Ch. 484 (A.B. 554)	1172- 1179	1342- 1349	7	1481-1488
	27. Assembly Bill No. 487 – 2007 Nevada Laws Ch. 547 (A.B. 487)	1180- 1182	1350- 1352	7	1489-1491
	28. Nevada Department of Taxation Annual Report for Fiscal Years 2004- 2005 and 2005-2006	1183- 1187	1353- 1357	7	1492-1496
	29. Initial Request for Refund Letter (specimen copy)	1188- 1194	1358- 1364		1497-1503
	30. Nevada Tax Department’s Denials of Request for Refunds	1195- 1218	1365- 1388	7	1504-1527
	Transcript of the State of Nevada Tax Commission Teleconferenced Open Meeting, Monday, July 9, 2007	1219- 1237	1389- 1407	7	1528-1546
	Transcript of the State of Nevada Tax Commission Teleconferenced Open Meeting, Monday, August 6, 2007	1238- 1332	1408- 1502	7	1547-1641
	Commission’s Findings of Facts and Conclusions of Law and Decision, October 12, 2007	1333- 1334	1503- 1504	7	1642-1643
	Petitioners’ Request for a Copy of the Nevada Tax Commission’s Formal	1335	1505	7	1644

Filing Date	Description	Vol.	Page
	Written Ruling, August 22, 2007		
	These Bates Numbered Pages Were Left Blank Intentionally: 202; 210; 218; 226; 234; 242; 250; 258; 266; 294; 309; 317; 318; and 326		
	Opposition to Petitioner's Application for Leave to Present Additional Evidence to the Nevada Tax Commission, filed 10/21/11	1506-1555	7 1645-1694
	Reply in Support of Application for Leave to Present Additional Evidence to the Nevada Tax Commission, filed 11/07/11	1556-1642	8 1695-1781
	Transcript of Hearing, dated 12/09/11	1643-1656	8 1782-1795
	Notice of Entry of Order Granting Petitioner's Application for Leave to Present Additional Evidence to the Nevada Tax Commission, filed 02/02/12	1657-1662	8 1796-1801
	Document submitted by Taxpayer on Remand		
	A – Memorandum - Analysis of Revenue Impact	1663-1665	8 1802-1804
	B – Live Entertainment Tax by number of seats (2004)	1666-1668	8 1805-1807
	C – Department of Taxation Update Request	1669-1672	8 1808-1811
	D – Live Entertainment Tax information and press releases	1673-1681	8 1812-1820

Filing Date	Description	Vol.	Page
	(various dated and undated documents)		
	E – LET Updates, Southern Nevada, 7/19/04	1682-1683	8 1821-1822
	F – Live Entertainment Tax- Seating Capacity 300-7400, January-December 2004	1684-1685	8 1823-1824
	G – LET by venue (DV000028-blank page)	1686-1694	8 1825-1833
	H – LET by category and venue	1695-1699	8 1834-1838
	I – 10% LET- Gentleman's Clubs	1700-1703	8 1839-1842
	J – LET account summary	1704-1710	8 1843-1849
	K – Various Correspondence to and from taxpayers - December 10, 2003, December 12, 2003, May 17, 2005, April 2, 2007, January 3, 2008	1711-1720	8 1850-1859
	L – LET Tax received 2004- 2008	1721-1777	8 1860-1916
	M – LET Tax received fiscal year 2007	1778-1779	8 1917-1918
	N – Monthly deposit report, prepared April 17 2009	1780-1788	8 1919-1927
	O – General Fund Revenues, fiscal year 2005- 2008, forecast 2009 - 2011	1789-1790	8 1928-1929
	P – SB 247 Bill History	1791-1793	8 1930-1932

Filing Date	Description	Vol.	Page
	Q – Department of Taxation- "What You Need to Know About Nevada's Live Entertainment Tax" 10/21/03, 7/6/05 and 8/15/05 and PowerPoint presentation	1794-1855	9 1933-1994
	R – Seating capacity information by district	1856-1858	9 1995-1997
	S – LET tax information for LCB	1859-1862	9 1998-2001
	T – Memorandum regarding LET tax- 5/21/04	1863-1867	9 2002-2006
	U – LET tax seating capacity 300 - 7400, January - September 2004	1868-1869	9 2007-2008
	V – AB 281 information regarding LET	1870-1872	9 2009-2011
	W – Draft Regulations for discussions 8/25/03	1873-1881	9 2012-2020
	X – Changes effective July 2005	1882-1883	9 2021-2022
	Y – Public Notice September 5, 2003, proposed regulations	1884-1935	9 2023-2074
	Z – Memorandum and adopted regulations, December 7, 2003	1936-2007	9 2075-2146
	AA – Regulation, LCB File No. R1 05-05, February 23, 2006	2008-2055	10 2147-2194
	BB – Minutes of Senate Committee on Taxation June 5, 2005	2056-2135	10 2195-2274

Filing Date	Description	Vol.	Page
	CC – LET PowerPoint presentation	2136-2146	10 2275-2285
	DD – Public Notice September 26, 2003, proposed regulations	2147-2201	10 2286-2340
	EE – Public Notice October 23, 2003 for meeting dated October 30, 2003	2202-2290	11 2341-2429
	FF – Public Notice October 24, 2003, proposed regulations	2291-2370	11 2430-2509
	GG – Notice of Public Meeting and Transcript of Public Meeting November 25, 2003	2371-2414	11 2510-2553
	HH – Nevada Tax Commission Meeting and Proposed Regulations - Posted November 19, 2003	2415-2496	12 2554-2635
	II – LET reports	2497-2512	12 2636-2651
	JJ – LET workshop- Compact Disc	2513-2514	12 2652-2653
	KK – Legislative History	2515-2569	12 2654-2708
	KK – Legislative History (Continued)	2570-2815	13 2709-2954
	KK – Legislative History (Continued)	2816-2856	14 2955-2995
	LET Updated Requests	2857-3064	14 2996-3203
	LET Updated Requests (Continued)	3065-3156	15 3204-3295
	LET PowerPoint	3157-3168	15 3296-3307

Filing Date	Description	Vol.	Page
	Letter from Petitioner's counsel to the Nevada Tax Commission re: NAC 360.135 Request for Subpoenas to Dino DiCianno, Michelle Jacobs, and Tesa Wanamaker, dated 06/14/12	3169-3173	15 3308-3312
	Letter from Respondent's counsel to the Nevada Tax Commission in opposition to the request for subpoenas, dated 06/15/12	3174-3179	15 3313-3318
	Letter from Petitioner's counsel to the Nevada Tax Commission in reply to Petitioner's opposition to the request for subpoenas, plus Exhibit A-B, dated 06/19/12	3180-3190	15 3319-3329
	Nevada Department of Taxation's Brief on Remand to Consider Additional Evidence, plus Exhibits A-G, dated 06/19/12	3191-3341	16 3330-3480
	Letter from Respondent's counsel to the Nevada Tax Commission re: Sur-Reply to the request for subpoenas, dated 06/20/12	3342-3373	16 3481-3512
	Letter from Petitioner's counsel to the Nevada Tax Commission re: Supplement to Reply to the request for subpoenas, dated 06/20/12	3374-3567	17 3513-3706
	Transcript of Nevada Tax Commission, 06/25/12	3658-3604	17 3707-3743
	Nevada Tax Commission Decision Letter, dated 09/06/12	3605-3610	17 3744-3749
	Hearing Officer's Order on Remand, dated 08/27/13	3611-3618	17 3750-3757
	Stipulation for Submission on the Record, 10/24/13	3619-3634	18 3758-3773
	Nevada Tax Commission Notice of Hearing, dated 11/22/13	3635-3636	18 3774-3775

Filing Date	Description	Vol.	Page
	Waiver of Notice, dated 11/22/13	3637	18 3776
	Transcript of Nevada Tax Commission (only the portions of Nevada Tax Commission relevant to this matter), 12/09/13	3638-3642	18 3777-3781
	Nevada Tax Commission's Decision, 02/12/14	3643-3718	18 3782-3857
12/09/2011	Minutes	1	48-49
12/16/2011	Minutes	1	50-51
06/08/2012	Minutes	1	84-85
09/22/2015	Minutes	18	3867-3868
10/27/2015	Minutes	18	3877-3878
11/24/2015	Minutes	18	3907-3909
10/15/2013	Minutes – Status Check	1	95-96
02/26/2016	Notice of Appeal	18	3934-4006
06/24/2016	Notice of Entry of Amended Order Denying Judicial Review of Administrative Decision	19	4027-4035
10/26/2011	Notice of Entry of Order	1	19-23
11/21/2011	Notice of Entry of Order	1	28-33
02/02/2012	Notice of Entry of Order	1	54-59
06/22/2012	Notice of Entry of Order	1	88-93
3/28/2014	Notice of Entry of Order	1	119-126

Filing Date	Description	Vol.	Page
02/04/2016	Notice of Entry of Order Denying Judicial Review of Administrative Decision	18	3921-3933
10/13/2015	Notice of Entry of Order Granting Petitioner's Motion to File Supplemental Brief and Setting Hearing on Petition for Judicial Review	18	3872-3876
03/31/2015	Notice of Entry of Order Granting Stipulation and Order to Extend Time	18	3861-3866
03/26/2014	Notice of Entry of Stipulation and Order Consolidating Cases	1	111-118
01/22/2015	Notice of Entry of Stipulation and Order for Extension of Time	1	130-134
06/27/2016	Notice of Entry of Stipulation and Proposed Amended Order	19	4039-4055
01/15/2016	Order Denying Judicial Review of Administrative Decision	18	3911-3920
06/21/2012	Order Denying Stay	1	86-87
10/09/2015	Order Granting Petitioner's Motion to File Supplemental Brief and Setting Hearing on Petition for Judicial Review	18	3869-3871
02/01/2012	Order Granting Plaintiffs Application for Leave to Present Additional Evidence to the Nevada Tax Commission	1	52-53
09/09/2013	Order Scheduling Status Check	1	94
12/02/2015	Order to Statistically Close Case	18	3910
09/23/2011	Petition for Judicial Review	1	1-12

Filing Date	Description	Vol.	Page
03/11/2014	Petition for Judicial Review (District Court Case No. A-14-697515-J)	1	97-106
03/24/2014	Stipulation and Order Consolidating Cases (Consolidating A-14-697515-J with A-11-648894-J)	1	107-110
11/21/2011	Stipulation and Order for Continuance	1	25-27
10/25/2011	Stipulation and Order for Extension of Time	1	16-18
01/21/2015	Stipulation and Order for Extension of Time	1	127-129
03/30/2015	Stipulation and Order for Extension of Time	18	3858-3860
06/23/2016	Stipulation and Proposed Amended Order	19	4007-4020
01/26/2015	Supplement to the Record on Appeal in Accordance with the Nevada Administrative Procedure Act (Entire Record - Index)	1	136-139
12/09/2011	Transcript (Entered on 10/30/2012 into District Court Case No. A-11-648894-J)	1	34-47
06/08/2012	Transcript (Entered on 10/30/2012 into District Court Case No. A-11-648894-J)	1	60-83
10/27/2015	Transcript of Proceedings Before the Honorable Jerry A. Wiese, II – October 27, 2015 (Re: Oral Argument on Petition for Judicial Review) (District Court Case No. A- 11-648894-J) (Entered into District Court Case No. A-14-697515-J)	18	3879-3906
01/26/2015	Transmittal of Supplement to the Record on Appeal	1	135

CLERK OF THE COURT

1 **SAO**
 2 ADAM PAUL LAXALT
 3 Attorney General
 4 DAVID J. POPE
 5 Senior Deputy Attorney General
 6 Nevada Bar No. 008617
 7 VIVIENNE RAKOWSKY
 8 Deputy Attorney General
 9 Nevada Bar No. 009160
 10 555 E. Washington Ave., Ste. 3900
 11 Las Vegas, Nevada 89101
 12 P: (702) 486-3426
 13 F: (702) 486-3416
 14 DPope@ag.nv.gov
 15 VRakowsky@ag.nv.gov
 16 Attorneys for Respondents

DISTRICT COURT
CLARK COUNTY, NEVADA

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

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

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

Petitioners,

v.

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

Respondents.

7/24/15
3 AM chambers calendar

STIPULATION AND ORDER FOR EXTENSION OF TIME

25 WHEREAS, the Parties have agreed to extend the briefing schedule and set a new
 26 hearing date.

27 IT IS HEREBY STIPULATED AND AGREED by and between the Parties, through their
 28 Appellants' Appendix Page 3858

1 respective undersigned counsel, that:

• Opening briefs are due before 4/14/15 —

• Respondents' opposition memorandum of points and authorities shall be filed on or before April 30, 2015;

• Petitioners' reply memorandum of points and authorities shall be filed on or before June 4, 2015; and

• Oral argument shall occur on or after July 24, 2015.

10 Dated: 3/24/15

11 ADAM PAUL LAXALT
12 Attorney General

13 By: [Signature]
14 DAVID J. POPE
15 Senior Deputy Attorney General
16 Nevada Bar No. 008617
17 555 E. Washington Ave., Ste. 3900
18 Las Vegas, Nevada 89101
19 Attorneys for Respondents

17 Dated: ^(NOB) 3-24-15

18 SHAFER & ASSOCIATES, P.C.

20 By: [Signature] (7623) fos:
21 BRADLEY J. SHAFER
22 3800 Capital City Blvd., Ste. 2
23 Lansing, Michigan 48906
24 Attorneys for Petitioners

Dated: 3-24-15

LAMBROSE BROWN

By: [Signature]
WILLIAM H. BROWN
6029 S. Ft. Apache Rd., #100
Las Vegas, Nevada
Attorneys for Petitioners

Dated: 3-24-15

GREENBURG TRAUIG, LLP

By: [Signature] (7623) fos:
MARK E. FERRARIO
3773 Howard Hughes Parkway, Ste. 400
Las Vegas, NV 89169
Attorneys for Petitioners

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

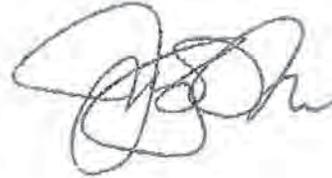
ORDER

offerings briefs are due on 4/14/15

Based upon the foregoing Stipulation, Respondents' opposition memorandum of points and authorities shall be filed on or before April 30, 2015; Petitioners' reply memorandum of points and authorities shall be filed on or before June 4, 2015; and Oral argument shall occur on or after July 24, 2015 at a date and time set by the court.

IT IS SO ORDERED.

DATED this 27 day of March, 2015.



DISTRICT COURT JUDGE

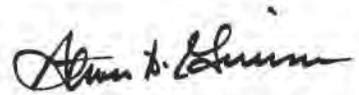


Submitted by:

ADAM PAUL LAXALT
Attorney General

By: _____

David J. Pope
DAVID J. POPE
Senior Deputy Attorney General
Nevada Bar No. 008617
555 E. Washington Ave., Ste. 3900
Las Vegas, Nevada 89101
Attorneys for Respondents



CLERK OF THE COURT

1 **NTSO**
ADAM PAUL LAXALT
2 Attorney General
DAVID J. POPE
3 Senior Deputy Attorney General
Nevada Bar No. 008617
4 VIVIENNE RAKOWSKY
Deputy Attorney General
5 Nevada Bar No. 009160
555 E. Washington Ave., Ste. 3900
6 Las Vegas, Nevada 89101
P: (702) 486-3103
7 F: (702) 486-3416
VRakowsky@ag.nv.gov
8 Attorneys for Respondents

9 **DISTRICT COURT**
10 **CLARK COUNTY, NEVADA**

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

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

Consolidated with:
Case No.: A-14-697515-J

17 Petitioners,

18 v.

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

21 Respondents.
22

23 **NOTICE OF ENTRY OF ORDER**
24 **GRANTING STIPULATION AND ORDER TO EXTEND TIME**

25 TO ALL INTERESTED PARTIES AND TO THEIR RESPECTIVE ATTORNEYS OF
26 RECORD HEREIN:
27
28

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

1 PLEASE TAKE NOTICE that the *Stipulation and Order Granting the Parties'*
2 *Agreement to Extend Time* was entered in the above-entitled action on the 30th of March,
3 2015, a copy of which is attached hereto.

4 DATED this 31st day of March, 2015.

5 ADAM PAUL LAXALAT
6 Attorney General

7
8 By: /s/ VIVIENNE RAKOWSKY
9 VIVIENNE RAKOWSKY
10 Deputy Attorney General
11 Nevada Bar No. 009160
12 *Attorneys for Defendants,*
13 *Nevada Department of Taxation*

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the **Notice of Entry of Order Granting the Parties' Request to Extend Time** with the Clerk of the Court by using the CM/ECF system on the 31st day of March, 2015. I also certify I e-mailed and mailed the foregoing document by First-Class Mail, postage prepaid as follows:

William H. Brown
Lambrose | Brown
300 S. Fourth Street, Ste. 700
Las Vegas, NV 89101
WBrown@LambroseBrown.com

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

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

/s/ Michele Caro
An employee of the
OFFICE OF THE ATTORNEY GENERAL

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

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CLERK OF THE COURT

1 **SAO**
 2 ADAM PAUL LAXALT
 2 Attorney General
 3 DAVID J. POPE
 3 Senior Deputy Attorney General
 Nevada Bar No. 008617
 4 VIVIENNE RAKOWSKY
 4 Deputy Attorney General
 5 Nevada Bar No. 009160
 5 555 E. Washington Ave., Ste. 3900
 6 Las Vegas, Nevada 89101
 6 P: (702) 486-3426
 7 F: (702) 486-3416
 7 DPope@ag.nv.gov
 8 VRakwosky@ag.nv.gov
 8 Attorneys for Respondents

10 **DISTRICT COURT**
 11 **CLARK COUNTY, NEVADA**

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

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

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

18 Petitioners,

19 v.

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

22 Respondents.

FILED
 3/24/15
 3 AM
 CHRYSTERS COLMAN

23 **STIPULATION AND ORDER FOR EXTENSION OF TIME**

24 WHEREAS, the Parties have agreed to extend the briefing schedule and set a new
 25 hearing date.
 26

27 IT IS HEREBY STIPULATED AND AGREED by and between the Parties, through their
 28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

respective undersigned counsel, that:

• Opening briefs are due before 4/14/15 —

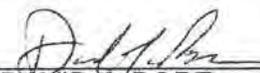
- Respondents' opposition memorandum of points and authorities shall be filed on or before April 30, 2015;
- Petitioners' reply memorandum of points and authorities shall be filed on or before June 4, 2015; and
- Oral argument shall occur on or after July 24, 2015.

Dated: 3/24/15

Dated: 3-24-15

ADAM PAUL LAXALT
Attorney General

LAMBROSE BROWN

By: 
DAVID J. POPE
Senior Deputy Attorney General
Nevada Bar No. 008617
555 E. Washington Ave., Ste. 3900
Las Vegas, Nevada 89101
Attorneys for Respondents

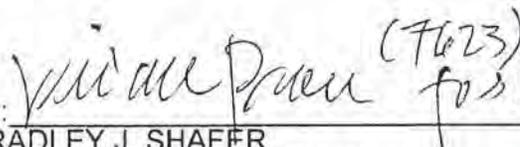
By: 
WILLIAM H. BROWN
6029 S. Ft. Apache Rd., #100
Las Vegas, Nevada
Attorneys for Petitioners

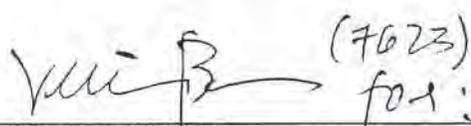
Dated: ~~10/3~~ 3-24-15

Dated: 3-24-15

SHAFER & ASSOCIATES, P.C.

GREENBURG TRAURIG, LLP

By:  (7623) fos:
BRADLEY J. SHAFER
3800 Capital City Blvd., Ste. 2
Lansing, Michigan 48906
Attorneys for Petitioners

By:  (7623) fos:
MARK E. FERRARIO
3773 Howard Hughes Parkway, Ste. 400
Las Vegas, NV 89169
Attorneys for Petitioners

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

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

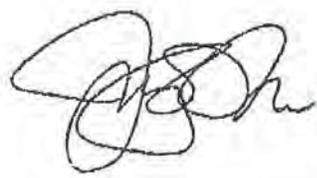
ORDER

original briefs are due on 4/14/15

Based upon the foregoing Stipulation, Respondents' opposition memorandum of points and authorities shall be filed on or before April 30, 2015; Petitioners' reply memorandum of points and authorities shall be filed on or before June 4, 2015; and Oral argument shall occur on or after July 24, 2015 at a date and time set by the court.

IT IS SO ORDERED.

DATED this 27 day of March, 2015.



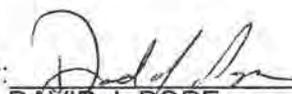
DISTRICT COURT JUDGE



Submitted by:

ADAM PAUL LAXALT
Attorney General

By:



DAVID J. POPE
Senior Deputy Attorney General
Nevada Bar No. 008617
555 E. Washington Ave., Ste. 3900
Las Vegas, Nevada 89101
Attorneys for Respondents

REGISTER OF ACTIONS

CASE NO. A-11-648894-J

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

§
§
§
§
§
§
§

Case Type: Civil Petition for Judicial Review
Date Filed: 09/23/2011
Location: Department 30
Cross-Reference Case Number: A648894
Supreme Court No.: 69886

RELATED CASE INFORMATION

Related Cases
A-14-697515-J (Consolidated)

PARTY INFORMATION

Defendant	Nevada Department of Taxation	Lead Attorneys David J. Pope Retained 7026568084(W)
Defendant	Nevada Tax Commission	David J. Pope Retained 7026568084(W)
Plaintiff	D I Food and Beverage of Las Vegas LLC Doing Business As Scores	William H. Brown Retained 702-816-2200(W)
Plaintiff	D Westwood Inc Doing Business As Treasures	William H. Brown Retained 702-816-2200(W)
Plaintiff	Deja Vu Showgirls of Las Vegas Doing Business As Deja Vu	William H. Brown Retained 702-816-2200(W)
Plaintiff	K-Kel, Inc. Doing Business As Spearmint Rhino Gentlemens Club	William H. Brown Retained 702-816-2200(W)
Plaintiff	Little Darlings of Las Vegas LLC Doing Business As Little Darlings	William H. Brown Retained 702-816-2200(W)
Plaintiff	Olympus Garden Inc Doing Business As Olympic Garden	William H. Brown Retained 702-816-2200(W)
Plaintiff	Power Company Inc Doing Business As Crazy Horse Too Gentlemens Club	William H. Brown Retained 702-816-2200(W)
Plaintiff	Shac LLC Doing Business As Sapphire	William H. Brown Retained 702-816-2200(W)

EVENTS & ORDERS OF THE COURT

09/22/2015 Motion for Leave (9:00 AM) (Judicial Officer Wiese, Jerry A.)
Motion for Leave to File Supplemental Brief Regarding New U.S. Supreme Court Precedent
Minutes

Appellants Appendix

08/18/2015 9:00 AM

09/22/2015 9:00 AM

- Motion for Leave to File Supplemental Brief Regarding New U.S. Supreme Court Precedent There being no objection. COURT ORDERED, motion GRANTED. Briefing schedule set as followed: 10/6/15 Response 10/13/15 Reply 10/27/15 9:00 am Hearing: Petition for Judicial Review

[Parties Present](#)

[Return to Register of Actions](#)

ORDR

1 WILLIAM H. BROWN
Nevada Bar No.: 7623
2 LAMBROSE BROWN
300 S. Fourth St. Ste. 700
3 Las Vegas, Nevada 89101
Telephone: (702) 816-2200
4 Facsimile: (702) 816-2300
Email: wbrown@lambrosebrown.com
5 *Counsel for Petitioner K-Kel, Inc.*

6 MARK E. FERRARIO
Nevada Bar No. 1625
7 BRANDON E. ROOS
Nevada Bar No. 7888
8 GREENBERG TRAUIG, LLP
3733 Howard Hughes Parkway
Suite 400 North
9 Las Vegas, Nevada 89169
Telephone: (702) 792-3773
10 Facsimile: (702) 792-9002
Email: ferrariom@gtlaw.com
11 *Counsel for Petitioner SHAC, LLC*

12 BRADLEY J. SHAFER
Michigan Bar No. P36604*
13 SHAFER & ASSOCIATES, P.C.
3800 Capital City Blvd., Suite #2
14 Lansing, Michigan 48906-2110
Telephone: (517) 886-6560
15 Facsimile: (517) 886-6565
Email: brad@bradshafelaw.com
16 *Co-Counsel for all Petitioners except SHAC, LLC*

17 **DISTRICT COURT**
18 **CLARK COUNTY, NEVADA**

19 K-KEL, INC., d/b/a *Spearmint Rhino*
20 *Gentlemen's Club*, OLYMPUS GARDEN,
INC., d/b/a *Olympic Garden*, SHAC, L.L.C.
21 d/b/a *Sapphire*, D. WESTWOOD, INC.,
d/b/a *Treasures*, DEJA VU SHOWGIRLS
22 OF LAS VEGAS, LLC, d/b/a/ *Déjà vu*
and LITTLE DARLINGS OF LAS VEGAS,
23 LLC, d/b/a *Little Darlings*,

24 **Petitioners,**

25 **vs.**

26 NEVADA DEPARTMENT OF TAXATION,
and NEVADA TAX COMMISSION,

27 **Respondents**
28

Electronically Filed
10/09/2015 03:29:41 PM

CLERK OF THE COURT

Case No. A-11-648894-J

Consolidated with: A-14-697515-J

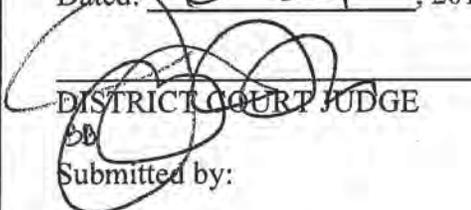
Dept: 30

1 **ORDER GRANTING PETITIONERS' MOTION TO FILE SUPPLEMENTAL BREIF**
2 **AND SETTING HEARING ON PETITION FOR JUDICIAL REVIEW**

3 This matter came on for hearing on September 22, 2015, at 9:00 a.m. before the Court
4 was petitioners' motion for leave to file supplemental brief (the "motion"), respondents'
5 opposition, and petitioners' reply. The parties were represented by and through their counsel of
6 record. The Court, being fully advised on the premises, and good cause appearing, now
7 therefore orders as follows:

- 8 1. Petitioners' motion is granted;
9
10 2. Respondents' may file an opposition to petitioners' supplemental brief no later than
11 **October 6, 2015;**
12
13 3. Petitioners may file a reply no later than **October 13, 2015;** and
14
15 4. Pursuant to NRS 233B.133(4), the Court will hold a hearing in this matter on
16 **October 27, 2015, at 9:00 a.m.**

17 Dated: 6 Oct, 2015.

18 
19 DISTRICT COURT JUDGE

20 Submitted by:

21 By: /s/ William H. Brown
22 WILLIAM H. BROWN
23 Nevada Bar No.: 7623
24 LAMBROSE BROWN
25 300 S. Fourth St. Ste. 700
26 Las Vegas, Nevada 89101
27 Telephone: (702) 816-2200
28 Facsimile: (702) 816-2300
wbrown@lambrosebrown.com
Counsel for Petitioner K-Kel, Inc.

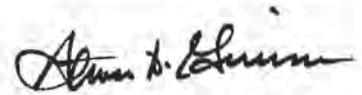
[Signatures continued below]

Approved as to form and content:

By: /s/ David J. Pope
DAVID J. POPE
Nevada Bar No. 8617
Senior Deputy Attorney General
VIVIENNE RAKOWSKY
Nevada Bar No. 9160
Deputy Attorney General
555 E. Washington Ave.,
Ste. 3900
Las Vegas, Nevada 89101
dpope@ag.nv.gov
Counsel for Respondents

1 By: /s/ Mark E. Ferrario
2 MARK E. FERRARIO
3 Nevada Bar No. 1625
4 BRANDON E. ROOS
5 Nevada Bar No. 7888
6 GREENBERG TRAUIG, LLP
7 3733 Howard Hughes Parkway
8 Suite 400 North
9 Las Vegas, Nevada 89169
10 Telephone: (702) 792-3773
11 Facsimile: (702) 792-9002
12 ferrariom@gtlaw.com
13 Counsel for Petitioner SHAC, LLC
14

15 By: /s/ Bradley J. Shafer
16 BRADLEY J. SHAFER
17 Michigan Bar No. P36604*
18 SHAFER & ASSOCIATES, P.C.
19 3800 Capital City Blvd., Suite #2
20 Lansing, Michigan 48906-2110
21 brad@bradshaferlaw.com
22 Co-Counsel for all Petitioners
23 except SHAC, LLC
24 *Admitted Pro Hac Vice
25
26
27
28



CLERK OF THE COURT

NEOJ

1 WILLIAM H. BROWN
Nevada Bar No.: 7623
2 LAMBROSE BROWN
300 S. Fourth St. Ste. 700
3 Las Vegas, Nevada 89101
Telephone: (702) 816-2200
4 Facsimile: (702) 816-2300
Email: wbrown@lambrosebrown.com
5 *Counsel for Petitioner K-Kel, Inc.*

6 MARK E. FERRARIO
Nevada Bar No. 1625
7 BRANDON E. ROOS
Nevada Bar No. 7888
8 GREENBERG TRAUERIG, LLP
3733 Howard Hughes Parkway
9 Suite 400 North
Las Vegas, Nevada 89169
10 Telephone: (702) 792-3773
Facsimile: (702) 792-9002
11 Email: ferrariom@gtlaw.com
Counsel for Petitioner SHAC, LLC

12 BRADLEY J. SHAFER
Michigan Bar No. P36604*
13 SHAFER & ASSOCIATES, P.C.
3800 Capital City Blvd., Suite #2
14 Lansing, Michigan 48906-2110
Telephone: (517) 886-6560
15 Facsimile: (517) 886-6565
Email: brad@bradshaferlaw.com
16 *Co-Counsel for all Petitioners except SHAC, LLC*

**DISTRICT COURT
CLARK COUNTY, NEVADA**

19 K-KEL, INC., d/b/a *Spearmint Rhino*
20 *Gentlemen's Club*, OLYMPUS GARDEN,
INC., d/b/a *Olympic Garden*, SHAC, L.L.C.
21 d/b/a *Sapphire*, D. WESTWOOD, INC.,
d/b/a *Treasures*, DEJA VU SHOWGIRLS
22 OF LAS VEGAS, LLC, d/b/a *Déjà vu*
and LITTLE DARLINGS OF LAS VEGAS,
23 LLC, d/b/a *Little Darlings*,

Petitioners,

vs.

26 NEVADA DEPARTMENT OF TAXATION,
and NEVADA TAX COMMISSION,

27 Respondents
28

Case No. A-11-648894-J

Consolidated with: A-14-697515-J

Dept: 30

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

**NOTICE OF ENTRY OF ORDER GRANTING PETITIONERS'
MOTION TO FILE SUPPLEMENTAL BRIEF AND SETTING
HEARING ON PETITION FOR JUDICIAL REVIEW**

Please take notice that an order granting petitioners' motion to file supplemental brief and setting hearing on petition for judicial review was entered on October 9, 2015, a copy of which is attached hereto.

Dated: October 13, 2015

By: /s/ William H. Brown
WILLIAM H. BROWN
Nevada Bar No.: 7623
LAMBROSE BROWN
300 S. Fourth St. Ste. 700
Las Vegas, Nevada 89101
Telephone: (702) 816-2200
Facsimile: (702) 816-2300
wbrown@lambrosebrown.com
Attorney for Petitioner K-Kel, Inc.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **NOTICE OF ENTRY OF ORDER GRANTING PETITIONERS' MOTION TO FILE SUPPLEMENTAL BRIEF AND SETTING HEARING ON PETITION FOR JUDICIAL REVIEW** was filed with the Clark County Nevada District Court by way of the Court's electronic filing system, the operation of which will cause service upon:

Adam Paul Laxalt
Attorney General
David J. Pope
Senior Deputy Attorney General
Vivienne Rakowsky
Deputy Attorney General
555 E. Washington Ave., Suite 3900
Las Vegas, Nevada 89101
Email: dpope@ag.nv.gov;
vrakowsky@ag.nv.gov
Attorneys for Respondents

Dated: October 13, 2015

/s/ Deidra Hufnagle
An employee of LAMBROSE BROWN

ORDR

1 WILLIAM H. BROWN
Nevada Bar No.: 7623
2 LAMBROSE BROWN
300 S. Fourth St. Ste. 700
3 Las Vegas, Nevada 89101
Telephone: (702) 816-2200
4 Facsimile: (702) 816-2300
Email: wbrown@lambrosebrown.com
5 *Counsel for Petitioner K-Kel, Inc.*

6 MARK E. FERRARIO
Nevada Bar No. 1625
7 BRANDON E. ROOS
Nevada Bar No. 7888
8 GREENBERG TRAUIG, LLP
3733 Howard Hughes Parkway
Suite 400 North
9 Las Vegas, Nevada 89169
Telephone: (702) 792-3773
10 Facsimile: (702) 792-9002
Email: ferrariom@gtlaw.com
11 *Counsel for Petitioner SHAC, LLC*

12 BRADLEY J. SHAFER
Michigan Bar No. P36604*
13 SHAFER & ASSOCIATES, P.C.
3800 Capital City Blvd., Suite #2
14 Lansing, Michigan 48906-2110
Telephone: (517) 886-6560
15 Facsimile: (517) 886-6565
Email: brad@bradshoferlaw.com
16 *Co-Counsel for all Petitioners except SHAC, LLC*

17 **DISTRICT COURT**
18 **CLARK COUNTY, NEVADA**

19 K-KEL, INC., d/b/a *Spearmint Rhino*
20 *Gentlemen's Club*, OLYMPUS GARDEN,
INC., d/b/a *Olympic Garden*, SHAC, L.L.C.
21 d/b/a *Sapphire*, D. WESTWOOD, INC.,
d/b/a *Treasures*, DEJA VU SHOWGIRLS
22 OF LAS VEGAS, LLC, d/b/a/ *Déjà vu*
and LITTLE DARLINGS OF LAS VEGAS,
23 LLC, d/b/a *Little Darlings*,

24 **Petitioners,**

25 **vs.**

26 NEVADA DEPARTMENT OF TAXATION,
and NEVADA TAX COMMISSION,

27 **Respondents**
28

Electronically Filed
10/09/2015 03:29:41 PM

CLERK OF THE COURT

Case No. A-11-648894-J

Consolidated with: A-14-697515-J

Dept: 30

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

By: /s/ Mark E. Ferrario
MARK E. FERRARIO
Nevada Bar No. 1625
BRANDON E. ROOS
Nevada Bar No. 7888
GREENBERG TRAUIG, LLP
3733 Howard Hughes Parkway
Suite 400 North
Las Vegas, Nevada 89169
Telephone: (702) 792-3773
Facsimile: (702) 792-9002
ferrariom@gtlaw.com
Counsel for Petitioner SHAC, LLC

By: /s/ Bradley J. Shafer
BRADLEY J. SHAFER
Michigan Bar No. P36604*
SHAFER & ASSOCIATES, P.C.
3800 Capital City Blvd., Suite #2
Lansing, Michigan 48906-2110
brad@bradshaferlaw.com
Co-Counsel for all Petitioners
except SHAC, LLC
*Admitted Pro Hac Vice

REGISTER OF ACTIONS

CASE NO. A-11-648894-J

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

§
§
§
§
§
§
§

Case Type: Civil Petition for Judicial Review
Date Filed: 09/23/2011
Location: Department 30
Cross-Reference Case Number: A648894
Supreme Court No.: 69886

RELATED CASE INFORMATION

Related Cases
A-14-697515-J (Consolidated)

PARTY INFORMATION

Defendant	Nevada Department of Taxation	Lead Attorneys David J. Pope Retained 7026568084(W)
Defendant	Nevada Tax Commission	David J. Pope Retained 7026568084(W)
Plaintiff	D I Food and Beverage of Las Vegas LLC Doing Business As Scores	William H. Brown Retained 702-816-2200(W)
Plaintiff	D Westwood Inc Doing Business As Treasures	William H. Brown Retained 702-816-2200(W)
Plaintiff	Deja Vu Showgirls of Las Vegas Doing Business As Deja Vu	William H. Brown Retained 702-816-2200(W)
Plaintiff	K-Kel, Inc. Doing Business As Spearmint Rhino Gentlemens Club	William H. Brown Retained 702-816-2200(W)
Plaintiff	Little Darlings of Las Vegas LLC Doing Business As Little Darlings	William H. Brown Retained 702-816-2200(W)
Plaintiff	Olympus Garden Inc Doing Business As Olympic Garden	William H. Brown Retained 702-816-2200(W)
Plaintiff	Power Company Inc Doing Business As Crazy Horse Too Gentlemens Club	William H. Brown Retained 702-816-2200(W)
Plaintiff	Shac LLC Doing Business As Sapphire	William H. Brown Retained 702-816-2200(W)

EVENTS & ORDERS OF THE COURT

10/27/2015 | Hearing (9:00 AM) (Judicial Officer Wiese, Jerry A.)
PETITION FOR JUDICIAL REVIEW
Minutes

Appellants' Appendix

Page 3877

10/27/2015 9:00 AM

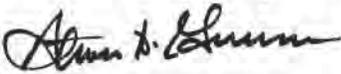
- Following arguments by counsel regarding facial challenge of live entertainment tax and first amendment right. COURT ORDERED, matter UNDER ADVISEMENT and will issue a written order from Chambers.

[Parties Present](#)

[Return to Register of Actions](#)

1 CASE NO. A-14-697515
2 DEPT. NO. 30
3 DOCKET U
4

Electronically Filed
03/21/2016 12:04:18 PM


CLERK OF THE COURT

5 DISTRICT COURT
6 CLARK COUNTY, NEVADA

7 * * * * *

8
9 K-KEL, INC., d/b/a Spearmint)
10 Rhino Gentlemen's Club, et)
11 al.,)
12)
13 Petitioner,)
14 vs.)
15 NEVADA DEPARTMENT OF TAXATION)
and NEVADA TAX COMMISSION,)
16 Respondents.)
17

18 REPORTER'S TRANSCRIPT
19 OF
20 PROCEEDINGS
21 BEFORE THE HONORABLE JERRY A. WIESE, II
22 DEPARTMENT XXX
23 DATED TUESDAY, OCTOBER 27, 2015

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

1 APPEARANCES:

2 For the Petitioner K-Kel, Inc.:

3 LAMBROSE BROWN
4 BY: WILLIAM H. BROWN, ESQ.
300 South Fourth Street
5 Suite 700
Las Vegas, Nevada 89101
6 (702) 816-2200
WBrown@LambroseBBrown.com

7 - AND -

8 SHAFER & ASSOCIATES
9 BY: BRADLEY J. SHAFER, ESQ.
3800 Capital City Boulevard
10 Suite 2
Lansing, Michigan 48906-2110
11 (517) 886-6560
Brad@bradshaferlaw.com

12 For the Petitioner SHAC, LLC:

13 GREENBERG TRAURIG
14 BY: MARK E. FERRARIO, ESQ.
3773 Howard Hughes Parkway
15 Suite 400 North
Las Vegas, Nevada 89169
16 (702) 792-3773
ferrariom@gtlaw.com

17
18 For the Respondents:

19 DEPARTMENT OF THE ATTORNEY GENERAL
20 BY: VIVIENNE RAKOWSKY, ESQ.
BY: DAVID J. POPE, ESQ.
21 555 East Washington Avenue
Suite 3900
22 Las Vegas, Nevada 89101
(702) 486-3103
vrakowsky@ag.nv.gov

23
24 * * * * *

25

1 LAS VEGAS, NEVADA, TUESDAY, OCTOBER 27, 2015;

2 9:42 A.M.

3
4 P R O C E E D I N G S

5 * * * * *

6
7 THE COURT: All right. So this is A648894,
8 K-Kel versus Nevada Department of Taxation. You guys
9 want to state your appearances.

10 MS. RAKOWSKY: Good morning, Your Honor.
11 Vivienne Rakowsky for the attorney general's office for
12 the department of taxation.

13 MR. POPE: Good morning, Your Honor. David
14 Pope also with the attorney general's office also on
15 behalf of the department of taxation.

16 MR. SHAFER: Brad Shafer from the Michigan
17 and Arizona bars on behalf of the petitioners, Your
18 Honor.

19 MR. BROWN: William Brown, K-Kel, Inc., Your
20 Honor.

21 MR. FERRARIO: Mark Ferrario for SHAC, Your
22 Honor.

23 THE COURT: Good morning. All right. So
24 it's on today for -- I don't know. I guess you guys
25 did a petition for judicial review and wanted oral

1 arguments.

2 MR. SHAFER: Yes, Your Honor.

3 THE COURT: I got a stack of stuff here.

4 MR. SHAFER: Yes, you do. That's why I made
5 the comment earlier on, I didn't want to drone on for,
6 you know, 45 minutes on oral argument.

7 We've been here, I think this is now the
8 third time before Your Honor. The first one was on
9 discovery issues. The second one was on the
10 supplemental brief because of the new U.S. Supreme
11 Court case of Reid versus Tom Gilbert. Your Honor
12 granted that motion. So the last proceedings were the
13 Department had filed a response to our supplemental
14 brief, and then we filed the reply.

15 And we've gone through in our memorandum of
16 points and authorities, Your Honor, I think pretty
17 exhaustively why we believe that the live entertainment
18 tax violates the First Amendment to the United States
19 constitution. And regrettably because I am not a
20 resident of the State of Nevada, I cannot vote for you
21 for reelection. If you uphold the First Amendment this
22 morning --

23 THE COURT: Just so everybody understands,
24 it's not a consideration.

25 MR. SHAFER: And because we put so much into

1 the briefing, Your Honor, I'll be more than happy to
2 answer whatever questions you have, but I really want
3 to address what I think -- if I was you, what would be
4 my question, which is the Nevada Supreme Court has
5 ruled on the facial constitutionality of this in the
6 Deja Vu Showgirls case. Why is this any different?
7 And shouldn't I just rule the same way that the Nevada
8 Supreme Court ruled?

9 And, Your Honor, I'll give you four responses
10 to that. The first is, Your Honor, we do not believe
11 that we were provided all of the discovery that we were
12 entitled to and that Your Honor ordered when we were
13 here the first time in front of you. As you may
14 recall, this case has a long, contorted history. This
15 portion was actually filed as really an offensive
16 action that was split by Judge Gonzalez because of the
17 consolidated Edison case. And she felt that our,
18 quote, as-applied challenge hadn't proceeded as a
19 petition for judicial review. That's why we're in
20 front of Your Honor right now.

21 And I was literally here in Nevada for the
22 depositions that we were going to take on our original
23 action when Judge Gonzalez either on a Monday or
24 Tuesday morning ruled as she did that because of
25 consolidated Edison, she was only going to hear the

1 facial challenge, and she did not believe that
2 discovery was permitted in a facial challenge and she
3 shut that down.

4 When we came back to Your Honor, or when we
5 filed the petition for judicial review and we first
6 came before Your Honor, we pointed out that there were
7 legitimate reasons why we had not taken discovery then,
8 which was the fact that the -- before consolidated
9 Edison, the law was clear that we got de novo review,
10 and you agreed with us and you sent it back to Nevada
11 Department of Taxation. We were allowed to present
12 some documentary evidence, but the Nevada Tax
13 Commission did not allow us to take the depositions
14 that we wanted.

15 So the first issue is, Your Honor, we believe
16 we're entitled to those depositions, and we did not get
17 those depositions. The second issue, Your Honor, is
18 really what are as-applied challenges all about? And
19 unlike the facial challenge, we take a look at what is
20 the effect and impact of the tax? The Nevada Supreme
21 Court looked at it and said, you know, facially, we
22 don't see any specific intent here to pick on anyone.
23 And we don't see any disparate action on behalf of --
24 on the part of the tax.

25 Now, that should be contrasted with what Your

1 Honor already has in front of you in regard to the
2 documentary evidence that we presented to the Nevada
3 Tax Commission. And not only do we have e-mails, we
4 have the legislative history, we have the fact that in
5 our interrogatories and when we asked, you know, please
6 present what the governmental interests are and why
7 this thing was enacted, they specifically responded to
8 the legislative history as their answer. So we've
9 given Your Honor the legislative history. But more
10 importantly, we've also given Your Honor the data in
11 regard to the impact of this tax.

12 And before I go over that, I need to talk
13 about what the United States Supreme Court did in the
14 Minneapolis Star case where there was a tax not on
15 newspapers but on ink and paper that was used in
16 publications. And in that case, the United States
17 Supreme Court invalidated -- in 1943, they invalidated
18 that tax because it impacted approximately with what
19 the U.S. Supreme Court said was two thirds of the big
20 newspapers were affected by that tax.

21 Contrast that with the data that we have
22 provided to Your Honor, and I'm not going to go through
23 all of it, but you can take a look at the percentages.
24 And in 2009, our clients paid 91 percent, 91 percent of
25 the 10 percent LET. Whereas the U.S. Supreme Court in

1 Minneapolis Star struck it only because two thirds were
2 paid by a particularized group.

3 We also have, Your Honor, the legislative
4 history that shows beyond any doubt that the intent was
5 to tax what they referred to as the strip clubs. They
6 not only wanted to tax the strip clubs, they wanted to
7 remove from taxation when the amendments came in in
8 2005 what they referred to as, quote, "family-oriented
9 entertainment" such as NASCAR and minor league baseball
10 that was then exempted. We also have in the
11 legislative record the fact that they felt that by
12 decreasing the seating capacity of the strip clubs that
13 would be subject to the tax because at that time under
14 the original tax not all of them were. They reduced
15 the seating capacity from 300 down to 200. They would
16 then make up the revenues that were lost by then
17 exempting the family-oriented establishments.

18 And most importantly, we have the legislative
19 record. Again, they referred to that in their answers
20 to interrogatories. The legislative record tells you
21 what the governmental interests are. We have a
22 legislative record saying that this may well be a way
23 to control strip clubs by taxing them.

24 The third thing, Your Honor, the reason that
25 this is different from the Deja Vu Showgirls case is of

1 course because of the case of Reid versus Town of
2 Gilbert. And I just want to refresh the Court's
3 recollection in regard to how the briefing went along
4 these lines. First, what we did was we submitted
5 our -- excuse me -- our motion for leave to file a
6 supplemental brief talking about Reid. The Department
7 responds by saying, Reid only applies to signed
8 regulations. In our reply, we then pointed out to Your
9 Honor the fact that two federal circuits, the Seventh,
10 and I believe it was the Fourth, have noted that that
11 is not the case and in fact expanded Reid to other
12 regulations. In fact, we pointed out Judge Manion's
13 concurring opinion in the Seventh Circuit opinion where
14 he points out that Reid applies to all laws that
15 potentially impact upon protected expression.

16 So now in their response to our supplemental
17 brief after Your Honor granted leave, when we were here
18 last time, what did they do in response to that? They
19 literally cite a case from 1890, a U.S. Supreme Court
20 case from 1890 that, No. 1, has nothing to do with the
21 First Amendment. The First Amendment wasn't argued in
22 there. And No. 2, precedes by a half a century when
23 the United States Supreme Court first started
24 developing their case law in 1943 in regard to the
25 application of the First Amendment to tax laws starting

1 with Murdock and then Minneapolis Star Tribune.

2 There is nothing that they have shown Your
3 Honor, again recalling that under the applicable case
4 law, they have the burden to demonstrate the
5 constitutionality of this law or this First Amendment.
6 They haven't demonstrated any reason. It has to be a
7 substantial governmental interest, and the regulation
8 has to be necessary to it. They haven't demonstrated
9 anything why these 26 exceptions, Your Honor, are
10 necessary to further the governmental interests. And
11 what did they say the governmental interest was?
12 Raising tax revenues, which we pointed out to Your
13 Honor, the U.S. Supreme Court said, that is not a
14 sufficient governmental interest in and of itself under
15 the First Amendment. They have given the Court
16 nothing.

17 So then the final issue, the reason that this
18 is distinguishable from the Deja Vu Showgirls case is
19 who our clients are. Our clients are strip clubs.
20 That isn't relevant in a facial challenge. The Court's
21 just looking at what the law says on its face. But now
22 what do we have by way of application of this law
23 through the 26 exceptions? The family-oriented
24 establishments are now exempt from tax, and all the
25 taxes on live entertainment and what is left, the

1 legislative history refers to the vast majority of the
2 taxes paid by the strip clubs. But we have also
3 provided Your Honor again with the documentation and
4 the data that shows that it's well beyond the two
5 thirds that the United States Supreme Court found to be
6 relevant in striking down the law in Minneapolis Star.

7 In one year, our clients paid as much as
8 91 percent of the tax. The government cannot tax
9 protected expression directly. They cannot pick out a
10 limited group of taxpayers. And they cannot make
11 distinctions of taxation based upon the content of
12 speech. And this statute violates all three precepts.
13 If you have any questions, Your Honor, I would be more
14 than happy to answer them.

15 THE COURT: Nope.

16 MR. SHAFER: Thank you.

17 MS. RAKOWSKY: Thank you, Your Honor.

18 Vivienne Rakowsky. I'm just trying to think of where I
19 should start to come back to that.

20 First, they were provided all of the
21 discovery. This Court allowed the plaintiffs, the
22 petitioners to include 1,510 pages of discovery that
23 were -- that were taken years after the initial cases
24 were filed. This Court remanded to look at the
25 discovery and determine whether the case -- whether

1 they would overturn, amend, or -- or just say that the
2 original 2007 tax commission case was upheld.

3 The ALJ, it went back to the Nevada Tax
4 Commission, and that Nevada Tax Commission first looked
5 at the -- whether they were allowed depositions. And
6 they turned around and looked at what they did in 2007
7 when they allowed these -- the petitioners at the time,
8 they said, Do you want to take discovery? Do you want
9 to do any of this? And they said, No, we have
10 everything. And then they said, Well, why don't you
11 take a month, determine what you need, and we'll come
12 back again, hear the case. After a month, they came
13 back. They had added additional 500 pages of
14 discovery, and they never ever asked for depositions.
15 Depositions were not asked for until years after the
16 case was already in district court.

17 We're here on the 2007 decision of the tax
18 commission. In -- so when we went back two years ago
19 to the -- to the tax commission, they turned around and
20 said, We'll accept these documents, because they were
21 in existence in 2007, but in 2007, you were given the
22 opportunity for additional discovery. You didn't want
23 it. And to come now, we don't want anything after 2007
24 because this is a PJ on our decision in 2007.

25 But what they did is they remanded the 1,500

1 documents to the ALJ. Told the ALJ to look at these
2 documents and determine whether they would change the
3 decision, abandon the decision, or upheld the decision,
4 and that's what she did. And she looked at all 1,500
5 documents and she came up with a written decision,
6 which said that the 1,500 documents did not change
7 anything. And she also -- and they also wrote a letter
8 after she had the documents for almost a year asking
9 again for depositions. And she denied it. Because it
10 wasn't in existence in 2007. So they have had the
11 discovery. The tax commission's looked at the
12 additional discovery. They have remanded it, they
13 upheld it, and now we're back here again.

14 With respect to the as-applied challenge,
15 they have -- they have been arguing the legislative
16 history of a bill that was never passed since 2006.
17 They were before the tax commission who said, We're not
18 looking for -- at the legislative history of a bill
19 that was never passed. They were in front of the ALJ.
20 We're not looking at it. In front of Judge Gonzalez.
21 Not looking at it. We were in front of the Nevada
22 Supreme Court, the Nevada Supreme Court said, The
23 statute is clear on its face. We don't even need to go
24 to the legislative history. And all they do is cite to
25 some comments and legislatures that were made during

1 hearings that had no relevance to the actual tax that
2 was eventually passed.

3 In fact, the United States Supreme Court and
4 the Nevada Supreme Court in other decisions have turned
5 around and said, We don't do that because why should we
6 look at what one legislature said and then overturn a
7 constitutional law which is just going to be brought
8 again and nobody's going to make any comments about it?
9 We're not going to overturn a law that's constitutional
10 based on comments of legislatures, and that's what's
11 happening here.

12 With regards to the impact of the tax, they
13 talk about Minneapolis Star. Minneapolis Star only
14 taxed, I think, 3 out of -- out of 16 different
15 providers. That really is not relevant here. In fact,
16 the Nevada Supreme Court, when they decided the Deja Vu
17 case, they basically give a roadmap for this case.
18 They knew the as-applied challenge was coming. They
19 made a determination saying that Judge Gonzalez
20 properly dismissed it and should proceed as an
21 as-applied challenge. So they knew this case was
22 coming. And in doing so, they could have gone directly
23 to the facial challenge. They could have determined
24 what right of way, there was no set of circumstances
25 under which a statute would be valid, but instead they

1 made a number of findings that applied to this
2 as-applied challenge. They said, quote, that "it's an
3 excise tax on admission fees and certain products."
4 It's not a First Amendment case. The live
5 entertainment tax does not even implicate the -- the
6 taxpayers' message, any of the 90 venues. None of them
7 are the messages discussed. They -- they said that --
8 they did away with their argument on intermediate
9 scrutiny by finding that the live entertainment tax
10 does not regulate live entertainment and it does not
11 burden the expressive conduct of the facility. And
12 this is very, very important these findings because
13 these findings apply here. This is not a First
14 Amendment tax. This is the -- this is a tax on -- on
15 places where live entertainment is taking place and
16 it's a tax on the admission. It does not tax or burden
17 the people performing the -- the live entertainment and
18 it does not look at their message.

19 They also did away with Murdock. And
20 these -- the districts have been arguing Murdock for
21 years. And under Murdock -- and Murdock was a prior
22 restraint case. And, in fact, the -- the Nevada
23 Supreme Court made some interesting findings when it
24 came to Murdock and even reprimanded the -- and even
25 reprimanded the petitioners by saying the Nevada

1 Supreme Court did the same in the subsequent Swaggert
2 (phonetic) case limited Murdock to apply only where
3 there's a flat license tax that operates a prior
4 restraint on the free exercise of religious beliefs.
5 So the Murdock case that they have argued in their
6 briefs doesn't even apply here because this is not a
7 prior restraint. Nobody has to pay the tax in order to
8 take part in First Amendment activities. The dancers
9 don't pay the tax. The patrons pay the tax.

10 The supreme court also stated that, Despite
11 its misnomer, the live entertainment tax does not
12 regulate live entertainment and does not regulate a
13 First Amendment activity. Imposing an excise tax on
14 business transactions would neither inhibit nor burden
15 the expressive conduct taking place at the facility.
16 They also said the Nevada -- the tax does not place a
17 burden on any activities because it's a tax on
18 admission paid by patrons.

19 As the ALJ noted in her decision that the --
20 that the petitioner's liability to be -- for the tax
21 has increased over the years only because their
22 business has increased. It has not affected their
23 business at all. And after reviewing the 1,500
24 documents, the ALJ actually noted, she says, Frankly,
25 it's difficult to imagine there might be facts to

1 support any of the petitioner's assertions. The
2 petitioner's position that the Nevada legislature
3 enacted that the live entertainment tax in an attempt
4 to suppress entertainment in Nevada, which is the life
5 blood of the tourism in our state, borders on the
6 absurd. I mean, the very thought that they would
7 try -- that our legislature would try to tax
8 gentlemen's club who bring in so much income into our
9 state is ridiculous. We have -- we have the same type
10 of venues in the casinos that we do -- that these --
11 that these gentlemen clubs have. There is adult
12 entertainment in the casinos, and -- and that tax --
13 the casinos are taxed the same way as the adult
14 entertainment industry. In other words, this is one
15 tax that's -- that is administered by two different
16 agencies.

17 So if you have an adult entertainment venue
18 that seats less than 7,500 people in a casino, they're
19 going to pay the same 10 percent tax on admission, the
20 same 10 percent tax on the merchandise and beverages as
21 the gentleman's club, as petitioners here today. This
22 is not two different taxes. It's one tax.

23 THE COURT: What kind of -- what kind of
24 places do we have in our -- in our casinos that
25 supplies --

1 MS. RAKOWSKY: We have all of the shows. We
2 have Zumanity. We have the -- the men -- the men's
3 strip shows. I mean, I provided an entire list of them
4 plus -- plus -- since -- since conventions are --
5 are -- are exempt, we have the AVN convention here
6 which is the adult entertainment convention that they
7 sell tickets to. And there's all types of live
8 entertainment going on in there. And it's definitely
9 adult entertainment. But that's also exempt because we
10 exempt all of the conventions.

11 So -- so -- so the tax is treated equally
12 across the lines. And if they talk about the -- okay.
13 And -- and I just want to add one more thing about what
14 goes on in the casinos. The casinos already pay tax.
15 The casinos pay 6 3/4 percent. And not only do they
16 pay the 6 3/4 percent, but when they have a venue that
17 has live entertainment in it, they're also paying the
18 10 percent that the -- that these gentleman's club
19 that -- that the venues outside of the casinos are
20 paying. And they're also -- if their venue is over
21 7,500, they're also paying the 5 percent just like any
22 other venue outside the casino.

23 So the tax is administered equally. Just
24 that because -- because the casino has a special board
25 that governs them, they're the ones who actually

1 administer the tax. And then the Department of
2 Taxation administers the ones outside. In fact, we
3 have -- we've had entertainment venues that have been
4 in the malls that are attached to casinos like in the
5 Venetian. If something is in the mall and they provide
6 live entertainment, then the Department of Taxation is
7 the one who administers the tax. But if it's inside
8 the casino itself, then that's administered by Gaming
9 Control.

10 Just going to skip ahead to the -- to the
11 third fact that they argued which is Reid. Reid is --
12 Reid is a First Amendment case. Reid affects behavior.
13 It looks at a First Amendment issue. It looks at
14 signs. It specifically looked at signs and said that
15 they're content based. And that goes back to the -- to
16 the case -- Reid goes -- Reid goes back and depends on
17 our Arkansas Writers Project. Arkansas Writers Project
18 years ago said that if something is content based, then
19 it's subject to strict scrutiny.

20 Arkansas Writers Project has been around for
21 years. They looked at that and they determined that
22 the -- that -- that Reid was looking at the content of
23 the signs. The political signs could only be a certain
24 size. Certain size that advertises this type of thing
25 could be a certain size. A directional sign could only

1 be a certain size. It could only be up to a certain
2 amount. So they looked at the content of the sign, and
3 that's how they determined it was subject to strict
4 scrutiny. They also took certain -- on three different
5 sign cases.

6 Now, as Mr. Shafer said, they have looked at
7 our cases too. They looked at political robocalling
8 and determined that political robocalling was content
9 based so they overruled that. They looked at
10 panhandling and panhandling with signs and realized
11 that's a First Amendment issue. But what we have here
12 is not a First Amendment issue. We have a tax that's
13 on the admission. The supreme court has already said
14 it's on the business transaction. It's not on the
15 First Amendment activity. So we don't even bring the
16 First Amendment into the determination of this tax.

17 So from the very beginning, the entire
18 argument is misplaced. And then in addition,
19 Mr. Shafer keeps saying that -- that the State has the
20 burden. Well, this is a petition for judicial review
21 which is governed by 233(B). And 233(B), 1352 has
22 specifically said that the burden is on the petitioner
23 to show -- to show that the decision of the
24 administrative body was incorrect.

25 So we're here, as I said, on a petition for

1 judicial review. We're not here on the facial
2 challenge because the facial challenge was never
3 determined below. We're only here with what has been
4 determined by the administrative agency. And that's
5 all governed by 32(B).

6 So the petitioner has the burden. And the
7 fourth issue that they mentioned was the -- the
8 exemption. They -- they tried to say that there's a
9 family tax, and there's -- there's a casino tax and
10 there's an adult entertainment tax. And by them saying
11 that they pay 90 percent of the tax, that's incorrect.
12 When it comes to the overall live entertainment tax,
13 they pay less than 6 percent. They pay the majority of
14 what the state administers because the majority of the
15 venues that are outside the casinos are gentlemen's
16 clubs. But there are 90 different venues that are
17 administered by the department of taxation. It's just
18 that the gentlemen's club, as a group, there's more of
19 them and they do more business. And that's the only
20 reason that they pay more of the tax. But if you have
21 any questions, I would be happy to answer them.

22 THE COURT: No.

23 MS. RAKOWSKY: Thank you.

24 MR. SHAFER: Thank you, Your Honor.

25 THE COURT: Should have given you guys a

1 separate day.

2 MS. RAKOWSKY: I didn't start it.

3 MR. SHAFER: I will try to be brief.

4 THE COURT: You guys lied to me when you said
5 it was going to be ten minutes; right?

6 MR. SHAFER: How long was I in my initial
7 comments?

8 THE COURT: It's been 45.

9 MR. SHAFER: Sorry. Sorry. Sorry,
10 everybody. The very first thing is, after nine years
11 of litigation, I'm glad that this state now
12 acknowledges that Reid is dependent on RADLIN, Arkansas
13 Writers Project, so that the Reid case is, in fact,
14 dependent on a First Amendment tax case.

15 Now, this is what NRS 368(A).200 says, Point
16 1, "Except as otherwise provided in this section, there
17 is hereby imposed an excise tax on admission to any
18 facility in the state where live entertainment is
19 provided." And you may remember from law school, first
20 day, First Amendment analysis, there's actually two
21 components of the First Amendment. There's the ability
22 to speak and there's also the ability to hear. Or in
23 this case, the ability to perform and the ability to
24 see. And she's absolutely right. The taxes on the
25 customer as coming in, and that is, in fact, a tax and

1 that is a prior restraint tax because the only way that
2 these people can come in and see the live entertainment
3 that's performed in my client's establishments is by
4 paying the tax.

5 That is what renders -- that's the first
6 reason that it renders it unconstitutional. Your
7 Honor, you can accept all of the statements that she
8 just made if you do one thing, you -- you do that --
9 you know that monkey poster we have all seen -- by
10 putting hands over the ears, putting hands over the
11 eyes, and putting hands over the mouth. Because the --
12 the 26 exceptions, without question, make distinctions
13 based on content of expression. It is not the tax
14 itself that makes a distinction, the tax that I just
15 read. It's the 26 exceptions where it leaves my
16 clients in and it takes out virtually everybody else.
17 She talks about the fact that because the customer --
18 because our clients were doing better, they started
19 paying more tax. That wasn't the data that I showed
20 you. The data that we showed you were the percentages
21 of what our clients paid over all of the tax, the
22 nongaming tax.

23 And let me also correct something that she
24 said, when Ms. Rakowsky made the statement that the
25 casinos pay the same thing. No, they don't. We

1 pointed out, Your Honor, how there's two separate sets
2 of tax here. There's a 5 percent tax on admissions and
3 there's a 10 percent tax on our clients which is
4 admissions, food, and beverages. That is a huge
5 distinction. And in regard to that tax, which is the
6 only thing we're challenging here, this is not our
7 facial challenge. What we're challenging is the tax
8 that was applied to our clients we paid in 19 -- in
9 2009, 91 percent of that tax, way over the 66 percent
10 that was at issue in Murdock.

11 Now, they talk about the comments of the
12 legislatures. And she would be absolutely correct if I
13 came before Your Honor and said, This is what this
14 legislator said. Okay. And you need to take that as
15 whole cloth because -- take that for the reason that
16 the whole legislature acted. But that's not what
17 happened here. Because what happened here is we
18 specifically asked in the interrogatories, Articulate
19 for us what the governmental interest is and how the
20 tax furthers that governmental interest. And what they
21 responded to us was the legislative history that we
22 have quoted to Your Honor. Now she gets up and says,
23 that's part of a statute that -- that -- a bill that
24 was never even passed. That is untrue. Take a look at
25 the bills that were at issue. And even if it was true,

1 even if it was true, that's what they have cited as the
2 governmental interest in the way that the -- that the
3 department is articulating that the governmental
4 interest is furthered here.

5 There's a reason we asked those discovery
6 requests. They're bound by those discovery requests,
7 Your Honor. They can't get out of this at that late
8 date. And those comments to the legislators are
9 directly relevant because they said it is. They agreed
10 to be bound by those statements in those interrogatory
11 answers.

12 I think that's all I have got.

13 MR. FERRARIO: Your Honor, can we correct one
14 thing? Any intimation that Judge Gonzalez went over
15 the legislative history is incorrect. Judge Gonzalez
16 refused to look at the legislative history. She made
17 that comment. I don't know if she meant to intimate
18 that or not. And the only thing I would add is is that
19 we're entitled to an objective review of the evidence,
20 as Mr. Shafer has said. And it's always baffled me
21 that the State has argued this and the tax
22 commissioner. When we stand up, we're looking at a
23 statute that's entitled Live Entertainment. And the
24 state starts off and says, That's not what this is
25 about. I think that should trigger in Your Honor's

1 head the need to look further. And I would encourage
2 you to follow Mr. Shafer's lead. Look at the record
3 here. The records speaks better than we can.

4 And that's what we've been trying to get the
5 courts to do. Go beyond the defensive measures being
6 articulated by the department. Look at the record.
7 Look at what the legislature was trying to do. Look at
8 the title of the statute. Then look at the law that
9 Mr. Shafer articulated, we've articulated in our
10 briefs, and particularly look at it in light of Reid.
11 An objective analysis of this leads to one conclusion,
12 and that is this tax needs to be struck down because it
13 was visited, and I mean, primarily on our clients. And
14 our clients were targeted and it's content based. Take
15 a look at the legislative history.

16 MR. SHAFER: Your Honor, we had given you
17 Judge Gonzalez's order. I apologize if I didn't talk
18 about that. But we gave Your Honor Judge Gonzalez's
19 order where she specifically said, because this is a
20 facial challenge, I will not look at the legislative
21 history. And that's the exact same argument that they
22 made to the Nevada Supreme Court. And you will see,
23 Your Honor, that in the decision, the Nevada Supreme
24 Court did not look at it.

25 MR. FERRARIO: And you now have it. We want

1 you to look at it.

2 THE COURT: Great.

3 MR. FERRARIO: We would welcome that. It's
4 actually entertainment, especially the part where it
5 says, if we do this somebody is going to come and
6 strike it down. Let's figure out a way to do it so it
7 doesn't look like it, so ...

8 MS. RAKOWSKY: Can I briefly respond to some
9 of the things that was said?

10 THE COURT: No. You guys just keep going on
11 forever.

12 MS. RAKOWSKY: Just I really would like to
13 because Judge Gonzalez said the statute was fair.

14 THE COURT: It was their petition; right?
15 They go first, and then you go, and then they go last.

16 MS. RAKOWSKY: Okay.

17 MR. FERRARIO: Thank you, Your Honor.

18 THE COURT: Thanks, guys. Have a good day.

19 I'll give you a written decision.

20 MR. SHAFER: Thank you.

21 (Thereupon, the proceedings
22 concluded at 10:14 a.m.)

23

24

25

REGISTER OF ACTIONS

CASE NO. A-11-648894-J

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

§
§
§
§
§
§
§

Case Type: Civil Petition for Judicial Review
Date Filed: 09/23/2011
Location: Department 30
Cross-Reference Case Number: A648894
Supreme Court No.: 69886

RELATED CASE INFORMATION

Related Cases
A-14-697515-J (Consolidated)

PARTY INFORMATION

Defendant	Nevada Department of Taxation	Lead Attorneys David J. Pope Retained 7026568084(W)
Defendant	Nevada Tax Commission	David J. Pope Retained 7026568084(W)
Plaintiff	D I Food and Beverage of Las Vegas LLC Doing Business As Scores	William H. Brown Retained 702-816-2200(W)
Plaintiff	D Westwood Inc Doing Business As Treasures	William H. Brown Retained 702-816-2200(W)
Plaintiff	Deja Vu Showgirls of Las Vegas Doing Business As Deja Vu	William H. Brown Retained 702-816-2200(W)
Plaintiff	K-Kel, Inc. Doing Business As Spearmint Rhino Gentlemens Club	William H. Brown Retained 702-816-2200(W)
Plaintiff	Little Darlings of Las Vegas LLC Doing Business As Little Darlings	William H. Brown Retained 702-816-2200(W)
Plaintiff	Olympus Garden Inc Doing Business As Olympic Garden	William H. Brown Retained 702-816-2200(W)
Plaintiff	Power Company Inc Doing Business As Crazy Horse Too Gentlemens Club	William H. Brown Retained 702-816-2200(W)
Plaintiff	Shac LLC Doing Business As Sapphire	William H. Brown Retained 702-816-2200(W)

EVENTS & ORDERS OF THE COURT

11/24/2015 Minute Order (9:00 AM) (Judicial Officer Wiese, Jerry A.)
PETITION FOR JUDICIAL REVIEW
Minutes

Appellants' Appendix

Page 3907

11/24/2015 9:00 AM

- The above-referenced matter came before Judge Jerry Wiese with regard to a Petition for Judicial Review filed by Petitioners, K-KEL, INC., d/b/a Spearmint Rhino Gentlemen s Club, OLYMPUS GARDEN, INC., d/b/a Olympic Garden, SHAC, LLC d/b/a Sapphire, D. WESTWOOD, INC., d/b/a Treasures, D J VU SHOWGIRLS OF LAS VEGAS, LLC, d/b/a D j vu and LITTLE DARLINGS OF LAS VEGAS, LLC, d/b/a Little Darlings. Briefs were filed in this matter, and the Court also heard oral argument. After supplemental briefing regarding the Reed case, and after oral argument, the Court took the matter under advisement. Based upon the pleadings and papers on file, after hearing oral argument, and good cause appearing, the Court now renders the following decision: This Court will not reiterate the procedural history or the factual background of this case, as the parties essentially agree to the underlying facts. Petitioners argue that the Commission should have permitted Petitioners to conduct the requested depositions in order to shed further light on the drafting and amending of the NLET and to identify the purpose for each and every one of the exceptions to the definition of live entertainment set forth in NRS 368A. Petitioners also argue that NLET is unconstitutional because it is a direct tax on First Amendment activities and is statutorily gerrymandered to apply only to a narrowly defined group of speakers, and in doing so discriminates based on the content of the entertainment. Lastly, Petitioners argue that in light of the recent ruling in *Reed v. Town of Gilbert, Arizona*, __U.S.__, 135 S. Ct. 2218 (2015), the NLET does not pass the constitutional muster of strict scrutiny that now applies, whereas in this case, there is a differentiation of the application of a law based upon the content of expression. The Department of Taxation (Department) argues that the Commission s decision on remand to deny depositions should be upheld because, while NRS 233B.131(2) provides for additional evidence under very specific conditions, it does not provide for additional evidence after receiving an adverse decision. This Court remanded the case to the Commission for review of evidence, not to allow additional evidence to be gathered. The Department also argues that NLET is a Constitutional revenue raising tax and not a tax on a First Amendment right, and it has not been applied to the Petitioners in an unconstitutional manner. Furthermore, the Department notes that the Nevada Supreme Court found that the NLET is constitutional on its face in *D j Vu Showgirls v. Department of Taxation*, 334 P.3d 392 (2014). In that case, the Nevada Supreme Court established that the standard of review for the NLET is a rational basis analysis, because it does not regulate live entertainment, it does not discriminate on the basis of the taxpayers' speech, and it does not target a small group of speakers or threaten to suppress viewpoints. *D j vu*, 334 P.3d at 401. Finally, the Department argues that the standard of review for a tax matter has been in place more than 125 years and has not changed on the basis of a sign ordinance case (*Reed*). The Department argues that the Court in *D j Vu* ruled that heightened scrutiny does not apply to tax classification unless the classification is hostile and oppressive discrimination against particular person and classes. NRS 233B.135 indicates that the Court shall not substitute its judgment for that of the agency as to the weight of evidence on a question of fact. (NRS 233B.135[3]). Pursuant to NRS 33B.135(3), the Court can remand, affirm, or set aside the Commission s decision if the substantial rights of the petitioner have been prejudiced because the agency s decision is in violation of statutory provisions, in excess of the statutory authority of the agency, made upon unlawful procedure, affected by other error of law, clearly erroneous, or an arbitrary or capricious abuse of discretion. The Commission did not find Petitioner s argument with respect to reopening discovery to allow depositions meritorious because all the information that Petitioners sought recently was available prior to 2007, and the information sought was consistently determined to be irrelevant. These are findings of fact by the Commission that may not be disturbed by this Court. The Court does not find that the Commission s determination violated the constitution or a statute, was in excess of its statutory authority, was made upon unlawful procedure, was affected by other error of law, was clearly erroneous, or was arbitrary, capricious, or an abuse of discretion. Consequently, the Commission s determination with regard to the request to take depositions, is hereby AFFIRMED. The construction of a statute is a question of law, and therefore, independent review is appropriate. However, this court will not readily disturb an administrative interpretation of statutory language. *City of Reno v. Reno Police Protective Ass n.*, 118 Nev. 889, 900 (2002). The Commission s determination that the NLET is constitutional as applied to the Petitioners is supported by the fact that the Nevada Supreme Court has determined that the NLET does not regulate live entertainment and is simply a tax on a business activity, on the expressive activity taking place within the facility. Petitioners have failed to meet their burden to show that the NLET has attacked

the content of their message. In addition, this Court finds that the Commission did not exceed their authority by concluding that NLET, as applied to Petitioners, is not an impermissible differential tax, and does not place a burden on a narrowly defined group of speakers. This court agrees that Reed does not apply to tax classification unless the classification is hostile and oppressive discrimination against particular person and classes, which there is no evidence of here. Therefore, the Commission's decision that NLET is not a content-based tax on first amendment activity, but a legitimate tax scheme, evenly applied, and used to raise state revenue shall not be disturbed. Based upon the foregoing, this Court concludes that there was substantial evidence supporting the Commission's decisions that the Commission's decisions did not violate NRS 233B.135, and consequently, the Commission's decisions are hereby AFFIRMED. The Petition for Judicial Review is DENIED. Respondent's counsel is to prepare an Order consistent with this Minute Order within 10 days, have it approved as to form and content by Petitioner's counsel, and submit to this Court for signature.

[Return to Register of Actions](#)

CLERK OF THE COURT

OSCC

**DISTRICT COURT
CLARK COUNTY, NEVADA**

K-KEL, INC., PLAINTIFF(S)
VS.
NEVADA DEPARTMENT OF
TAXATION, DEFENDANT(S)

CASE NO.: A-11-648894-J
A-14-697515-J
DEPARTMENT 30

CIVIL ORDER TO STATISTICALLY CLOSE CASE

Upon review of this matter and good cause appearing,
IT IS HEREBY ORDERED that the Clerk of the Court is hereby directed to
statistically close this case for the following reason:

DISPOSITIONS:

- Default Judgment
- Judgment on Arbitration
- Stipulated Judgment
- Summary Judgment
- Involuntary Dismissal
- Motion to Dismiss by Defendant(s)
- Stipulated Dismissal
- Voluntary Dismissal
- Transferred (before trial)
- Non-Jury – Disposed After Trial Starts
- Non-Jury – Judgment Reached
- Jury – Disposed After Trial Starts
- Jury – Verdict Reached
- Other Manner of Disposition

DATED this 1st day of December, 2015.

JERRY A. WIESE
DISTRICT COURT JUDGE

CLERK OF THE COURT

1 **ODJR**
 2 ADAM PAUL LAXALT
 3 Attorney General
 4 DAVID J. POPE
 5 Senior Deputy Attorney General
 6 Nevada Bar No. 008617
 7 VIVIENNE RAKOWSKY
 8 Deputy Attorney General
 9 Nevada Bar No. 009160
 10 555 E. Washington Ave., Ste. 3900
 11 Las Vegas, Nevada 89101
 12 P: (702) 486-3103
 13 F: (702) 486-3416
 14 VRakowsky@ag.nv.gov
 15 DJPope @ag.nv.gov
 16 Attorneys for Respondents

DISTRICT COURT
CLARK COUNTY, NEVADA

12 K-KEL, INC., d/b/a Spearmint Rhino)
 13 Gentlemen's Club; OLYMPUS GARDEN,)
 14 INC., d/b/a Olympic Garden; SHAC, L.L.C.,)
 15 d/b/a Sapphire; D. WESTWOOD, INC.,)
 16 d/b/a Treasures; DÉJÀ VU SHOWGIRLS)
 17 OF LAS VEGAS, LLC, d/b/a Déjà vu; and)
 18 LITTLE DARLINGS OF LAS VEGAS, LLC,)
 19 d/b/a Little Darlings,)

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

Petitioners,

Consolidated with:
 Case No.: A-14-697515-J

v.

18 STATE OF NEVADA, ex rel.)
 19 DEPARTMENT OF TAXATION and TAX)
 20 COMMISSION,)

Respondents.

<input type="checkbox"/> Voluntary Dismissal	<input checked="" type="checkbox"/> Summary Judgment
<input type="checkbox"/> Dismissal by Defendant	<input type="checkbox"/> Stipulated Judgment
<input type="checkbox"/> Dismissal by Plaintiff	<input type="checkbox"/> Default Judgment
<input type="checkbox"/> Judgment by Defendant	<input type="checkbox"/> Judgment of Arbitration

ORDER DENYING JUDICIAL REVIEW OF ADMINISTRATIVE DECISION

24 The above-referenced matter came before the Honorable Judge Jerry Wiese with
 25 regard to the Consolidated Petitions for Judicial Review of the decisions by the Nevada Tax
 26 Commission (hereinafter "Commission") filed by Petitioners, K-KEL, INC., d/b/a Spearmint
 27 Rhino Gentlemen s Club, OLYMPUS GARDEN, INC., d/b/a Olympic Garden, SHAC, LLC

Appellants' Appendix

Page 3911

1 d/b/a Sapphire, D. WESTWOOD, INC., d/b/a Treasures, DEJA VU SHOWGIRLS OF LAS
2 VEGAS, LLC, d/b/a Deja vu and LITTLE DARLINGS OF LAS VEGAS, LLC, d/b/a Little
3 Darlings ("Petitioners"). Both sides filed briefs, and the Court heard oral argument. The
4 Petitioners were represented by William Brown Esq., Mark Ferrario, Esq. and Bradley Shafer,
5 Esq. (admitted Pro Hac Vice). The Nevada Tax Commission was represented by Vivienne
6 Rakowsky, Deputy Attorney General and David Pope, Senior Deputy Attorney General.

7 After supplemental briefing regarding the Supreme Court decision in Reed v Town of
8 Gilbert, Arizona, 135 U.S. 2218 (2015), and after oral argument, the Court took the matter
9 under advisement and issued a Minute Order on November 24, 2015 which is attached hereto
10 as Exhibit "A".

11 The procedural history of this matter dates back to a decision by the Nevada Tax
12 Commission dated October 12, 2007 upholding the Live Entertainment Tax
13 (PJR-11-648894-J), a remand in January 2012 to allow the Commission to review additional
14 evidence and determine whether it would amend, affirm or reverse its 2007 decision and re-
15 open discovery to allow depositions (PJR 14-697515-J), and supplemental briefing to
16 determine whether the standard of review for the Live Entertainment Tax changed based on
17 the U.S. Supreme Court decision in Reed v. Town of Gilbert, Arizona, 135 S. Ct. 2218 (2015).

18 Based upon the pleadings and papers on file, after hearing oral argument, and good
19 cause appearing, the Court renders the following findings of fact:

- 20 1. The parties essentially agreed to the procedural history and underlying factual
21 background of this case.
- 22 2. The three issues before this Court were:
 - 23 a. Petition for Judicial Review of the Nevada Tax Commission October 12, 2007
24 decision denying Petitioners requests for refunds of Live Entertainment Tax
25 ("NLET") paid, and finding that the NLET does not violate the U.S.
26 Constitution or Nevada Constitution, is not targeted at gentlemen's clubs,
27 and is not a tax based on the content of the taxpayer's message.

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

- 1 b. Petition for Judicial Review of the Nevada Tax Commission's decision dated
2 September 6, 2012 finding that discovery would not be reopened to allow
3 depositions, and decision on February 12, 2014 upholding the Hearing
4 Officers Hearing on Remand finding that the more than 1,500 pages of
5 supplemental materials were insufficient to cause the Commission's October
6 12, 2007 decision to be reversed or amended.
- 7 c. Petitioner's supplemental briefing claiming that the U.S. Supreme Court
8 decision in Reed v. Gilbert Arizona changed the standard of review for
9 determining the constitutionality of the Live Entertainment Tax to strict
10 scrutiny.
- 11 3. The Petitioners made the following arguments:
- 12 a. That the NLET is unconstitutional because it is a direct tax on First
13 Amendment activities and is statutorily gerrymandered to apply only to a
14 narrowly defined group of speakers, and in doing so discriminates based on
15 the content of the entertainment;
- 16 b. The Commission should have permitted Petitioners to conduct the requested
17 depositions in order to shed further light on the drafting and amending of the
18 NLET and to identify the purpose for each and every one of the exceptions to
19 the definition of live entertainment set forth in NRS 368A; and
- 20 c. Based on the recent ruling in Reed v. Town of Gilbert, Arizona, U.S. , 135
21 S. Ct. 2218 (2015), strict scrutiny applies, and the NLET does not pass the
22 constitutional muster because there is a differentiation of the application of a
23 law based upon the content of the expression.
- 24 4. The Department made the following arguments:
- 25 a. That the NLET is Constitutional revenue raising tax and not a tax on a First
26 Amendment right, and the tax has not been applied to the Petitioners in an
27 unconstitutional manner. The Nevada Supreme Court found that the NLET is

1 constitutional on its face in Deja Vu Showgirls v. Department of Taxation, 334
2 P.3d 392 (2014). In that case, the Nevada Supreme Court established that
3 the standard of review for the NLET is a rational basis analysis, because it
4 does not regulate live entertainment, it does not discriminate on the basis of
5 the taxpayers' speech, and it does not target a small group of speakers or
6 threaten to suppress viewpoints. Deja vu, 334 P.3d at 401;

- 7 b. That the Commission's decision on remand to deny depositions should be
8 upheld because, while NRS 233B.131(2) provides for additional evidence
9 under very specific conditions, it does not provide for additional evidence
10 after receiving an adverse decision. Moreover, the information that the
11 Petitioners were seeking was available in 2007. On January 24, 2012, the
12 Court remanded the case to the Commission for review of evidence, not to
13 allow additional evidence to be gathered; and
- 14 c. The standard used by the court to review a tax matter has been in place
15 more than 125 years and has not changed on the basis of a sign ordinance
16 case (Reed). The Court in Deja Vu had previously ruled that heightened
17 scrutiny does not apply to tax classification unless the classification is hostile
18 and oppressive discrimination against particular person and classes.

19 The Court made the following conclusions of law:

- 20 5. NRS 233B.135 indicates that the Court shall not substitute its judgment for that of
21 the agency as to the weight of evidence on a question of fact. NRS 233B.135(3).
- 22 6. Pursuant to NRS 233B.135(3), the Court can remand, affirm, or set aside the
23 Commission's decision if the substantial rights of the petitioner have been
24 prejudiced because the agency's decision is in violation of statutory provisions, in
25 excess of the statutory authority of the agency, made upon unlawful procedure,
26 affected by other error of law, clearly erroneous, or an arbitrary or capricious abuse
27 of discretion.

- 1 7. The Commission did not find Petitioner's argument with respect to reopening
2 discovery to allow depositions meritorious because all the information that
3 Petitioners sought recently was available prior to 2007, and the information sought
4 was consistently determined to be irrelevant. The Commission's decision did not
5 violate the constitution or a statute, was not in excess of its statutory authority, was
6 not made upon unlawful procedure, was not affected by other error of law, was not
7 clearly erroneous, and was not arbitrary, capricious, or an abuse of discretion.
8 These findings of fact by the Commission may not be disturbed by this Court. The
9 Commission's determination with regard to the request to take depositions is hereby
10 AFFIRMED.
- 11 8. The construction of a statute is a question of law, and therefore, independent review
12 is appropriate. However, the court will not readily disturb an administrative
13 interpretation of statutory language. City of Reno v. Reno Police Protective Ass'n.,
14 118 Nev. 889, 900 (2002). The Commission's determination that the NLET is
15 constitutional as applied to the Petitioners is supported by the fact that the Nevada
16 Supreme Court has determined that the NLET does not regulate live entertainment
17 and is simply a tax on a business transaction, and not a tax on the expressive
18 activity taking place within the facility.
- 19 9. Petitioners have failed to meet their burden to show that the NLET has attacked the
20 content of their message.
- 21 10. The Commission did not exceed their authority by concluding that NLET, as applied
22 to Petitioners, is not an impermissible differential tax, and does not place a burden
23 on a narrowly defined group of speakers.
- 24 11. Reed v Town of Gilbert, Arizona, 135 U.S. 2218 (2015), does not apply to tax
25 classification unless the classification is hostile and oppressive discrimination
26 against particular person and classes. This Court does not find any evidence here
27 that NLET triggers the application of Reed.

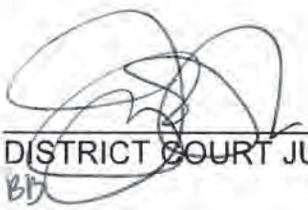
1 12. The Commission's decision that NLET is not a content-based tax on first
2 amendment activity, but a legitimate tax scheme, evenly applied, and used to raise
3 state revenue shall not be disturbed.

4 **ORDER**

5 Based upon the foregoing, this Court Orders that there was substantial evidence
6 supporting the Commission's decisions and that the Commission's decisions did not violate
7 NRS 233B.135, and consequently, the Commission's decisions are hereby AFFIRMED. The
8 Petition for Judicial Review is DENIED.

9 **IT IS SO ORDERED**

10 DATED this 13 day of May, 2016.

11
12
13 
14 _____
15 DISTRICT COURT JUDGE
16 BT

15 Respectfully Submitted By:

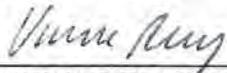
16 
17 _____
18 VIVENNE RAKOWSKY
19 Deputy Attorney General
20
21
22
23
24
25
26
27
28

EXHIBIT A

EXHIBIT A

11/24/2015 Minute Order (9:00 AM) (Judicial Officer Wiese, Jerry A.)

Minutes

11/24/2015 9:00 AM

- The above-referenced matter came before Judge Jerry Wiese with regard to a Petition for Judicial Review filed by Petitioners, K-KEL, INC., d/b/a Spearmint Rhino Gentlemen's Club, OLYMPUS GARDEN, INC., d/b/a Olympic Garden, SHAC, LLC d/b/a Sapphire, D. WESTWOOD, INC., d/b/a Treasures, D J VU SHOWGIRLS OF LAS VEGAS, LLC, d/b/a D j v u and LITTLE DARLINGS OF LAS VEGAS, LLC, d/b/a Little Darlings. Briefs were filed in this matter, and the Court also heard oral argument. After supplemental briefing regarding the Reed case, and after oral argument, the Court took the matter under advisement. Based upon the pleadings and papers on file, after hearing oral argument, and good cause appearing, the Court now renders the following decision: This Court will not reiterate the procedural history or the factual background of this case, as the parties essentially agree to the underlying facts. Petitioners argue that the Commission should have permitted Petitioners to conduct the requested depositions in order to shed further light on the drafting and amending of the NLET and to identify the purpose for each and every one of the exceptions to the definition of live entertainment set forth in NRS 368A. Petitioners also argue that NLET is unconstitutional because it is a direct tax on First Amendment activities and is statutorily gerrymandered to apply only to a narrowly defined group of speakers, and in doing so discriminates based on the content of the entertainment. Lastly, Petitioners argue that in light of the recent ruling in *Reed v. Town of Gilbert, Arizona*, ___ U.S. ___, 135 S. Ct. 2218 (2015), the NLET does not pass the constitutional muster of strict scrutiny that now applies, whereas in this case, there is a differentiation of the application of a law based upon the content of expression. The Department of Taxation (Department) argues that the Commission's decision on remand to deny depositions should be upheld because, while NRS 233B.131(2) provides for additional evidence under very specific conditions, it does not provide for additional evidence after receiving an adverse decision. This Court remanded the case to the Commission for review of evidence, not to allow additional evidence to be gathered. The Department also argues that NLET is a Constitutional revenue raising tax and not a tax on a First Amendment right, and it has not been applied to the Petitioners in an unconstitutional manner. Furthermore, the Department notes that the Nevada Supreme Court found that the NLET is constitutional on its face in *D j Vu Showgirls v. Department of Taxation*, 334 P.3d 392 (2014). In that case, the Nevada Supreme Court established that the standard of review for the NLET is a rational basis analysis, because it does not regulate live entertainment, it does not discriminate on the basis of the taxpayers' speech, and it does not target a small group of speakers or threaten to suppress viewpoints. *D j v u*, 334 P.3d at 401. Finally, the Department argues that the standard of review for a tax matter has been in place more than 125 years and has not changed on the basis of a sign ordinance case (*Reed*). The Department argues that the Court in *D j Vu* ruled that heightened scrutiny does not apply to tax classification unless the classification is hostile and oppressive discrimination against particular person and classes. NRS 233B.135 indicates that the Court shall not substitute its judgment for that of the agency as to the weight of evidence on a question of fact. (NRS 233B.135[3]). Pursuant to NRS 33B.135(3), the Court can remand, affirm, or set aside the Commission's decision if the substantial rights of the petitioner have been prejudiced because the agency's decision is in violation of statutory provisions, in excess of the statutory authority of the agency, made upon unlawful procedure, affected by other error of law, clearly erroneous, or an arbitrary or capricious abuse of discretion. The Commission did not find Petitioner's argument with respect to reopening discovery to allow depositions meritorious because all the information that Petitioners sought recently was available prior to 2007, and the information sought was consistently determined to be irrelevant. These are findings of fact by the Commission that may not be disturbed by this Court. The Court does not find that the Commission's determination violated the constitution or a statute, was in excess of its statutory authority, was made upon unlawful procedure, was affected by other error of law, was clearly erroneous, or was arbitrary, capricious, or an abuse of discretion. Consequently, the Commission's determination with regard to the request to take depositions, is hereby AFFIRMED. The construction of a statute is a question of law, and therefore, independent review is appropriate. However, this court will not readily disturb an administrative interpretation of statutory language. *City of Reno v. Reno Police Protective Ass'n.*, 118 Nev. 889, 900 (2002). The Commission's determination that the NLET is constitutional as applied to the Petitioners is supported by the fact that the Nevada Supreme Court has determined that the NLET does not regulate live entertainment and is simply a tax on a business transaction, and not on the expressive activity taking place within the facility. Petitioners have failed to meet their burden to show that the NLET has attacked the content of their message. In addition, this Court finds that the Commission did not exceed their authority by concluding that NLET, as applied to Petitioners, is not an impermissible differential tax, and does not place a burden on a narrowly defined group of speakers. This court agrees that *Reed* does not apply to tax classification unless the classification is hostile and oppressive discrimination against particular person and classes, which there is no

evidence of here. Therefore, the Commission's decision that NLET is not a content-based tax on first amendment activity, but a legitimate tax scheme, evenly applied, and used to raise state revenue shall not be disturbed. Based upon the foregoing, this Court concludes that there was substantial evidence supporting the Commission's decisions that the Commission's decisions did not violate NRS 233B.135, and consequently, the Commission's decisions are hereby AFFIRMED. The Petition for Judicial Review is DENIED. Respondent's counsel is to prepare an Order consistent with this Minute Order within 10 days, have it approved as to form and content by Petitioner's counsel, and submit to this Court for signature.

[Return to Register of Actions](#)

1 **NEOJ**
2 ADAM PAUL LAXALT
3 Attorney General
4 DAVID J. POPE
5 Senior Deputy Attorney General
6 Nevada Bar No. 008617
7 VIVIENNE RAKOWSKY
8 Deputy Attorney General
9 Nevada Bar No. 009160
555 E. Washington Ave., Ste. 3900
Las Vegas, Nevada 89101
P: (702) 486-3103
F: (702) 486-3416
VRakowsky@ag.nv.gov
DJPope @ag.nv.gov
Attorneys for Respondents

10 **DISTRICT COURT**
11 **CLARK COUNTY, NEVADA**

12 K-KEL, INC., d/b/a Spearmint Rhino)
13 Gentlemen's Club; OLYMPUS GARDEN,)
14 INC., d/b/a Olympic Garden; SHAC, L.L.C.,)
15 d/b/a Sapphire; D. WESTWOOD, INC.,)
16 d/b/a Treasures; DÉJÀ VU SHOWGIRLS)
17 OF LAS VEGAS, LLC, d/b/a Déjà vu; and)
18 LITTLE DARLINGS OF LAS VEGAS, LLC,)
19 d/b/a Little Darlings,)

20 Petitioners,)

21 v.)

22 STATE OF NEVADA, ex rel.)
23 DEPARTMENT OF TAXATION and TAX)
24 COMMISSION,)

25 Respondents.)

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

Consolidated with:
Case No.: A-14-697585-J

NOTICE OF ENTRY OF ORDER DENYING
JUDICIAL REVIEW OF ADMINISTRATIVE
DECISION

26 PLEASE TAKE NOTICE that the ORDER DENYING JUDICIAL REVIEW OF
27 ADMINISTRATIVE DECISION was entered on January 13, 2016, and electronically filed on

28 ...
...
...
...

1 January 15th, 2016, a copy of which is attached hereto.

2 DATED this 4th day of February, 2016.

3 Respectfully submitted:

4 ADAM PAUL LAXALT
5 Attorney General

6 By: /S/ VIVIENNE RAKOWSKY
7 DAVID J. POPE
8 Senior Deputy Attorney General
9 VIVIENNE RAKOWSKY
10 Deputy Attorney General
11 Attorneys for Respondents

CERTIFICATE OF SERVICE

I certify that I am an employee of the State of Nevada, Office of the Attorney General, and that on the 4th day of February, 2016, I filed and served the foregoing **ORDER DENYING JUDICIAL REVIEW OF ADMINISTRATIVE DECISION** with the Clerk of the Court by using the electronic filing system and placing a true and accurate copy of the foregoing in U.S. Mail at Las Vegas, Nevada, first class, postage prepaid, and via e-mail, to the following:

William H. Brown
Lambrose | Brown
300 S. Fourth Street, Ste. 700
Las Vegas, NV 89101
wbrown@lambrosebrown.com

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

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

/S/ MICHELE CARO
An employee of the Office of the Attorney General

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

Anna D. Quinn
CLERK OF THE COURT

1 **ODJR**
ADAM PAUL LAXALT
2 Attorney General
DAVID J. POPE
3 Senior Deputy Attorney General
Nevada Bar No. 008617
4 VIVIENNE RAKOWSKY
Deputy Attorney General
5 Nevada Bar No. 009160
555 E. Washington Ave., Ste. 3900
6 Las Vegas, Nevada 89101
P: (702) 486-3103
7 F: (702) 486-3416
VRakowsky@ag.nv.gov
8 DJPope @ag.nv.gov
9 Attorneys for Respondents

10 **DISTRICT COURT**
11 **CLARK COUNTY, NEVADA**

12 K-KEL, INC., d/b/a Spearmint Rhino)
Gentlemen's Club; OLYMPUS GARDEN,)
13 INC., d/b/a Olympic Garden; SHAC, L.L.C.,)
d/b/a Sapphire; D. WESTWOOD, INC.,)
14 d/b/a Treasures; DÉJÀ VU SHOWGIRLS)
OF LAS VEGAS, LLC, d/b/a Déjà vu; and)
15 LITTLE DARLINGS OF LAS VEGAS, LLC,)
d/b/a Little Darlings,)

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

16 Petitioners,

Consolidated with:
Case No.: A-14-697515-J

17 v.

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

20 Respondents.)

<input type="checkbox"/> Voluntary Dismissal	<input checked="" type="checkbox"/> Summary Judgment
<input type="checkbox"/> Dismissed by Dismissal	<input type="checkbox"/> Stipulated Judgment
<input type="checkbox"/> Dismissed by Settlement	<input type="checkbox"/> Default Judgment
<input type="checkbox"/> Judgment by Deft(s)	<input type="checkbox"/> Judgment of Arbitration

23 **ORDER DENYING JUDICIAL REVIEW OF ADMINISTRATIVE DECISION**

24 The above-referenced matter came before the Honorable Judge Jerry Wiese with
25 regard to the Consolidated Petitions for Judicial Review of the decisions by the Nevada Tax
26 Commission (hereinafter "Commission") filed by Petitioners, K-KEL, INC., d/b/a Spearmint
27 Rhino Gentlemen s Club, OLYMPUS GARDEN, INC., d/b/a Olympic Garden, SHAC, LLC

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

1 d/b/a Sapphire, D. WESTWOOD, INC., d/b/a Treasures, DEJA VU SHOWGIRLS OF LAS
2 VEGAS, LLC, d/b/a Deja vu and LITTLE DARLINGS OF LAS VEGAS, LLC, d/b/a Little
3 Darlings ("Petitioners"). Both sides filed briefs, and the Court heard oral argument. The
4 Petitioners were represented by William Brown Esq., Mark Ferrario, Esq. and Bradley Shafer,
5 Esq. (admitted Pro Hac Vice). The Nevada Tax Commission was represented by Vivienne
6 Rakowsky, Deputy Attorney General and David Pope, Senior Deputy Attorney General.

7 After supplemental briefing regarding the Supreme Court decision in Reed v Town of
8 Gilbert, Arizona, 135 U.S. 2218 (2015), and after oral argument, the Court took the matter
9 under advisement and issued a Minute Order on November 24, 2015 which is attached hereto
10 as Exhibit "A".

11 The procedural history of this matter dates back to a decision by the Nevada Tax
12 Commission dated October 12, 2007 upholding the Live Entertainment Tax
13 (PJR-11-648894-J), a remand in January 2012 to allow the Commission to review additional
14 evidence and determine whether it would amend, affirm or reverse its 2007 decision and re-
15 open discovery to allow depositions (PJR 14-697515-J), and supplemental briefing to
16 determine whether the standard of review for the Live Entertainment Tax changed based on
17 the U.S. Supreme Court decision in Reed v. Town of Gilbert, Arizona, 135 S. Ct. 2218 (2015).

18 Based upon the pleadings and papers on file, after hearing oral argument, and good
19 cause appearing, the Court renders the following findings of fact:

- 20 1. The parties essentially agreed to the procedural history and underlying factual
21 background of this case.
- 22 2. The three issues before this Court were:
 - 23 a. Petition for Judicial Review of the Nevada Tax Commission October 12, 2007
24 decision denying Petitioners requests for refunds of Live Entertainment Tax
25 ("NLET") paid, and finding that the NLET does not violate the U.S.
26 Constitution or Nevada Constitution, is not targeted at gentlemen's clubs,
27 and is not a tax based on the content of the taxpayer's message.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

- b. Petition for Judicial Review of the Nevada Tax Commission's decision dated September 6, 2012 finding that discovery would not be reopened to allow depositions, and decision on February 12, 2014 upholding the Hearing Officers Hearing on Remand finding that the more than 1,500 pages of supplemental materials were insufficient to cause the Commission's October 12, 2007 decision to be reversed or amended.
 - c. Petitioner's supplemental briefing claiming that the U.S. Supreme Court decision in Reed v. Gilbert Arizona changed the standard of review for determining the constitutionality of the Live Entertainment Tax to strict scrutiny.
3. The Petitioners made the following arguments:
- a. That the NLET is unconstitutional because it is a direct tax on First Amendment activities and is statutorily gerrymandered to apply only to a narrowly defined group of speakers, and in doing so discriminates based on the content of the entertainment;
 - b. The Commission should have permitted Petitioners to conduct the requested depositions in order to shed further light on the drafting and amending of the NLET and to identify the purpose for each and every one of the exceptions to the definition of live entertainment set forth in NRS 368A; and
 - c. Based on the recent ruling in Reed v. Town of Gilbert, Arizona, U.S. , 135 S. Ct. 2218 (2015), strict scrutiny applies, and the NLET does not pass the constitutional muster because there is a differentiation of the application of a law based upon the content of the expression.
4. The Department made the following arguments:
- a. That the NLET is Constitutional revenue raising tax and not a tax on a First Amendment right, and the tax has not been applied to the Petitioners in an unconstitutional manner. The Nevada Supreme Court found that the NLET is

1 constitutional on its face in Deja Vu Showgirls v. Department of Taxation, 334
2 P.3d 392 (2014). In that case, the Nevada Supreme Court established that
3 the standard of review for the NLET is a rational basis analysis, because it
4 does not regulate live entertainment, it does not discriminate on the basis of
5 the taxpayers' speech, and it does not target a small group of speakers or
6 threaten to suppress viewpoints. Deja vu, 334 P.3d at 401;

7 b. That the Commission's decision on remand to deny depositions should be
8 upheld because, while NRS 233B.131(2) provides for additional evidence
9 under very specific conditions, it does not provide for additional evidence
10 after receiving an adverse decision. Moreover, the information that the
11 Petitioners were seeking was available in 2007. On January 24, 2012, the
12 Court remanded the case to the Commission for review of evidence, not to
13 allow additional evidence to be gathered; and

14 c. The standard used by the court to review a tax matter has been in place
15 more than 125 years and has not changed on the basis of a sign ordinance
16 case (Reed). The Court in Deja Vu had previously ruled that heightened
17 scrutiny does not apply to tax classification unless the classification is hostile
18 and oppressive discrimination against particular person and classes.

19 The Court made the following conclusions of law:

- 20 5. NRS 233B.135 indicates that the Court shall not substitute its judgment for that of
21 the agency as to the weight of evidence on a question of fact. NRS 233B.135(3).
- 22 6. Pursuant to NRS 233B.135(3), the Court can remand, affirm, or set aside the
23 Commission's decision if the substantial rights of the petitioner have been
24 prejudiced because the agency's decision is in violation of statutory provisions, in
25 excess of the statutory authority of the agency, made upon unlawful procedure,
26 affected by other error of law, clearly erroneous, or an arbitrary or capricious abuse
27 of discretion.

- 1 7. The Commission did not find Petitioner's argument with respect to reopening
2 discovery to allow depositions meritorious because all the information that
3 Petitioners sought recently was available prior to 2007, and the information sought
4 was consistently determined to be irrelevant. The Commission's decision did not
5 violate the constitution or a statute, was not in excess of its statutory authority, was
6 not made upon unlawful procedure, was not affected by other error of law, was not
7 clearly erroneous, and was not arbitrary, capricious, or an abuse of discretion.
8 These findings of fact by the Commission may not be disturbed by this Court. The
9 Commission's determination with regard to the request to take depositions is hereby
10 AFFIRMED.
- 11 8. The construction of a statute is a question of law, and therefore, independent review
12 is appropriate. However, the court will not readily disturb an administrative
13 interpretation of statutory language. City of Reno v. Reno Police Protective Ass'n.,
14 118 Nev. 889, 900 (2002). The Commission's determination that the NLET is
15 constitutional as applied to the Petitioners is supported by the fact that the Nevada
16 Supreme Court has determined that the NLET does not regulate live entertainment
17 and is simply a tax on a business transaction, and not a tax on the expressive
18 activity taking place within the facility.
- 19 9. Petitioners have failed to meet their burden to show that the NLET has attacked the
20 content of their message.
- 21 10. The Commission did not exceed their authority by concluding that NLET, as applied
22 to Petitioners, is not an impermissible differential tax, and does not place a burden
23 on a narrowly defined group of speakers.
- 24 11. Reed v. Town of Gilbert, Arizona, 135 U.S. 2218 (2015), does not apply to tax
25 classification unless the classification is hostile and oppressive discrimination
26 against particular person and classes. This Court does not find any evidence here
27 that NLET triggers the application of Reed.
- 28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

12. The Commission's decision that NLET is not a content-based tax on first amendment activity, but a legitimate tax scheme, evenly applied, and used to raise state revenue shall not be disturbed.

ORDER

Based upon the foregoing, this Court Orders that there was substantial evidence supporting the Commission's decisions and that the Commission's decisions did not violate NRS 233B.135, and consequently, the Commission's decisions are hereby AFFIRMED. The Petition for Judicial Review is DENIED.

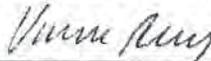
IT IS SO ORDERED

DATED this 13 day of January, 2016.



DISTRICT COURT JUDGE
BJ

Respectfully Submitted By:



VIVENNE RAKOWSKY
Deputy Attorney General

EXHIBIT A

EXHIBIT A

REGISTER OF ACTIONS

CASE NO. A-11-648894-J

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

11/23/2011 10:51:59 AM

Case Type: Civil Petition for Judgment Review
Date Filed: 09/23/2011
Location: Department 30
Cross-Reference Case Number: A648894

RELATED CASE INFORMATION

Related Cases
A-14-697515-J (Consolidated)

PARTY INFORMATION

Defendant	Nevada Department of Taxation	Lead Attorneys David J. Pope A A Retained 7026568084(W)
Defendant	Nevada Tax Commission	David J. Pope A A Retained 7026568084(W)
Plaintiff	D I Food and Beverage of Las Vegas LLC	William H. Brown A A Retained 702-816-2200(W)
Plaintiff	D Westwood Inc	William H. Brown A A Retained 702-816-2200(W)
Plaintiff	Deja Vu Showgirls of Las Vegas	William H. Brown A A Retained 702-816-2200(W)
Plaintiff	K-Kel, Inc.	William H. Brown A A Retained 702-816-2200(W)
Plaintiff	Little Darlings of Las Vegas LLC	William H. Brown A A Retained 702-816-2200(W)
Plaintiff	Olympus Garden Inc	William H. Brown A A Retained 702-816-2200(W)
Plaintiff	Power Company Inc	William H. Brown A A Retained 702-816-2200(W)
Plaintiff	Shac LLC	William H. Brown A A Retained 702-816-2200(W)

11/24/2015 Minute Order (9:00 AM) (Judicial Officer Wiese, Jerry A.)

Minutes

11/24/2015 9:00 AM

- The above-referenced matter came before Judge Jerry Wiese with regard to a Petition for Judicial Review filed by Petitioners, K-KEL, INC., d/b/a Spearmint Rhino Gentlemen's Club, OLYMPUS GARDEN, INC., d/b/a Olympic Garden, SHAC, LLC d/b/a Sapphire, D. WESTWOOD, INC., d/b/a Treasures, D J VU SHOWGIRLS OF LAS VEGAS, LLC, d/b/a D j vu and LITTLE DARLINGS OF LAS VEGAS, LLC, d/b/a Little Darlings. Briefs were filed in this matter, and the Court also heard oral argument. After supplemental briefing regarding the Reed case, and after oral argument, the Court took the matter under advisement. Based upon the pleadings and papers on file, after hearing oral argument, and good cause appearing, the Court now renders the following decision: This Court will not reiterate the procedural history or the factual background of this case, as the parties essentially agree to the underlying facts. Petitioners argue that the Commission should have permitted Petitioners to conduct the requested depositions in order to shed further light on the drafting and amending of the NLET and to identify the purpose for each and every one of the exceptions to the definition of live entertainment set forth in NRS 368A. Petitioners also argue that NLET is unconstitutional because it is a direct tax on First Amendment activities and is statutorily gerrymandered to apply only to a narrowly defined group of speakers, and in doing so discriminates based on the content of the entertainment. Lastly, Petitioners argue that in light of the recent ruling in *Reed v. Town of Gilbert, Arizona*, ___U.S. ___, 135 S. Ct. 2218 (2015), the NLET does not pass the constitutional muster of strict scrutiny that now applies, whereas in this case, there is a differentiation of the application of a law based upon the content of expression. The Department of Taxation (Department) argues that the Commission's decision on remand to deny depositions should be upheld because, while NRS 233B.131(2) provides for additional evidence under very specific conditions, it does not provide for additional evidence after receiving an adverse decision. This Court remanded the case to the Commission for review of evidence, not to allow additional evidence to be gathered. The Department also argues that NLET is a Constitutional revenue raising tax and not a tax on a First Amendment right, and it has not been applied to the Petitioners in an unconstitutional manner. Furthermore, the Department notes that the Nevada Supreme Court found that the NLET is constitutional on its face in *D j Vu Showgirls v. Department of Taxation*, 334 P.3d 392 (2014). In that case, the Nevada Supreme Court established that the standard of review for the NLET is a rational basis analysis, because it does not regulate live entertainment, it does not discriminate on the basis of the taxpayers' speech, and it does not target a small group of speakers or threaten to suppress viewpoints. *D j vu*, 334 P.3d at 401. Finally, the Department argues that the standard of review for a tax matter has been in place more than 125 years and has not changed on the basis of a sign ordinance case (*Reed*). The Department argues that the Court in *D j Vu* ruled that heightened scrutiny does not apply to tax classification unless the classification is hostile and oppressive discrimination against particular person and classes. NRS 233B.135 indicates that the Court shall not substitute its judgment for that of the agency as to the weight of evidence on a question of fact. (NRS 233B.135[3]). Pursuant to NRS 33B.135(3), the Court can remand, affirm, or set aside the Commission's decision if the substantial rights of the petitioner have been prejudiced because the agency's decision is in violation of statutory provisions, in excess of the statutory authority of the agency, made upon unlawful procedure, affected by other error of law, clearly erroneous, or an arbitrary or capricious abuse of discretion. The Commission did not find Petitioner's argument with respect to reopening discovery to allow depositions meritorious because all the information that Petitioners sought recently was available prior to 2007, and the information sought was consistently determined to be irrelevant. These are findings of fact by the Commission that may not be disturbed by this Court. The Court does not find that the Commission's determination violated the constitution or a statute, was in excess of its statutory authority, was made upon unlawful procedure, was affected by other error of law, was clearly erroneous, or was arbitrary, capricious, or an abuse of discretion. Consequently, the Commission's determination with regard to the request to take depositions, is hereby AFFIRMED. The construction of a statute is a question of law, and therefore, independent review is appropriate. However, this court will not readily disturb an administrative interpretation of statutory language. *City of Reno v. Reno Police Protective Ass n.*, 118 Nev. 889, 900 (2002). The Commission's determination that the NLET is constitutional as applied to the Petitioners is supported by the fact that the Nevada Supreme Court has determined that the NLET does not regulate live entertainment and is simply a tax on a business transaction, and not on the expressive activity taking place within the facility. Petitioners have failed to meet their burden to show that the NLET has attacked the content of their message. In addition, this Court finds that the Commission did not exceed their authority by concluding that NLET, as applied to Petitioners, is not an impermissible differential tax, and does not place a burden on a narrowly defined group of speakers. This court agrees that *Reed* does not apply to tax classification unless the classification is hostile and oppressive discrimination against particular person and classes, which there is no

evidence of here. Therefore, the Commission's decision that NLET is not a content-based tax on first amendment activity, but a legitimate tax scheme, evenly applied, and used to raise state revenue shall not be disturbed. Based upon the foregoing, this Court concludes that there was substantial evidence supporting the Commission's decisions that the Commission's decisions did not violate NRS 233B.135, and consequently, the Commission's decisions are hereby AFFIRMED. The Petition for Judicial Review is DENIED. Respondent's counsel is to prepare an Order consistent with this Minute Order within 10 days, have it approved as to form and content by Petitioner's counsel, and submit to this Court for signature.

[Return to Register of Actions](#)