

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Appellants,

v.

State of Nevada, ex rel. Department of
Taxation and Tax Commission,

Respondents.

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Supreme Court Case No.: 69886

District Court Case No.:

**A-11-648894-J consolidated with
A-14-697515-J**

APPEAL FROM THE EIGHTH JUDICIAL DISTRICT COURT

RESPONDENTS' APPENDIX VOLUME II - BATES NUMBERS RA0093-RA0191

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DISTRICT COURT
CLARK COUNTY, NEVADA

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

Plaintiffs,

vs.

NEVADA DEPARTMENT OF TAXATION;
NEVADA TAX COMMISSION; and
NEVADA STATE BOARD OF EXAMINERS,

Defendants.

Case No.:
Dept. No.:

A554970
IX

COMPLAINT FOR REFUND,
PURSUANT TO N.R.S. 368A.290(1)(b)
AND N.R.S. 368A.300(3)(b),
DECLARATORY RELIEF,
INJUNCTIVE RELIEF AND DAMAGES

NOW COME Plaintiffs K-Kel, Inc., d/b/a *Spearmint Rhino Gentlemen's Club*,
Olympus Garden, Inc., d/b/a *Olympic Garden*, SHAC, L.L.C., d/b/a *Sapphire*, The Power
Company, Inc., d/b/a *Crazy Horse Too Gentlemen's Club*, D. Westwood, Inc., d/b/a

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CLERK OF THE COURT

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1 *Treasures*, and D.I. Food & Beverage of Las Vegas, LLC, d/b/a *Scores* (collectively referred
2 to herein as the "Plaintiffs"), by and through their attorneys, and state for their complaint
3 pursuant to N.R.S. 368A.290(1)(b) and N.R.S. 368A.300(3)(b) against Defendant Nevada
4 Department of Taxation, Defendant Nevada Tax Commission, and Defendant Nevada State
5 Board of Examiners (collectively referred to herein as the "Defendants"), as follows:
6

7 INTRODUCTION

8 1. This is a civil action brought pursuant to N.R.S. 368A.290(1)(b) and N.R.S.
9 368A.300(3)(b), wherein Plaintiffs pray for a refund of the Live Entertainment Tax
10 paid for the tax periods of January, February, March, and April, 2004, as well as for
11 declaratory judgment, injunctive relief, and damages. Specifically, Plaintiffs seek to
12 have this Court declare as unconstitutional on its face, and enjoin, the Nevada Tax on
13 Live Entertainment (referred to herein as the "Live Entertainment Tax," or simply the
14 "Tax") as established by Title 32, Chapter 368A, of the Nevada Revised Statutes
15 ("Chapter 368A"), and the regulations promulgated in furtherance thereof, as being an
16 impermissible tax on constitutionally protected expression. A copy of the statute as
17 originally enacted is attached hereto as Exhibit 1, and a copy of the current codified
18 version of Chapter 368A is attached hereto as Exhibit 2, and both are incorporated
19 herein by reference. A copy of the administrative regulations promulgated in
20 furtherance of Chapter 368A is attached hereto as Exhibit 3, and is incorporated herein
21 by reference.
22
23
24

25 JURISDICTION AND VENUE

26 2. This Court has jurisdiction and power to grant the refund requested pursuant to N.R.S.
27 368A.290, as well as jurisdiction and authority to grant the declaratory judgment
28

1 prayed for here pursuant to Rule 57 of the Nevada Rules of Civil Procedure and
2 N.R.S. 33.040. Additionally, this Court has jurisdiction and power to grant the
3 injunctive relief requested pursuant to Rule 65 of the Nevada Rules of Civil Procedure
4 and N.R.S. § 33.010.

5 3. This suit is authorized by law to redress deprivations under color of state law of the
6 rights, privileges, and immunities secured by Article I, §§ 9 and 10, and Article 10, §1,
7 of the Nevada Constitution, as well as the First and Fourteenth Amendments to the
8 United States Constitution, and for declaratory and injunctive relief.

9 4. Venue resides in this Court and is proper and appropriate as relevant proceeds were
10 conducted, and the Plaintiffs maintain their principal place of business, within Clark
11 County in the State of Nevada, pursuant to N.R.S. 368A.290(2).

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14 PARTIES

15 5. Plaintiffs incorporate herein by reference each and every paragraph above as though
16 fully set forth herein.

17 6. Plaintiff, K-Kel, Inc., d/b/a *Spearmint Rhino Gentlemen's Club* ("*Spearmint Rhino*")
18 is a corporation duly organized under the laws of the State of Nevada, and is
19 authorized and qualified to do business in the State of Nevada.

20 7. Plaintiff, Olympus Garden, Inc., d/b/a *Olympic Garden* ("*Olympic*") is a corporation
21 duly organized under the laws of the State of Nevada, and is authorized and qualified
22 to do business in the State of Nevada.

23 8. Plaintiff, SHAC, L.L.C., d/b/a *Sapphire* ("*Sapphire*") is a limited liability company
24 duly organized under the laws of the State of Nevada, and is authorized and qualified
25 to do business in the State of Nevada.
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- 1 9. Plaintiff, The Power Company, Inc., d/b/a *Crazy Horse Too Gentlemen's Club*
2 (*"Crazy Horse"*) is a corporation duly organized under the laws of the State of
3 Nevada, and is authorized and qualified to do business in the State of Nevada.
- 4 10. Plaintiff, D. Westwood, Inc., d/b/a *Treasures* (*"Treasures"*) is a corporation duly
5 organized under the laws of the State of Nevada, and is authorized and qualified to do
6 business in the State of Nevada.
- 7 11. Plaintiff, D.I. Food & Beverage of Las Vegas, LLC, d/b/a *Scores* (*"Scores"*) is a
8 corporation duly organized under the laws of the State of Nevada, and is authorized
9 and qualified to do business in the State of Nevada.
- 10 12. None of the Plaintiffs operate their facilities as licensed gaming establishments under
11 the laws of the State of Nevada.
- 12 13. Defendant Nevada Department of Taxation (hereinafter sometimes referred to simply
13 as the "Department") is a governmental entity created under the laws of the State of
14 Nevada, which administers and enforces the statutory provisions challenged herein,
15 and collects the Live Entertainment Tax, for all non-gaming licensed taxpayers. It is a
16 required Defendant in this action pursuant to N.R.S. 368A.290(1)(b) and N.R.S.
17 368A.300(3)(b).
- 18 14. Defendant Nevada Tax Commission (hereinafter sometimes referred to simply as the
19 "Commission") is a governmental entity created under the laws of the State of Nevada,
20 which administers and enforces some of the statutory provisions challenged herein,
21 and is authorized to consider and rule upon, among other things, appeals of claims
22 under Chapter 368A. It is named as a Defendant herein as it rendered the decision
23 which the Plaintiffs challenge by way of this action.
- 24
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1 15. Defendant, Nevada State Board of Examiners (hereinafter sometimes referred to
2 simply as the "Board of Examiners") is a governmental entity created under the laws
3 of the State of Nevada, and consists of the governor, the secretary of state, and the
4 attorney general. Pursuant to N.R.S. § 368A.250, the Board of Examiners is
5 authorized to approve, among other things, refunds with regard to any erroneously or
6 illegally collected or computed tax under Chapter 368A, which the Plaintiffs seek here.
7

8 **STATEMENT OF FACTS**

9 16. Plaintiffs incorporate herein by reference each and every paragraph above as though
10 fully set forth herein.

11 17. On or about July 22, 2003, the State of Nevada enacted, pursuant to the adoption of
12 Chapter 368A, a Tax on Live Entertainment, which imposes, subject to numerous
13 exceptions, an excise tax on admission to any facility within the State of Nevada that
14 provides defined "live entertainment."
15

16 18. Shortly after the enactment of Chapter 368A, numerous and various administrative
17 regulations were promulgated regarding the administration and enforcement of
18 Chapter 368A. These regulations, which set forth definitions, applicability and
19 methods of calculating the Live Entertainment Tax, and procedures, can be found at
20 NAC 368A.010 through NAC 368.540, and are attached hereto as Exhibit 3. As
21 utilized herein, the phrase "Chapter 368A" encompasses both the statute and these
22 regulations promulgated in furtherance thereof attached as Exhibit 3.
23

24 19. Pursuant to N.R.S. § 368A.140, the Defendant Nevada Department of Taxation is
25 obligated to collect the tax imposed by Chapter 368A from taxpayers who/which are
26 not licensed gaming establishments, and is also obligated to adopt such regulations as
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28

1 are necessary to carry out those functions.

2 20. Upon information and belief, one of the primary purposes for the enactment of
3 Chapter 368A was to impose an excise tax upon those establishments in the State of
4 Nevada that provide live so-called "adult" entertainment in the form of exotic dancing,
5 "topless" dancing, and fully nude performance dance entertainment.
6

7 21. As originally enacted, the tax imposed by Chapter 368A was not applicable, under the
8 terms of N.R.S. § 368A.200(5)(d), to live entertainment that is not provided at a
9 licensed gaming establishment if the facility in which the live entertainment is
10 provided had a maximum occupancy of less than 300 persons.
11

12 22. On June 17, 2005, Chapter 368A was amended by Assembly Bill No. 554, which --
13 among other things -- reduced the scope of the exception as contained in N.R.S.
14 § 368A.200(5)(d) from a maximum seating capacity limitation of 300 to 200. Upon
15 information and belief, the purpose of the July 17, 2005, amendments to
16 Chapter 368A, and in particular those to N.R.S. § 368A.200(5)(d), was to specifically
17 extend the tax obligation as contained in Chapter 368A to "adult" entertainment
18 establishments which were not then subject to the Live Entertainment Tax, including a
19 number of the Plaintiffs in this action. The same amendments changed the language of
20 some provisions of Chapter 368A. Unless stated otherwise, all references herein to the
21 statutory provisions of Chapter 368A are to the current codified version attached
22 hereto as Exhibit 2.
23

24
25 23. *Spearmint Rhino* operates a commercial establishment at 3344 S. Highland Avenue,
26 Las Vegas, Nevada, 89109, whereupon live performance dance entertainment is
27 presented to the consenting adult public. The Defendants have taken the position that
28

1 *Spearmint Rhino* is subject to Chapter 368A, as amended, and have required *Spearmint*
2 *Rhino* to pay the Live Entertainment Tax as mandated therein.

3 24. *Olympic Garden* operates a commercial establishment at 1531 S. Las Vegas
4 Boulevard, Las Vegas, Nevada, 89104, whereupon live performance dance
5 entertainment is presented to the consenting adult public. The Defendants have taken
6 the position that *Olympic Garden* is subject to Chapter 368A, as amended, and have
7 required *Olympic Garden* to pay the Live Entertainment Tax as mandated therein.

8
9 25. *Sapphire* operates a commercial establishment at 3025 Industrial Road, Las Vegas,
10 Nevada, 89109, whereupon live performance dance entertainment is presented to the
11 consenting adult public. The Defendants have taken the position that *Sapphire* is
12 subject to Chapter 368A, as amended, and have required *Sapphire* to pay the Live
13 Entertainment Tax as mandated therein.

14
15 26. *Crazy Horse* operates a commercial establishment at 2476 Industrial Road, Las Vegas,
16 Nevada, 89102, whereupon live performance dance entertainment is presented to the
17 consenting adult public. The Defendants have taken the position that *Crazy Horse* is
18 subject to Chapter 368A, as amended, and have required *Crazy Horse* to pay the Live
19 Entertainment Tax as mandated therein.

20
21 27. *Treasures* operates a commercial establishment at 2801 Westwood, Las Vegas,
22 Nevada, 89109, whereupon live performance dance entertainment is presented to the
23 consenting adult public. The Defendants have taken the position that *Treasures* is
24 subject to Chapter 368A, as amended, and have required *Treasures* to pay the Live
25 Entertainment Tax as mandated therein.

26
27 28. *Scores* operates a commercial establishment at 3355 South Procyon Avenue, Las
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1 Vegas, Nevada, 89102, whereupon live performance dance entertainment is presented
2 to the consenting adult public. The Defendants have taken the position that *Scores* is
3 subject to Chapter 368A, as amended, and have required *Scores* to pay the Live
4 Entertainment Tax as mandated therein.

5 29. All of the facilities operated by the Plaintiffs have maximum occupancies of less than
6 7,500 persons.

7
8 30. The Plaintiffs all present upon their business premises some form of live "exotic"
9 performance dance entertainment. Some of the Plaintiffs present live clothed and
10 "topless" female performance dance entertainment, and others of the Plaintiffs present
11 live clothed, "topless" and fully nude female performance dance entertainment; all of
12 which is non-obscene. The non-obscene performance dance entertainment presented
13 on the establishments operated by the Plaintiffs constitutes speech and expression, as
14 well as a form of assembly, protected by not only Article I, §§ 9 and 10, of the Nevada
15 Constitution, but by the First and Fourteenth Amendments to the United States
16 Constitution as well.

17
18
19 31. Chapter 368A is a lengthy and complex statute containing numerous and various
20 provisions affecting the constitutionally protected conduct of the Plaintiffs, their
21 agents, representatives, entertainers and employees, as well as those individuals from
22 the consenting adult audience who would seek to view the entertainment provided by
23 the Plaintiffs. Plaintiffs assert the constitutional rights of their patrons as well in this
24 action.

25
26 32. The Defendants take the position that pursuant to the definitions set forth in Chapter
27 368A, Plaintiffs are obligated to pay the Live Entertainment Tax since their
28

1 establishments fall within the definition of "live entertainment" found in N.R.S.
2 368A.090, and since they are not otherwise exempted from having to pay that tax.

3 33. Plaintiffs contend that the Live Entertainment Tax as mandated by Chapter 368A is
4 both illegal and unconstitutional, and for those reasons they do not desire to pay those
5 taxes. Nevertheless, under threat of criminal prosecution and/or the imposition of
6 fines and other penalties against them, Plaintiffs have, beginning at various times, paid
7 the Live Entertainment Tax mandated by Chapter 368A.

8
9 34. Pursuant to N.R.S. § 368A.260, Plaintiffs each filed timely requests for refunds of the
10 Live Entertainment Tax they had paid, together with claims for the statutory interest
11 provided for by N.R.S. § 368A.270 and § 368A.310.

12
13 35. To date, each request for refund has been denied by the Defendant Nevada Department
14 of Taxation, pursuant to a one page letter. Each letter informed the Plaintiffs that the
15 denial may be appealed to Defendant Nevada Tax Commission pursuant to N.R.S. §
16 360.245 by filing a written notice of appeal with the Defendant Department within
17 thirty days of the service of the denial letter.

18
19 36. Each Plaintiff has filed a timely written notice of appeal with the Defendant
20 Department of Taxation. After the Plaintiffs and the Defendant Department had an
21 opportunity to submit briefing to the Defendant Nevada Tax Commission, a hearing
22 was scheduled on July 9, 2007, before the Defendant Commission to hear the appeal of
23 the denials of the requests for refunds of the Live Entertainment Tax paid by the
24 Plaintiffs for the tax periods of January, February, March, and April, 2004.

25
26 37. After the hearing commenced on July 9, 2007, the Defendant Commission voted to
27 continue the hearing until August 6, 2007, in order to give the parties an opportunity to
28

1 submit supplemental materials and information.

2 38. The Defendant Commission, after considering the testimony, argument, and materials
3 submitted on July 9, 2007, and on August 6, 2007, issued a written decision denying
4 Plaintiffs' appeals on October 12, 2007. That ruling is attached hereto as Exhibit 4.

5 39. Pursuant to N.R.S. § 368A.290, "[w]ithin 90 days after a final decision upon a claim
6 filed pursuant to this chapter is rendered" by the Commission, "the claimant may bring
7 an action against the Department on the grounds set forth in the claim." It is pursuant
8 to this provision that Plaintiffs have filed this action.

9
10 40. Pursuant to N.R.S. 368A.300(3)(b), if the claimant is aggrieved by the decision of the
11 "Nevada Tax Commission rendered on appeal, the claimant may, within 90 days after
12 the decision is rendered, bring an action against the Board on the grounds set forth in
13 the claim for the recovery of the whole or any part of the amount claimed as an
14 overpayment."
15

16 41. Plaintiffs further filed this action in order to protect their fundamental constitutional
17 rights from infringement by the enforcement of Chapter 368A, which they contend is
18 unconstitutional on its face as it: 1) imposes a tax directly on "live entertainment," an
19 activity which is protected by Article I, §§ 9 and 10 of the Nevada Constitution as well
20 as the First and Fourteenth to the United States Constitution, therefore constituting a
21 direct tax on "First Amendment" freedoms and in particular on live exotic
22 performance dance entertainment; 2) applies only to a small number and category of
23 speakers; 3) it is in violation of Article 10, §1 of the Nevada Constitution; and 4) it is
24 an impermissible discriminatory tax which discriminates based upon the content of
25 speech and expression. In addition, N.R.S. 368A.200(5)(a) precludes the taxation of
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27
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1 live entertainment that "the State is prohibited from taxing under the Constitution,
2 laws or treaties of the United States or the Nevada Constitution." Because the
3 Plaintiffs cannot be so taxed under either the United States or Nevada Constitutions,
4 Plaintiffs are exempt from having to pay the Live Entertainment tax pursuant to this
5 exemption. These are the grounds which Plaintiffs set forth in their requests for
6 refunds.
7

8 **EXCERPTS OF THE TAX ON LIVE ENTERTAINMENT STATUTE**

9 42. Plaintiffs incorporate herein by reference each and every paragraph above as though
10 fully set forth herein.

11 43. Chapter 368A states, at N.R.S. 368A.200(1), that "[e]xcept as otherwise provided in
12 this section, there is hereby imposed an excise tax on admission to any facility in this
13 State where live entertainment is provided." If the live entertainment is provided at a
14 facility with a maximum occupancy of less than 7,500, the rate of tax is 10% of the
15 admission charge to the facility plus 10% of any amounts paid for food, refreshments
16 and merchandise purchased at the facility. If the live entertainment is provided at a
17 facility with a maximum occupancy of at least 7,500, the rate of the tax is 5% of the
18 admission charged to the facility.
19
20

21 44. Chapter 368A defines an "[a]dmission charge" in N.R.S. 368A.020 as:
22

23 [T]he total amount, expressed in terms of money, of consideration paid
24 for the right or privilege to have access to a facility where live
25 entertainment is provided. The term includes, without limitation, an
entertainment fee, a cover charge, a table reservation fee, or a required
minimum purchase of food, refreshments or merchandise.

26 45. Chapter 368A defines a "facility" in N.R.S. 368A.060 as:
27

28 "(a) Any area or premises where live entertainment is provided and for
which consideration is collected for the right or privilege of entering that
area or those premises if the live entertainment is provided at:

- (1) An establishment that is not a licensed gaming establishment; or
- (2) A licensed gaming establishment that is licensed for less than 51 slot machines, less than six games, or any combination of slot machines and games within those respective limits.

(b) Any area or premises where live entertainment is provided if the live entertainment is provided at any other licensed gaming establishment."

46. "[L]ive entertainment" is defined in N.R.S. § 368A.090 as:

"[A]ny activity provided for pleasure, enjoyment, recreation, relaxation, diversion or other similar purpose by a person or persons who are physically present when providing that activity to a patron or group of patrons who are physically present."

This definition includes, among other activities, "[d]ancing performed by one or more professional or amateur dancers."

47. Chapter 368A states, at N.R.S. § 368A.140(2), that the Defendant Department shall collect the Live Entertainment Tax from non-gaming licensed taxpayers, such as is the case of the Plaintiffs here, and is empowered to "adopt such regulations are necessary to carry out" that collection.

48. N.R.S. § 368A.090(b) specifically excludes certain types of entertainment from the definition of "live entertainment," such as: instrumental or vocal music if it "does not routinely rise to the volume that interferes with casual conversation" and would not "generally cause patrons to watch as well as listen"; occasional performances by employees who have primary job functions other than performing; performances in certain licensed gaming establishments "as long as performers stroll continuously throughout the facility" or if they "enhance the theme of the establishment or attract patrons to the areas of the performances"; entertainment that is provided by patrons; animal behaviors for the purpose of education and scientific research; and occasional dancing which, among other things, "primarily serves to provide ambience to the

1 facility."

2 49. Pursuant to N.R.S. 368A.200(5), the tax imposed by Chapter 368 is not applicable to a
3 variety of circumstances. Some of the exemptions include live entertainment that the
4 State is prohibited from taxing under the Constitution, laws or treaties of the United
5 States or Nevada Constitution; live entertainment that is not provided at a licensed
6 gaming establishment if the facility has a maximum seating capacity of less than 200;
7 live entertainment that is provided at a licensed gaming establishment that is licensed
8 for less than 51 slot machines, less than six games, or any combination of slot
9 machines and games within those limits, if the facility has a maximum seating capacity
10 of less than 200; merchandise sold outside the facility in which the live entertainment
11 is provided, unless the purchase of the merchandise entitles the purchaser to admission
12 to the entertainment; and music performed by musicians who move constantly through
13 the audience if no other form of live entertainment is afforded to the patrons.
14

15
16 50. Overpayments and refunds of the Live Entertainment Tax are addressed in N.R.S.
17 368A.250, which provides that if the Defendant Department determines that any tax has
18 been "erroneously or illegally collected or computed," the Defendant Department must
19 record the fact and certify the amount owed and from whom it was collected to
20 Defendant Board of Examiners. If the amount is approved by the Defendant Board of
21 Examiners, it is then credited on any amount that is due from that person under Chapter
22 368A, with the balance refunded to that person.
23

24
25 51. Chapter 368A provides, at N.R.S. § 368A.290(1), that the Defendant Nevada Tax
26 Commission is authorized to render a final decision upon claims for refunds under that
27 chapter. Further, at N.R.S. § 368A.300(2), Chapter 368A provides that a claim there
28

1 under that is disallowed by the Defendant Department may be appealed to the
2 Defendant Commission.

3 **COUNT I - DECLARATORY RELIEF**

4 52. Plaintiffs incorporate herein by reference each and every paragraph above as though
5 fully set forth herein.

6
7 53. Chapter 368A is unconstitutional on its face under Article I, §§ 9 and 10, and Article
8 10, §1, of the Nevada Constitution as well as the First and Fourteenth Amendments to
9 the United States Constitution, for numerous and various reasons, including, but not
10 limited to, the fact that:

- 11 a. It effectuates an impermissible prior restraint on speech and expression;
12
13 b. It fails to further any important, substantial or compelling governmental
14 interest;
15
16 c. It permits restrictions on speech and expression that are greater than are
17 essential to further any asserted governmental interests;
18
19 d. It permits restrictions on speech and expression that are not the least restrictive
20 means available;
21
22 e. It contains criteria that are both arbitrary and capricious and which are not
23 supported by any legislative record;
24
25 f. It contains numerous and various terms and phrases which are impermissibly
26 vague, and ambiguous, and the applicable definitions as contained therein are
27 impermissibly and substantially overbroad judged in relation to their plainly
28 legitimate sweep;
g. It imbues the Defendants with unbridled discretion;
h. It impermissibly singles out constitutionally protected businesses for certain
regulations;
i. It violates the procedural and substantive due process rights of the Plaintiffs
and others, including but not limited to the customers and patrons who frequent
Plaintiffs' establishments;
j. It violates the privacy rights of the customers and patrons who frequent

Plaintiffs' establishments;

- k. It violates Plaintiffs' equal protection rights in that it unconstitutionally discriminates against expressive businesses based upon the content of speech, and it further creates and permits uneven treatment in the exercise of constitutionally protected rights in the State of Nevada, and therefore permits differing treatment amongst individuals who desire to engage in constitutionally protected speech;
- l. It is an impermissible direct tax on constitutionally protected freedoms;
- m. It is a discriminatory tax that only impacts upon a small number and category of speakers;
- n. It is an impermissible discriminatory tax that discriminates based upon the content of speech and expression;
- o. It impermissibly requires a person or business to pay for the right to exercise a right guaranteed by the Nevada and United States Constitutions;
- p. It was enacted upon an insufficient record and is not justified on any factual or legal ground; and
- q. It violates the separation of powers doctrine.

54. Because the Live Entertainment Tax is an impermissible and/or unconstitutional tax upon in violation of Article I, §§ 9 and 10, and Article 10, §1, of the Nevada Constitution as well as the First and Fourteenth Amendments to the United States Constitution, Plaintiffs are not subject to payment of the Live Entertainment Tax pursuant to the provisions of N.R.S. § 368A.200(5)(a).

55. This Court has the authority to declare the rights and other relations of the Plaintiffs and of the Defendants, and should do so here.

56. Because of the questioned constitutionality of the Live Entertainment Tax as required by Chapter 368A, and because of the potential application of the exemption as contained in N.R.S. § 368A.200(5)(a) in regard to the Live Entertainment Tax being applied to these Plaintiffs, Plaintiffs are entitled to a declaration by this Court in regard to the

1 constitutionality of Chapter 368A as well as the applicability of the exemption as
2 contained in N.R.S. § 368A.200(5)(a).

3 57. For the reasons as set forth above, this Court should declare that the Live Entertainment
4 Tax as mandated by Chapter 368A is unconstitutional on its face. Also for the reasons
5 as set forth above, this Court should declare that Plaintiffs need not pay the Live
6 Entertainment Tax as required by Chapter 368A both as a result of the constitutional
7 violations as enumerated above as well as the specific exemption as set forth in N.R.S.
8 § 368A.200(5)(a). In addition, this Court should declare that the Defendants have
9 violated the constitutional rights of the Plaintiffs by requiring them to have paid the
10 Live Entertainment Tax for the tax period of January 2004 through April 2004, which
11 are at issue in this action.
12
13

14 **WHEREFORE**, Plaintiffs respectfully request that this Honorable Court declare the
15 Live Entertainment Tax under Chapter 368A unconstitutional on its face; that Plaintiffs need
16 not pay the Live Entertainment Tax as mandated by Chapter 368A both because it violates
17 Article I, §§ 9 and 10, and Article 10, §1, of the Nevada Constitution as well as the First and
18 Fourteenth Amendments to the United States Constitution, and because Plaintiffs are exempt
19 from paying the Live Entertainment Tax pursuant to the provisions of N.R.S.
20 § 368A.200(5)(a); and that the Defendants have violated the Plaintiffs' constitutional rights by
21 having required them to have paid the Live Entertainment Tax for the tax period of January
22 2004 through April 2004, which are at issue in this action.
23
24

25 ...

26 ...

27 ...

COUNT II - REQUEST FOR REFUND

58. Plaintiffs incorporate herein by reference each and every paragraph above as though fully set forth herein.

59. Plaintiffs should not have been required to pay the Live Entertainment Tax as mandated by Chapter 368A both because it violates Article I, §§ 9 and 10, and Article 10, §1, of the Nevada Constitution as well as the First and Fourteenth Amendments to the United States Constitution and because Plaintiffs are exempt from paying the Live Entertainment Tax pursuant to the provisions of N.R.S. § 368A.200(5)(a).

60. Both the Defendant Nevada Department of Taxation and the Defendant Nevada Tax Commission erred in not granting Plaintiffs' requests for refunds.

61. This Court has the power to grant Plaintiffs' requests for refunds pursuant to N.R.S. § 368A.290 and N.R.S. § 368A.300, and should do so here.

WHEREFORE, Plaintiffs respectfully request that this Honorable Court vacate the decisions of both the Defendant Nevada Department of Taxation and the Defendant Nevada Tax Commission, and enter an order directing Defendant Nevada Department of Taxation to refund the Live Entertainment Taxes paid by the Plaintiffs for the tax periods of January, February, March and April, 2004, and to pay the statutory interest provided for by N.R.S. § 368A.270 and § 368A.310. Further, Plaintiffs respectfully request that this Honorable Court enter an order requiring Defendant Nevada Tax Commission to record the payments of the Live Entertainment Tax made by the Plaintiffs during those periods and to certify those amounts to the Defendant State Board of Examiners, and further ordering the Defendant State Board of Examiners to approve and authorize the refund from the State Treasury of all such Live Entertainment Tax payments that have been involuntarily made by the Plaintiffs during

1 those periods under Chapter 368A, together with interest as required by N.R.S. § 368A.270
2 and § 368A.310.

3 **COUNT III - INJUNCTIVE RELIEF**

4 62. Plaintiffs incorporate herein by reference each and every paragraph above as though
5 fully set forth herein.

6
7 63. Any action taken or to be taken by the Defendants to enforce any portion of Chapter
8 368A against Plaintiffs has been taken and will be taken under color of law, and has
9 deprived and will deprive Plaintiffs of their constitutional rights as set forth herein, and
10 will cause them irreparable harm for which compensatory damages are an inadequate
11 remedy as a matter of law.

12
13 64. The threat of enforcement of Chapter 368A is both great and immediate. In addition,
14 Chapter 368A is both flagrantly and patently violative of Plaintiffs' constitutional
15 rights. There is no other remedy at law which would suffice to protect Plaintiffs'
16 interests for the reasons above enumerated.

17
18 65. The public interest weighs in favor of preventing deprivation of constitutional rights,
19 and is always served by enjoining an unconstitutional law.

20 66. Plaintiffs have a substantial likelihood of success of prevailing on their constitutional
21 claims against Chapter 368A, in that it is blatantly and patently unconstitutional. The
22 Defendants will suffer no harm by the entry of such an injunction, as there can be no
23 legitimate governmental interest in enforcing an unconstitutional law. In addition, the
24 "balancing" of the equities tips in favor of the Plaintiffs and in the entry of a
25 preliminary injunction, due to the paramount position of rights afforded under the First
26 Amendment in comparison to the lack of harm occasioned to the Defendants if such an
27
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1 injunction is granted.

2 **WHEREFORE**, Plaintiffs respectfully request that this Honorable Court enter both a
3 preliminary and permanent enjoining the Defendants, as well as their officers, agents,
4 employees and representatives, from enforcing Chapter 368A against the Plaintiffs and/or from
5 collecting the Live Entertainment Tax against the Plaintiffs. Further, Plaintiffs respectfully
6 request that this Honorable Court enter a permanent injunction ordering Defendant Nevada Tax
7 Commission to record the payments of the Live Entertainment Tax made by the Plaintiffs for
8 the tax periods of January, February, March and April 2004, and to certify those amounts to the
9 Defendant State Board of Examiners, and further ordering the Defendant State Board of
10 Examiners to approve and authorize the refund from the State Treasury of all such Live
11 Entertainment Tax payments
12 that have been involuntarily made by the Plaintiffs under Chapter 368A during those periods,
13 together with interest as required by N.R.S. § 368A.270 and § 368A.310.

14
15
16 **PRAYER FOR RELIEF**

17 **WHEREFORE**, Plaintiffs pray that this Honorable Court enter judgment against
18 Defendants, which would include:
19

- 20 A. A declaration that the Live Entertainment Tax under Chapter 368A is unconstitutional
21 on its face; that Plaintiffs need not pay the Live Entertainment Tax as mandated by
22 Chapter 368A both because it violates Article I, §§ 9 and 10, and Article 10, §1, of
23 the Nevada Constitution as well as the First and Fourteenth Amendments to the United
24 States Constitution, and because Plaintiffs are exempt from paying the Live
25 Entertainment Tax pursuant to the provisions of N.R.S. § 368A.200(5)(a); and that the
26 Defendants have violated the Plaintiffs' constitutional rights by having required them
27
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1 to have paid the Live Entertainment Tax in the past;

2 B. A preliminary and permanent injunction restraining the Defendants, as well as their
3 officers, agents, employees and representatives, from enforcing Chapter 368A against
4 the Plaintiffs and/or from collecting the Live Entertainment Tax against the Plaintiffs;

5 C. Entry of an order vacating the determinations of the Nevada Department of Taxation
6 and the Defendant Nevada Tax Commission denying Plaintiffs' requests for refunds;

7 D. Entry of an order directing Defendant Nevada Department of Taxation to refund the
8 Live Entertainment Taxes paid by the Plaintiffs for the tax periods of January,
9 February, March and April 2004, together with the statutory interest provided for by
10 N.R.S. § 368A.270 and § 368A.310;

11 E. A permanent injunction requiring Defendant Nevada Tax Commission to record the
12 payments of the Live Entertainment Tax made by the Plaintiffs during those tax
13 periods and to certify those amounts to the Defendant State Board of Examiners, and
14 further ordering the Defendant State Board of Examiners to approve and authorize the
15 refund from the State Treasury of all such Live Entertainment Tax payments that have
16 been involuntarily made by the Plaintiffs under Chapter 368A during those tax
17 periods, together with interest as required by N.R.S. § 368A.270 and § 368A.310; and
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1 F. Entry of such other and further relief as the Court deems just and proper.

2 DATED this 9th day of January, 2008.

3 GHANEM & SULLIVAN, LLP

4 By

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FILED

NOT FOR PUBLICATION

MAY 20 2008

UNITED STATES COURT OF APPEALS

**MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS**

FOR THE NINTH CIRCUIT

DEJA VU SHOWGIRLS OF LAS
VEGAS, L.L.C., dba Deja Vu Showgirls;
et al.,

Plaintiffs - Appellants,

v.

NEVADA DEPARTMENT OF
TAXATION; et al.,

Defendants - Appellees.

No. 06-16634

D.C. No. CV-06-00480-RLH

MEMORANDUM*

Appeal from the United States District Court
for the District of Nevada
Roger L. Hunt, District Judge, Presiding

Submitted May 15, 2008**
San Francisco, California

Before: O'SCANNLAIN and HAWKINS, Circuit Judges, and SELNA***, District
Judge.

* This disposition is not appropriate for publication and is not precedent
except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without
oral argument. See Fed. R. App. P. 34(a)(2).

*** The Honorable James V. Selna, United States District Judge for the
Central District of California, sitting by designation.

Deja Vu appeals from the district court's judgement which dismissed a 42 U.S.C. § 1983 challenge to Nevada's Live Entertainment Tax, on the grounds that the Tax Injunction Act, 28 U.S.C. § 1341 ("The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."), deprived it of jurisdiction.

Deja Vu has failed to establish that there is any defect in the Nevada court and administrative system which deprives it of "a plain, speedy and efficient remedy" to challenge Nevada's Live Entertainment Tax. *See Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503 (1981). Therefore, the district court did not have jurisdiction.

Under the circumstances, we need not reach the state sovereign immunity issue.

AFFIRMED.

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Ed. [Signature]
CLERK OF THE COURT

8 DISTRICT COURT
9 CLARK COUNTY, NEVADA

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

21 Plaintiffs,

22 v.

23 NEVADA DEPARTMENT OF
24 TAXATION, NEVADA TAX
25 COMMISSION, NEVADA STATE
26 BOARD OF EXAMINERS, and MICHELLE
27 JACOBS, in her official capacity only,

28 Defendants.

CASE NO. A533273
DEPT. NO. IX

VERIFIED AMENDED
COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF,
DAMAGES, AND ATTORNEY
FEES AND COSTS

24 NOW COMES Plaintiffs, Deja Vu Showgirls of Las Vegas, L.L.C., d/b/a *Deja Vu*
25 *Showgirls*, Little Darlings of Las Vegas, L.L.C., d/b/a *Little Darlings*, K-Kel, Inc., d/b/a *Spearmint*
26 *Rhino Gentlemen's Club*, Olympus Garden, Inc., d/b/a *Olympic Garden*, SHAC, L.L.C., d/b/a
27 *Sapphire*, The Power Company, Inc., d/b/a *Crazy Horse Too Gentlemen's Club*, D. Westwood, Inc.,

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JAN 28 2009

CLERK OF THE COURT

1 d/b/a *Treasures*, and D.I. Food & Beverage of Las Vegas, LLC, d/b/a *Scores* (collectively referred
2 to herein as the "Plaintiffs"), by and through their attorneys, and state for their complaint against
3 Defendants Nevada Department of Taxation, Nevada Tax Commission, Nevada State Board of
4 Examiners, and Michelle Jacobs in her official capacity only (collectively referred to herein as the
5 "Defendants"), as follows:

6 **INTRODUCTION**

7 1. This is a civil action wherein Plaintiffs pray for a declaratory judgment, damages, attorney
8 fees and costs, as well as both a preliminary and permanent injunction to restrain and enjoin
9 the Defendants, as well as their agents, employees and representatives, from acting under
10 color of state law to deprive the Plaintiffs of their rights, privileges and immunities secured
11 to them by the Constitution of the State of Nevada and the Constitution of the United States.
12 Specifically, Plaintiffs seek to have this Court declare as unconstitutional on its face and as
13 applied to Plaintiffs, and to enjoin, all aspects of the Nevada Tax on Live Entertainment
14 (referred to herein as the "Live Entertainment Tax," or simply the "Tax") as established by
15 Title 32, Chapter 368A, of the Nevada Revised Statutes ("Chapter 368A"), as being an
16 impermissible tax on constitutionally protected expression. A copy of that statute is attached
17 hereto as Ex. "A," and is incorporated herein by reference.

18 **JURISDICTION AND VENUE**

19 2. This Court has jurisdiction and power to grant the injunctive relief requested pursuant to
20 Rule 65 of the Nevada Rules of Civil Procedure and N.R.S. § 33.010, and jurisdiction and
21 authority to grant the declaratory judgment prayed for here pursuant to Rule 57 of the Nevada
22 Rules of Civil Procedure and N.R.S. 33.040.

23 3. The federal statutory law which further authorizes the institution of this suit is 42 U.S.C.
24 § 1983, which provides, in part:

25 "Every person who, under color of any statute, ordinance, regulation, custom
26 or usage, of any State or Territory . . . subjects, or causes to be subjected, any
27 citizen of the United States or other person within the jurisdiction thereof to
the deprivation of any rights, privileges or immunities secured by the
Constitution and laws, shall be liable to the party injured in an action at law,
suit in equity, or other proper proceeding for redress . . ."

1 4. Authorization for the request of attorney's fees and costs is conferred by 42 U.S.C. § 1988.

2 5. This suit is authorized by law to redress deprivations under color of state law of rights,
3 privileges, and immunities secured by Article I, §§ 9 and 10, of the Nevada Constitution, as
4 well as the First and Fourteenth Amendments to the United States Constitution, and for
5 declaratory and injunctive relief.

6 6. Venue resides in this Court and is proper and appropriate as the various acts complained of
7 occurred, and the Defendants are located, within Clark County in the State of Nevada.

8 **PARTIES**

9 7. Plaintiffs incorporate herein by reference each and every paragraph above as though fully set
10 forth herein.

11 8. Plaintiff, Deja Vu Showgirls of Las Vegas, L.L.C., d/b/a *Deja Vu Showgirls* ("*Deja Vu*"), is
12 a Limited Liability Company duly organized under the laws of the State of Nevada, and is
13 authorized and qualified to do business in the State of Nevada.

14 9. Plaintiff, Little Darlings of Las Vegas, L.L.C., d/b/a *Little Darlings* ("*Little Darlings*"), is
15 a Limited Liability Company duly organized under the laws of the State of Nevada, and is
16 authorized and qualified to do business in the State of Nevada.

17 10. Plaintiff, K-Kel, Inc., d/b/a *Spearmint Rhino Gentlemen's Club* ("*Spearmint Rhino*") is a
18 Corporation duly organized under the laws of the State of Nevada, and is authorized and
19 qualified to do business in the State of Nevada.

20 11. Plaintiff, Olympus Garden, Inc., d/b/a *Olympic Garden* ("*Olympic*") is a Corporation duly
21 organized under the laws of the State of Nevada, and is authorized and qualified to do
22 business in the State of Nevada.

23 12. Plaintiff, SHAC, L.L.C., d/b/a *Sapphire* ("*Sapphire*") is a Limited Liability Company duly
24 organized under the laws of the State of Nevada, and is authorized and qualified to do
25 business in the State of Nevada.

26 13. Plaintiff, The Power Company, Inc., d/b/a *Crazy Horse Too Gentlemen's Club* ("*Crazy*
27 *Horse*") is a Corporation duly organized under the laws of the State of Nevada, and is

1 authorized and qualified to do business in the State of Nevada.

2 14. Plaintiff, D. Westwood, Inc., d/b/a *Treasures* ("*Treasures*") is a Corporation duly organized
3 under the laws of the State of Nevada, and is authorized and qualified to do business in the
4 State of Nevada.

5 15. Plaintiff, D.I. Food & Beverage of Las Vegas, LLC, d/b/a *Scores* ("*Scores*") is a Corporation
6 duly organized under the laws of the State of Nevada, and is authorized and qualified to do
7 business in the State of Nevada.

8 16. None of the Plaintiffs operate their facilities as licensed gaming establishments under the
9 laws of the State of Nevada.

10 17. Defendant, Nevada Department of Taxation (hereinafter sometimes referred to simply as the
11 "Department") is a governmental entity created under the laws of the State of Nevada, which
12 administers and enforces the statutory provisions challenged herein, and collects the Live
13 Entertainment Tax, for all non-gaming licensed taxpayers.

14 18. Defendant, Nevada Tax Commission (hereinafter sometimes referred to simply as the
15 "Commission") is a governmental entity created under the laws of the State of Nevada,
16 which administers and enforces some of the statutory provisions challenged herein, and is
17 authorized to consider and rule upon, among other things, appeals of claims under
18 Chapter 368A.

19 19. Defendant, Nevada State Board of Examiners (hereinafter sometimes referred to simply as
20 the "Board of Examiners") is a governmental entity created under the laws of the State of
21 Nevada, and consists of the governor, the secretary of state, and the attorney general.
22 Pursuant to N.R.S. § 368A.250, the Board of Examiners is authorized to approve, among
23 other things, refunds with regard to any erroneously or illegally collected or computed tax
24 under Chapter 368A.

25 20. Defendant, Michelle Jacobs, who is named in this lawsuit in her official capacity only, is an
26 employee of the Nevada Department of Taxation, and is responsible for the administration
27 of Chapter 368A.

1 **STATEMENT OF FACTS**

2 21. Plaintiffs incorporate herein by reference each and every paragraph above as though fully set
3 forth herein.

4 22. On or about July 22, 2003, the State of Nevada enacted, pursuant to the adoption of
5 Chapter 368A, a Tax on Live Entertainment, which imposes, subject to numerous exceptions,
6 an excise tax on admission to any facility within the State of Nevada that provides defined
7 "live entertainment."

8 23. Pursuant to N.R.S. § 368A.140, the Defendant Nevada Department of Taxation is obligated
9 to collect the tax imposed by Chapter 367A from taxpayers who/which are not licensed
10 gaming establishments, and is also obligated to adopt such regulations as are necessary to
11 carry out those functions.

12 24. Upon information and belief, one of the primary purposes for the enactment of Chapter 368A
13 was to impose an excise tax upon those establishments in the State of Nevada that provide
14 live so-called "adult" entertainment in the form of exotic dancing, "topless" dancing, and
15 fully nude performance dance entertainment.

16 25. As originally enacted, the tax imposed by Chapter 368A was not applicable, under the terms
17 of N.R.S. § 368A.200(5)(d), to live entertainment that is not provided at a licensed gaming
18 establishment if the facility in which the live entertainment is provided had a maximum
19 occupancy of less than 300 persons.

20 26. On June 17, 2005, Chapter 368A was amended by Assembly Bill No. 554, which - - among
21 other things - - reduced the scope of the exception as contained in N.R.S. § 368A.200(5)(d)
22 from a maximum seating capacity limitation of 300 to 200. Upon information and belief, the
23 purpose of the July 17, 2005, amendments to Chapter 368A, and in particular those to N.R.S.
24 § 368A.200(5)(d), was to specifically extend the tax obligation as contained in Chapter 368A
25 to "adult" entertainment establishments which were not then subject to the Live
26 Entertainment Tax, including a number of the Plaintiffs in this action.
27
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- 1 27. *Deja Vu* operates a commercial establishment at 3247 Industrial Road, Las Vegas, Nevada,
2 89109, whereupon live performance dance entertainment is presented to the consenting adult
3 public. The Defendants have taken the position that *Deja Vu* is subject to Chapter 368A, as
4 amended, and have required *Deja Vu* to pay the Live Entertainment Tax as mandated therein.
- 5 28. *Little Darlings* operates a commercial establishment at 1514 Western Avenue, Las Vegas,
6 Nevada, 89102, whereupon live performance dance entertainment is presented to the
7 consenting adult public. The Defendants have taken the position that *Little Darlings* is
8 subject to Chapter 368A, as amended, and have required *Little Darlings* to pay the Live
9 Entertainment Tax as mandated therein.
- 10 29. *Spearmint Rhino* operates a commercial establishment at 3344 S. Highland Avenue, Las
11 Vegas, Nevada, 89109, whereupon live performance dance entertainment is presented to the
12 consenting adult public. The Defendants have taken the position that *Spearmint Rhino* is
13 subject to Chapter 368A, as amended, and have required *Spearmint Rhino* to pay the Live
14 Entertainment Tax as mandated therein.
- 15 30. *Olympic Garden* operates a commercial establishment at 1531 S. Las Vegas Boulevard, Las
16 Vegas, Nevada, 89104, whereupon live performance dance entertainment is presented to the
17 consenting adult public. The Defendants have taken the position that *Olympic Garden* is
18 subject to Chapter 368A, as amended, and have required *Olympic Garden* to pay the Live
19 Entertainment Tax as mandated therein.
- 20 31. *Sapphire* operates a commercial establishment at 3025 Industrial Road, Las Vegas, Nevada,
21 89109, whereupon live performance dance entertainment is presented to the consenting adult
22 public. The Defendants have taken the position that *Sapphire* is subject to Chapter 368A,
23 as amended, and have required *Sapphire* to pay the Live Entertainment Tax as mandated
24 therein.
- 25 32. *Crazy Horse* operates a commercial establishment at 2476 Industrial Road, Las Vegas,
26 Nevada, 89102, whereupon live performance dance entertainment is presented to the
27 consenting adult public. The Defendants have taken the position that *Crazy Horse* is subject

1 to Chapter 368A, as amended, and have required *Crazy Horse* to pay the Live Entertainment
2 Tax as mandated therein.

3 33. *Treasures* operates a commercial establishment at 2801 Westwood, Las Vegas, Nevada,
4 89109, whereupon live performance dance entertainment is presented to the consenting adult
5 public. The Defendants have taken the position that *Treasures* is subject to Chapter 368A,
6 as amended, and have required *Treasures* to pay the Live Entertainment Tax as mandated
7 therein.

8 34. *Scores* operates a commercial establishment at 3355 South Procyon Avenue, Las Vegas,
9 Nevada, 89102, whereupon live performance dance entertainment is presented to the
10 consenting adult public. The Defendants have taken the position that *Scores* is subject to
11 Chapter 368A, as amended, and have required *Scores* to pay the Live Entertainment Tax as
12 mandated therein.

13 35. All of the facilities operated by the Plaintiffs have maximum occupancies of less than 7,500
14 persons.

15 36. The Plaintiffs all present upon their business premises some form of live "exotic"
16 performance dance entertainment. Some of the Plaintiffs present live clothed and "topless"
17 female performance dance entertainment, and others of the Plaintiffs present live clothed,
18 "topless" and fully nude female performance dance entertainment; all of which is non-
19 obscene. The non-obscene performance dance entertainment presented on the establishments
20 operated by the Plaintiffs constitutes speech and expression, as well as a form of assembly,
21 protected by not only Article I, §§ 9 and 10, of the Nevada Constitution, but the First and
22 Fourteenth Amendments to the United States Constitution, as well.

23 37. The Defendants take the position that pursuant to the definitions set forth in Chapter 368A,
24 Plaintiffs are obligated to pay the Live Entertainment Tax since their establishments fall
25 within the definition of "live entertainment" found in N.R.S. § 368A.090, and since they are
26 not otherwise exempted from having to pay that tax.

1 38. Plaintiffs contend that the Live Entertainment Tax as mandated by Chapter 368A is both
2 illegal and unconstitutional, and for those reasons they do not desire to pay those taxes.
3 Nevertheless, under threat of criminal prosecution and/or the imposition of fines and other
4 penalties against them, Plaintiffs have all, beginning at various times, paid the Live
5 Entertainment Tax mandated by Chapter 368A.

6 39. Plaintiffs have filed this action in order to protect their fundamental constitutional rights
7 from infringement by the enforcement of Chapter 368A, which they contend is
8 unconstitutional on its face and as applied to Plaintiffs as it imposes a tax directly on "live
9 entertainment;" an activity which is protected by Article I, §§ 9 and 10 of the Nevada
10 Constitution as well as the First and Fourteenth to the United States Constitution. Chapter
11 368A is therefore a direct tax on "First Amendment" freedoms, and in particular on live
12 exotic performance dance entertainment.

13 40. Plaintiffs have suffered, and will continue to suffer, irreparable harm due to the enforcement
14 of Chapter 368A in that their constitutional rights have been infringed upon, as well as their
15 ability to provide constitutionally protected entertainment.

16 **EXCERPTS OF THE TAX ON LIVE ENTERTAINMENT STATUTE**

17 41. Plaintiffs incorporate herein by reference each and every paragraph above as though fully set
18 forth herein.

19 42. Chapter 368A states, at N.R.S. § 368A.200(1), that "[e]xcept as otherwise provided in this
20 section, there is hereby imposed an excise tax on admission to any facility in this State where
21 live entertainment is provided." If the live entertainment is provided at a facility with a
22 maximum occupancy of less than 7,500, the rate of tax is 10% of the admission charge to the
23 facility plus 10% of any amounts paid for food, refreshments and merchandise purchased at
24 the facility. If the live entertainment is provided at a facility with a maximum occupancy of
25 at least 7,500, the rate of the tax is 5% of the admission charged to the facility.

26 43. Chapter 368A defines an "[a]dmission charge" in N.R.S. § 368A.020 as:
27
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1 [T]he total amount, expressed in terms of money, of consideration paid for
2 the right or privilege to have access to a facility where live entertainment is
3 provided. The term includes, without limitation, an entertainment fee, a cover
charge, a table reservation fee, or a required minimum purchase of food,
refreshments or merchandise.

4 44. Chapter 368A defines a "facility" in N.R.S. § 368A.060 as:

5 "(a) Any area or premises where live entertainment is provided and for which
6 consideration is collected for the right or privilege of entering that area or
those premises if the live entertainment is provided at:

- 7 (1) An establishment that is not a licensed gaming establishment; or
8 (2) A licensed gaming establishment that is licensed for less than 51
slot machines, less than six games, or any combination of slot
9 machines and games within those respective limits.

10 (b) Any area or premises where live entertainment is provided if the live
entertainment is provided at any other licensed gaming establishment."

11 45. "[L]ive entertainment" is defined in § 368A.090 as:

12 "[A]ny activity provided for pleasure, enjoyment, recreation, relaxation,
13 diversion or other similar pupose by a person or persons who are physically
present when providing that activity to a patron or group of patrons who are
14 physically present."

15 This definition includes, among other activities, "[d]ancing performed by one or more
16 professional or amateur dancers."

17 46. Chapter 368A states, at N.R.S. § 368A.142(2), that the Department shall collect the Live
18 Entertainment Tax from non-gaming licensed taxpayers, such as is the case of the Plaintiffs
19 here, and is empowered to "adopt such regulations are necessary to carry out" that collection.

20 47. Pursuant to N.R.S. § 368A.200(5), the tax imposed by Chapter 368 is not applicable to a
21 variety of circumstances. Some of the exemptions include live entertainment that the State
22 is prohibited from taxing under the Constitution, laws or treaties of the United States or
23 Nevada Constitution; live entertainment that is not provided at a licensed gaming
24 establishment if the facility has a maximum seating capacity of less than 200; live
25 entertainment that is provided at a licensed gaming establishment that is licensed for less
26 than 51 slot machines, less than six games, or any combination of slot machines and games
27 within those limits, if the facility has a maximum seating capacity of less than 200;
merchandise sold outside the facility in which the live entertainment is provided, unless the

1 purchase of the merchandise entitles the purchaser to admission to the entertainment; and
2 music performed by musicians who move constantly through the audience if no other form
3 of live entertainment is afforded to the patrons.

4 48. Overpayments and refunds of the Live Entertainment Tax are addressed in N.R.S.
5 § 368A.250, which provides that if the Department determines that any tax has been
6 "erroneously or illegally collected or computed," the Department must record the fact and
7 certify the amount owed and from whom it was collected to Defendant Board of Examiners.
8 If the amount is approved by the Board of Examiners, it is then credited on any amount that
9 is due from that person under Chapter 368A, with the balance refunded to that person.

10 49. Chapter 368A provides, at N.R.S. § 368A.280(1), that "[n]o injunction, writ of mandate or
11 other legal or equitable process may issue in any suit, action or proceeding in any court
12 against this state or against any officer of the State to prevent or enjoin the collection under
13 this chapter of the tax imposed by this chapter or any amount of tax, penalty or interest
14 required to be collected." Accordingly, Plaintiffs have no ability to seek injunctive relief in
15 state court against collection of the Live Entertainment Tax.

16 50. Chapter 368A provides, at N.R.S. § 368A.290(1), that the Nevada Tax Commission is
17 authorized to render a final decision upon claims for refunds under that chapter. Further, at
18 N.R.S. § 368A.300(2), Chapter 368A provides that a claim thereunder that is disallowed by
19 the Department may be appealed to the Nevada Tax Commission.

20 **COUNT I - DECLARATORY RELIEF**

21 51. Plaintiffs incorporate herein by reference each and every paragraph above as though fully set
22 forth herein.

23 52. Chapter 368A is unconstitutional on its face and as applied to Plaintiffs under Article I, §§ 9
24 and 10 of the Nevada Constitution as well as the First and Fourteenth Amendments to the
25 United States Constitution, for numerous and various reasons, including, but not limited to,
26 the fact that:

27 a. It effectuates an impermissible prior restraint on speech and expression;

- b. It fails to further any important, substantial or compelling governmental interest;
- c. It permits restrictions on speech and expression that are greater than are essential to further any asserted governmental interests;
- d. It permits restrictions on speech and expression that are not the least restrictive means available;
- e. It contains criteria that are both arbitrary and capricious and which are not supported by any legislative record;
- f. It contains numerous and various terms and phrases which are impermissibly vague, and ambiguous, and the applicable definitions as contained therein are impermissibly and substantially overbroad judged in relation to their plainly legitimate sweep;
- g. It imbues the Defendants with unbridled discretion;
- h. It impermissibly singles out constitutionally protected businesses for certain regulations;
- i. It violates the substantive due process rights of the Plaintiffs and others;
- j. It violates Plaintiffs' equal protection rights in that it unconstitutionally discriminates against expressive businesses based upon the content of speech, and it further creates and permits uneven treatment in the exercise of constitutionally protected rights in the State of Nevada, and therefore permits differing treatment amongst individuals who desire to engage in constitutionally protected speech;
- k. It is an impermissible direct tax on constitutionally protected freedoms;
- l. It impermissibly requires a person or business to pay for the right to exercise a right guaranteed by the Nevada and United States Constitutions;
- m. It was enacted upon an insufficient record and is not justified on any factual or legal ground; and
- n. It violates the separation of powers doctrine.

53. Because the Live Entertainment Tax is an impermissible and/or unconstitutional direct tax upon expression protected by Article I, §§ 9 and 10 of the Nevada Constitution as well as the First Amendment to the United States Constitution, Plaintiffs are not subject to payment of the Live Entertainment Tax pursuant to the provisions of N.R.S. § 368A.200(5)(a).

54. This Court has the authority to declare the rights and other relations of the Plaintiffs and of the Defendants, and should do so here.

55. Because of the questioned constitutionality of the Live Entertainment Tax as required by Chapter 368A, and because of the potential application of the exemption as contained in

1 N.R.S. § 368A.200(5)(a) in regard to the Live Entertainment Tax being applied to these
2 Plaintiffs, Plaintiffs are entitled to a declaration by this Court in regard to the
3 constitutionality of Chapter 368A as well as the applicability of the exemption as contained
4 in N.R.S. § 368A.200(5)(a).

5 56. For the reasons as set forth above, this Court should declare that the Live Entertainment Tax
6 as mandated by Chapter 368A is unconstitutional on its face and as applied to Plaintiffs.
7 Also for the reasons as set forth above, this Court should declare that Plaintiffs need not pay
8 the Live Entertainment Tax as required by Chapter 368A both as a result of the constitutional
9 violations as enumerated above as well as the specific exemption as set forth in N.R.S.
10 § 368A.200(5)(a). In addition, this Court should declare that the Defendants have violated
11 the constitutional rights of the Plaintiffs by requiring them to have paid the Live
12 Entertainment Tax in the past.

13 **WHEREFORE**, Plaintiffs respectfully request that this Honorable Court declare the Live
14 Entertainment Tax under Chapter 368A unconstitutional on its face and as applied to Plaintiffs; that
15 Plaintiffs need not pay the Live Entertainment Tax as mandated by Chapter 368A both because it
16 violates Article I, §§ 9 and 10 of the Nevada Constitution as well as the First Amendment to the
17 United States Constitution, and because Plaintiffs are exempt from paying the Live Entertainment
18 Tax pursuant to the provisions of N.R.S. § 368A.200(5)(a); and that the Defendants have violated
19 the Plaintiffs' constitutional rights by having required them to have paid the Live Entertainment Tax
20 in the past.

21 **COUNT II - INJUNCTIVE RELIEF**

22 57. Plaintiffs incorporate herein by reference each and every paragraph above as though fully set
23 forth herein.

24 58. Any action taken or to be taken by the Defendants to enforce any portion of Chapter 368A
25 against Plaintiffs has been taken and will be taken under color of law, and has deprived and
26 will deprive Plaintiffs of their constitutional rights as set forth herein, and will cause them
27 irreparable harm for which compensatory damages are an inadequate remedy as a matter of

1 law.

2 59. The threat of enforcement of Chapter 368A is both great and immediate. In addition,
3 Chapter 368A is both flagrantly and patently violative of Plaintiffs' constitutional rights.
4 There is no other remedy at law which would suffice to protect Plaintiffs' interests for the
5 reasons above enumerated.

6 60. The public interest weighs in favor of preventing deprivation of constitutional rights, and is
7 always served by enjoining an unconstitutional law.

8 61. Plaintiffs have a substantial likelihood of success of prevailing on their constitutional claims
9 against Chapter 368A, in that it is blatantly and patently unconstitutional. The Defendants
10 will suffer no harm by the entry of such an injunction, as there can be no legitimate
11 governmental interest in enforcing an unconstitutional law. In addition, the "balancing" of
12 the equities tips in favor of the Plaintiffs and in the entry of a preliminary injunction, due to
13 the paramount position of rights afforded under the First Amendment in comparison to the
14 lack of harm occasioned to the Defendants if such an injunction is granted.

15 **WHEREFORE**, Plaintiffs respectfully request that this Honorable Court enter both a
16 preliminary and permanent enjoining the Defendants, as well as their officers, agents, employees and
17 representatives, from enforcing Chapter 368A against the Plaintiffs and/or from collecting the Live
18 Entertainment Tax against the Plaintiffs. Further, Plaintiffs respectfully request that this Honorable
19 Court enter a permanent injunction ordering Defendant Nevada Tax Commission to record the
20 payments of the Live Entertainment Tax made by the Plaintiffs and to certify those amounts to the
21 Defendant State Board of Examiners, and further ordering the Defendant State Board of Examiners
22 to approve and authorize the refund from the State Treasury of all such Live Entertainment Tax
23 payments that have been involuntarily made by the Plaintiffs under Chapter 368A, together with
24 interest as required by N.R.S. § 368A.310.

25 **COUNT III - DAMAGES AGAINST DEFENDANTS**

26 62. Plaintiffs incorporate herein by reference each and every paragraph above as though fully set
27 forth herein.

1 63. All of the actions of Defendants, by and through their agents, employees and representatives,
2 have been undertaken, and will be undertaken, in the course and scope of official duties and
3 under the color of state law.

4 64. As a direct and proximate cause of the application and/or enforcement of Chapter 368A by
5 Defendants against the Plaintiffs, the Plaintiffs have incurred and suffered significant and
6 substantial damages, and will in the future suffer significant and substantial damages,
7 including, but not limited to having to pay an illegal and/or unconstitutional tax; loss of
8 constitutional rights; lost business profits; and having to incur costs and attorney fees in
9 seeking protection of their constitutional rights asserted herein.

10 65. Any actions by Defendants to enforce and/or apply Chapter 368A against the Plaintiffs have
11 been and will be made under color of state law, and will unquestionably result in the
12 deprivation of Plaintiffs' constitutional and civil rights as set forth above so as to render
13 Defendants liable for these losses pursuant to 42 U.S.C. §1983.

14 66. Pursuant to 42 U.S.C. §1983 and common law, Plaintiffs are entitled to an award of damages
15 for the injuries set forth above.

16 **WHEREFORE**, Plaintiffs respectfully request this Honorable Court to enter an award of
17 damages against Defendants and in favor of the Plaintiffs in amounts to which the Plaintiffs are
18 found to be entitled.

19 **COUNT IV - ATTORNEY FEES AND COSTS**

20 67. Plaintiffs incorporate herein by reference each and every paragraph above as though fully set
21 forth herein.

22 68. Because Chapter 368A is violative of the Nevada Constitution and the United States
23 Constitution on its face and as applied to Plaintiffs, and because its application and/or
24 enforcement has and will deprive the Plaintiffs of their fundamental state and federal
25 constitutional rights, Plaintiffs are entitled, as prevailing parties, to an award of costs and
26 attorney fees incurred herein pursuant to 42 U.S.C. § 1988.

27 **WHEREFORE**, Plaintiffs respectfully request this Honorable Court to award costs and
28

Respectfully submitted,

SHAFFER & ASSOCIATES, P.C.

Dated: January 26, 2009

By:


BRADLEY J. SHAFFER (P36604)

Attorney for Plaintiffs

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Admitted Pro Hac Vice

West's Nevada Revised Statutes Annotated Currentness
Title 32. Revenue and Taxation
→ Chapter 368A. Tax on Live Entertainment
General Provisions

368A.010. Definitions

As used in this chapter, unless the context otherwise requires, the words and terms defined in NRS 368A.020 to 368A.115, inclusive, have the meanings ascribed to them in those sections.

[FN1] See Historical and Statutory Notes below for effective date information.

368A.020. "Admission charge" defined

"Admission charge" means the total amount, expressed in terms of money, of consideration paid for the right or privilege to have access to a facility where live entertainment is provided. The term includes, without limitation, an entertainment fee, a cover charge, a table reservation fee, or a required minimum purchase of food, refreshments or merchandise.

[FN1] See Historical and Statutory Notes below for effective date information.

368A.030. "Board" defined

"Board" means the State Gaming Control Board.

[FN1] See Historical and Statutory Notes below for effective date information.

368A.040. "Business" defined

"Business" means any activity engaged in or caused to be engaged in by a business entity with the object of gain, benefit or advantage, either direct or indirect, to any person or governmental entity.

[FN1] See Historical and Statutory Notes below for effective date information.

368A.050. "Business entity" defined

1. "Business entity" includes:

(a) A corporation, partnership, proprietorship, limited-liability company, business association, joint venture, limited-liability partnership, business trust and their equivalents organized under the laws of this state or another jurisdiction and any other type of entity that engages in business.

(b) A natural person engaging in a business if he is deemed to be a business entity pursuant to NRS 368A.120.

2. The term does not include a governmental entity.

[FN1] See Historical and Statutory Notes below for effective date information.

368A.053. "Casual assemblage" defined

"Casual assemblage" includes, without limitation:

1. Participants in conventions, business meetings or tournaments governed by chapter 463 of NRS, and their guests; or
2. Persons celebrating a friend's or family member's wedding, birthday, anniversary, graduation, religious ceremony or similar occasion that is generally recognized as customary for celebration.

368A.055. "Commission" defined

"Commission" means the Nevada Gaming Commission.

368A.060. "Facility" defined

1. "Facility" means:

(a) Any area or premises where live entertainment is provided and for which consideration is collected for the right or privilege of entering that area or those premises if the live entertainment is provided at:

- (1) An establishment that is not a licensed gaming establishment; or
- (2) A licensed gaming establishment that is licensed for less than 51 slot machines, less than [six] 6 games, or any combination of slot machines and games within those respective limits.

(b) Any area or premises where live entertainment is provided if the live entertainment is provided at any other licensed gaming establishment.

2. "Facility" encompasses, if live entertainment is provided at a licensed gaming establishment that is licensed for:

(a) Less than 51 slot machines, less than 6 games, or any combination of slot machines and games within those respective limits, any area or premises where the live entertainment is provided and for which consideration is collected, from one or more patrons, for the right or privilege of entering that area or those premises, even if additional consideration is collected for the right or privilege of entering a smaller venue within that area or those premises; or

(b) At least 51 slot machines or at least 6 games, any designated area on the premises of the licensed gaming establishment within which the live entertainment is provided.

[FN1] See Historical and Statutory Notes below for effective date information.

368A.070. "Game" defined

"Game" has the meaning ascribed to it in NRS 463.0152.

[FN1] See Historical and Statutory Notes below for effective date information.

368A.080. "Licensed gaming establishment" defined

"Licensed gaming establishment" has the meaning ascribed to it in NRS 463.0169.

[FN1] See Historical and Statutory Notes below for effective date information.

368A.090, "Live entertainment" defined

1. "Live entertainment" means any activity provided for pleasure, enjoyment, recreation, relaxation, diversion or other similar purpose by a person or persons who are physically present when providing that activity to a patron or group of patrons who are physically present.

2. The term:

(a) Includes, without limitation, any one or more of the following activities:

- (1) Music or vocals provided by one or more professional or amateur musicians or vocalists;
- (2) Dancing performed by one or more professional or amateur dancers or performers;
- (3) Acting or drama provided by one or more professional or amateur actors or players;
- (4) Acrobatics or stunts provided by one or more professional or amateur acrobats, performers or stunt persons;
- (5) Animal stunts or performances induced by one or more animal handlers or trainers, except as otherwise provided in subparagraph (7) of paragraph (b);
- (6) Athletic or sporting contests, events or exhibitions provided by one or more professional or amateur athletes or sportsmen;
- (7) Comedy or magic provided by one or more professional or amateur comedians, magicians, illusionists, entertainers or performers;
- (8) A show or production involving any combination of the activities described in subparagraphs (1) to (7), inclusive; and
- (9) A performance involving one or more of the activities described in this paragraph by a disc jockey who presents recorded music. For the purposes of this subsection, a disc jockey shall not be deemed to have engaged in a performance involving one or more of the activities described in this paragraph if the disc jockey generally limits his interaction with patrons to introducing the recorded music, making announcements of general interest to patrons, and explaining, encouraging or directing participatory activities between patrons.

(b) Excludes, without limitation, any one or more of the following activities:

- (1) Instrumental or vocal music, which may or may not be supplemented with commentary by the musicians, in a restaurant, lounge or similar area if such music does not routinely rise to the volume that interferes with casual conversation and if such music would not generally cause patrons to watch as well as listen;
- (2) Occasional performances by employees whose primary job function is that of preparing, selling or serving food, refreshments or beverages to patrons, if such performances are not advertised as entertainment to the public;
- (3) Performances by performers of any type if the performance occurs in a licensed gaming establishment other than a licensed gaming establishment that is licensed for less than 51 slot machines, less than 6 games, or any combination of slot machines and games within those respective limits, as long as the performers stroll continuously throughout the facility;

(4) Performances in areas other than in nightclubs, lounges, restaurants or showrooms, if the performances occur in a licensed gaming establishment other than a licensed gaming establishment that is licensed for less than 51 slot machines, less than 6 games, or any combination of slot machines and games within those respective limits, which enhance the theme of the establishment or attract patrons to the areas of the performances, as long as any seating provided in the immediate area of the performers is limited to seating at slot machines or gaming tables;

(5) Television, radio, closed circuit or Internet broadcasts of live entertainment;

(6) Entertainment provided by a patron or patrons, including, without limitation, singing by patrons or dancing by or between patrons;

(7) Animal behaviors induced by animal trainers or caretakers primarily for the purpose of education and scientific research; and

(8) An occasional activity, including, without limitation, dancing, that:

(I) Does not constitute a performance;

(II) Is not advertised as entertainment to the public;

(III) Primarily serves to provide ambience to the facility; and

(IV) Is conducted by an employee whose primary job function is not that of an entertainer.

[FN1] See Historical and Statutory Notes below for effective date information.

368A.097. "Shopping mall" defined

"Shopping mall" includes any area or premises where multiple vendors assemble for the primary purpose of selling goods or services, regardless of whether consideration is collected for the right or privilege of entering that area or those premises.

368A.100. "Slot machine" defined

"Slot machine" has the meaning ascribed to it in NRS 463.0191.

[FN1] See Historical and Statutory Notes below for effective date information.

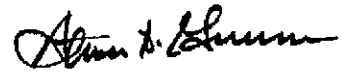
368A.110. "Taxpayer" defined

"Taxpayer" means:

1. If live entertainment that is taxable under this chapter is provided at a licensed gaming establishment, the person licensed to conduct gaming at that establishment.

2. Except as otherwise provided in subsection 3, if live entertainment that is taxable under this chapter is not provided at a licensed gaming establishment, the owner or operator of the facility where the live entertainment is provided.

3. If live entertainment that is taxable under this chapter is provided at a publicly owned facility or on public land, the person



CLERK OF THE COURT

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13 **DISTRICT COURT**
14 **CLARK COUNTY, NEVADA**

15 **DÉJÀ VU SHOWGIRLS OF LAS VEGAS,**)

16 **LLC, d/b/a *Déjà Vu Showgirls*, LITTLE**)

17 **DARLINGS OF LAS VEGAS, LLC, d/b/a**)

***Little Darlings*, K-KEL, INC., d/b/a**)

***Spearmint Rhino Gentlemen's Club*,**)

18 **OLYMPUS GARDEN, INC., d/b/a *Olympic***)

***Garden*, SHAC, LLC, d/b/a *Sapphire*, THE**)

19 **POWER COMPANY, INC., d/b/a *Crazy***)

***Horse Too Gentlemen's Club*, D.**)

20 **WESTWOOD, INC., d/b/a *Treasures*, and**)

21 **D.I. FOOD & BEVERAGE OF LAS**)

VEGAS, LLC, d/b/a *Scores*)

22)
23 **Plaintiffs,**)

24 **vs.**)

25 **NEVADA DEPARTMENT OF TAXATION**)

NEVADA TAX COMMISSION, NEVADA)

26 **STATE BOARD OF EXAMINERS, and**)

MICHELLE JACOBS, in her official)

27 **capacity only,**)

28 **Defendants.**)

Case No. A554970

Dept. No. IX

FIRST AMENDED COMPLAINT
COMPLAINT

Arbitration exemption: NAR 3(A): Seeks
Declaratory and Injunctive Relief

1 **NOW COME** Plaintiffs, K-Kel, Inc., d/b/a *Spearmint Rhino Gentlemen's Club*, Olympus
2 Garden, Inc., d/b/a *Olympic Garden*, SHAC, L.L.C., d/b/a *Sapphire*, The Power Company, Inc., d/b/a
3 *Crazy Horse Too Gentlemen's Club*, D. Westwood, Inc., d/b/a *Treasures*, and D.I. Food & Beverage
4 of Las Vegas, LLC, d/b/a *Scores* (collectively referred to herein as the "Plaintiffs"), by and through
5 their attorneys, and state for their first amended complaint pursuant to N.R.S. 368A.290(1)(b) and
6 N.R.S. 368A.300(3)(b) against Defendant Nevada Department of Taxation, Defendant Nevada Tax
7 Commission, and Defendant Nevada State Board of Examiners (collectively referred to herein as the
8 "Defendants"), as follows:

10 **INTRODUCTION**

11 1. This is a civil action brought pursuant to N.R.S. 368A.290(1)(b) and N.R.S. 368A.300(3)(b),
12 wherein Plaintiffs pray for a refund of the Live Entertainment Tax paid for the tax periods of
13 January, February, March, and April, 2004, as well as for declaratory judgment, injunctive
14 relief, and damages. Specifically, Plaintiffs seek to have this Court declare as unconstitutional
15 on its face and as applied to these Plaintiffs, and enjoin, the Nevada Tax on Live Entertainment
16 (referred to herein as the "Live Entertainment Tax," or simply the "Tax") as established by
17 Title 32, Chapter 368A, of the Nevada Revised Statutes ("Chapter 368A"), and the regulations
18 promulgated in furtherance thereof, as being an impermissible tax on constitutionally protected
19 expression. A copy of the statute as originally enacted is attached hereto as Exhibit 1, and a
20 copy of the current codified version of Chapter 368A is attached hereto as Exhibit 2, and both
21 are incorporated herein by reference. A copy of the administrative regulations promulgated in
22 furtherance of Chapter 368A is attached hereto as Exhibit 3, and is incorporated herein by
23 reference.

26 **JURISDICTION AND VENUE**

27 2. This Court has jurisdiction and power to grant the refund requested pursuant to N.R.S.
28 368A.290 as well as jurisdiction and authority to grant the declaratory judgment prayed for

1 here pursuant to Rule 57 of the Nevada Rules of Civil Procedure and N.R.S. 33.040.
2 Additionally, this Court has jurisdiction and power to grant the injunctive relief requested
3 pursuant to Rule 65 of the Nevada Rules of Civil Procedure and N.R.S. § 33.010.

4 3. This suit is authorized by law to redress deprivations under color of state law of the rights,
5 privileges, and immunities secured by Article I, §§ 9 and 10, and Article 10, §1, of the Nevada
6 Constitution, as well as the First and Fourteenth Amendments to the United States
7 Constitution, and for declaratory and injunctive relief.

8
9 4. Venue resides in this Court and is proper and appropriate as relevant proceeds were conducted,
10 and the Plaintiffs maintain their principal place of business, within Clark County in the State of
11 Nevada, pursuant to N.R.S. 368A.290(2).

12 PARTIES

13
14 5. Plaintiffs incorporate herein by reference each and every paragraph above as though fully set
15 forth herein.

16 6. Plaintiff, K-Kel, Inc., d/b/a *Spearmint Rhino Gentlemen's Club* ("*Spearmint Rhino*") is a
17 Corporation duly organized under the laws of the State of Nevada, and is authorized and
18 qualified to do business in the State of Nevada.

19 7. Plaintiff, Olympus Garden, Inc., d/b/a *Olympic Garden* ("*Olympic*") is a Corporation duly
20 organized under the laws of the State of Nevada, and is authorized and qualified to do business
21 in the State of Nevada.

22
23 8. Plaintiff, SHAC, L.L.C., d/b/a *Sapphire* ("*Sapphire*") is a Limited Liability Company duly
24 organized under the laws of the State of Nevada, and is authorized and qualified to do business
25 in the State of Nevada.

26 9. Plaintiff, The Power Company, Inc., d/b/a *Crazy Horse Too Gentlemen's Club* ("*Crazy*
27 *Horse*") is a Corporation duly organized under the laws of the State of Nevada, and is
28 authorized and qualified to do business in the State of Nevada.

- 1 10. Plaintiff, D. Westwood, Inc., d/b/a *Treasures* ("*Treasures*") is a Corporation duly organized
2 under the laws of the State of Nevada, and is authorized and qualified to do business in the
3 State of Nevada.
- 4 11. Plaintiff, D.I. Food & Beverage of Las Vegas, LLC, d/b/a *Scores* ("*Scores*") is a Corporation
5 duly organized under the laws of the State of Nevada, and is authorized and qualified to do
6 business in the State of Nevada.
- 7 12. None of the Plaintiffs operate their facilities as licensed gaming establishments under the laws
8 of the State of Nevada.
- 9 13. Defendant Nevada Department of Taxation (hereinafter sometimes referred to simply as the
10 "Department") is a governmental entity created under the laws of the State of Nevada, which
11 administers and enforces the statutory provisions challenged herein, and collects the Live
12 Entertainment Tax, for all non-gaming licensed taxpayers. It is a required Defendant in this
13 action pursuant to N.R.S. 368A.290(1)(b) and N.R.S. 368A.300(3)(b).
- 14 14. Defendant Nevada Tax Commission (hereinafter sometimes referred to simply as the
15 "Commission") is a governmental entity created under the laws of the State of Nevada, which
16 administers and enforces some of the statutory provisions challenged herein, and is authorized
17 to consider and rule upon, among other things, appeals of claims under Chapter 368A. It is
18 named as a Defendant here as it rendered the decision which the Plaintiffs Challenge by way of
19 this action.
- 20 15. Defendant, Nevada State Board of Examiners (hereinafter sometimes referred to simply as the
21 "Board of Examiners") is a governmental entity created under the laws of the State of Nevada,
22 and consists of the governor, the secretary of state, and the attorney general. Pursuant to
23 N.R.S. § 368A.250, the Board of Examiners is authorized to approve, among other things,
24 refunds with regard to any erroneously or illegally collected or computed tax under Chapter
25 368A, which the Plaintiffs seek here.
- 26
27
28

STATEMENT OF FACTS

16. Plaintiffs incorporate herein by reference each and every paragraph above as though fully set forth herein.
17. On or about July 22, 2003, the State of Nevada enacted, pursuant to the adoption of Chapter 368A, a Tax on Live Entertainment, which imposes, subject to numerous exceptions, an excise tax on admission to any facility within the State of Nevada that provides defined "live entertainment."
18. Shortly after the enactment of Chapter 368A, numerous and various administrative regulations were promulgated regarding the administration and enforcement of Chapter 38A. These regulations, which set forth definitions, applicability and methods of calculating the Live Entertainment Tax, and procedures, can be found at NAC 368A.010 through NAC 368.540, and are attached hereto as Exhibit 3. As utilized herein, the phrase "Chapter 368A" encompasses both the statute and these regulations promulgated in furtherance thereof attached as Exhibit 3.
19. Pursuant to N.R.S. § 368A.140, the Defendant Nevada Department of Taxation is obligated to collect the tax imposed by Chapter 368A from taxpayers who/which are not licensed gaming establishments, and is also obligated to adopt such regulations as are necessary to carry out those functions.
20. Upon information and belief, one of the primary purposes for the enactment of Chapter 368A was to impose an excise tax upon those establishments in the State of Nevada that provide live so-called "adult" entertainment in the form of exotic dancing, "topless" dancing, and fully nude performance dance entertainment.
21. As originally enacted, the tax imposed by Chapter 368A was not applicable, under the terms of N.R.S. § 368A.200(5)(d), to live entertainment that is not provided at a licensed gaming establishment if the facility in which the live entertainment is provided had a maximum

- 1 occupancy of less than 300 persons.
- 2 22. On June 17, 2005, Chapter 368A was amended by Assembly Bill No. 554, which - - among
3 other things - - reduced the scope of the exception as contained in N.R.S. § 368A.200(5)(d)
4 from a maximum seating capacity limitation of 300 to 200. Upon information and belief, the
5 purpose of the July 17, 2005, amendments to Chapter 368A, and in particular those to N.R.S. §
6 368A.200(5)(d), was to specifically extend the tax obligation as contained in Chapter 368A to
7 "adult" entertainment establishments which were not then subject to the Live Entertainment
8 Tax, including a number of the Plaintiffs in this action. The same amendments changed the
9 language of some provisions of Chapter 368A. Unless stated otherwise, all references herein
10 to the statutory provisions of Chapter 368A are to the current codified version attached hereto
11 as Exhibit 2.
- 12
- 13 23. *Spearmint Rhino* operates a commercial establishment at 3344 S. Highland Avenue, Las
14 Vegas, Nevada, 89109, whereupon live performance dance entertainment is presented to the
15 consenting adult public. The Defendants have taken the position that *Spearmint Rhino* is
16 subject to Chapter 368A, as amended, and have required *Spearmint Rhino* to pay the Live
17 Entertainment Tax as mandated therein.
- 18
- 19 24. *Olympic Garden* operates a commercial establishment at 1531 S. Las Vegas Boulevard, Las
20 Vegas, Nevada, 89104, whereupon live performance dance entertainment is presented to the
21 consenting adult public. The Defendants have taken the position that *Olympic Garden* is
22 subject to Chapter 368A, as amended, and have required *Olympic Garden* to pay the Live
23 Entertainment Tax as mandated therein.
- 24
- 25 25. *Sapphire* operates a commercial establishment at 3025 Industrial Road, Las Vegas, Nevada,
26 89109, whereupon live performance dance entertainment is presented to the consenting adult
27 public. The Defendants have taken the position that *Sapphire* is subject to Chapter 368A, as
28 amended, and have required *Sapphire* to pay the Live Entertainment Tax as mandated therein.

- 1 26. *Crazy Horse* operates a commercial establishment at 2476 Industrial Road, Las Vegas, Nevada,
2 89102, whereupon live performance dance entertainment is presented to the consenting adult
3 public. The Defendants have taken the position that *Crazy Horse* is subject to Chapter 368A,
4 as amended, and have required *Crazy Horse* to pay the Live Entertainment Tax as mandated
5 therein.
6
7 27. *Treasures* operates a commercial establishment at 2801 Westwood, Las Vegas, Nevada, 89109,
8 whereupon live performance dance entertainment is presented to the consenting adult public.
9 The Defendants have taken the position that *Treasures* is subject to Chapter 368A, as amended,
10 and have required *Treasures* to pay the Live Entertainment Tax as mandated therein.
11
12 28. *Scores* operates a commercial establishment at 3355 South Procyon Avenue, Las Vegas,
13 Nevada, 89102, whereupon live performance dance entertainment is presented to the
14 consenting adult public. The Defendants have taken the position that *Scores* is subject to
15 Chapter 368A, as amended, and have required *Scores* to pay the Live Entertainment Tax as
16 mandated therein.
17
18 29. All of the facilities operated by the Plaintiffs have maximum occupancies of less than 7,500
19 persons.
20
21 30. The Plaintiffs all present upon their business premises some form of live "exotic" performance
22 dance entertainment. Some of the Plaintiffs present live clothed and "topless" female
23 performance dance entertainment, and others of the Plaintiffs present live clothed, "topless"
24 and fully nude female performance dance entertainment; all of which is non-obscene. The
25 non-obscene performance dance entertainment presented on the establishments operated by the
26 Plaintiffs constitutes speech and expression, as well as a form of assembly, protected by not
27 only Article I, §§ 9 and 10, of the Nevada Constitution, but by the First and Fourteenth
28 Amendments to the United States Constitution as well.
31. Chapter 368A is a lengthy and complex statute containing numerous and various provisions

1 affecting the constitutionally protected conduct of the Plaintiffs, their agents, representatives,
2 entertainers and employees, as well as those individuals from the consenting adult audience
3 who would seek to view the entertainment provided by the Plaintiffs. Plaintiffs assert the
4 constitutional rights of their patrons as well in this action.

5
6 32. The Defendants take the position that pursuant to the definitions set forth in Chapter 368A,
7 Plaintiffs are obligated to pay the Live Entertainment Tax since their establishments fall within
8 the definition of "live entertainment" found in N.R.S. § 368A.090, and since they are not
9 otherwise exempted from having to pay that tax.

10 33. Plaintiffs contend that the Live Entertainment Tax as mandated by Chapter 368A is both illegal
11 and unconstitutional, and for those reasons they do not desire to pay those taxes. Nevertheless,
12 under threat of criminal prosecution and/or the imposition of fines and other penalties against
13 them, Plaintiffs have, beginning at various times, paid the Live Entertainment Tax mandated
14 by Chapter 368A.

15
16 34. Pursuant to N.R.S. § 368A.260, Plaintiffs each filed timely requests for refunds of the Live
17 Entertainment Tax they had paid, together with claims for the statutory interest provided for by
18 N.R.S. § 368A.270 and § 368A.310.

19 35. To date, each request for refund has been denied by the Defendant Nevada Department of
20 Taxation, pursuant to a one page letter. Each letter informed the Plaintiffs that the denial may
21 be appealed to Defendant Nevada Tax Commission pursuant to N.R.S. § 360.245 by filing a
22 written notice of appeal with the Defendant Department within thirty days of the service of the
23 denial letter.

24
25 36. Each Plaintiff has filed a timely written notice of appeal with the Defendant Department of
26 Taxation. After the Plaintiffs and the Defendant Department had an opportunity to submit
27 briefing to the Defendant Nevada Tax Commission, a hearing was scheduled on July 9, 2007,
28 before the Defendant Commission to hear the appeal of the denials of the requests for refunds

1 of the Live Entertainment Tax paid by the Plaintiffs for the tax periods of January, February,
2 March, and April, 2004.

3 37. After the hearing commenced on July 9, 2007, the Defendant Commission voted to continue
4 the hearing until August 6, 2007, in order to give the parties an opportunity to submit
5 supplemental materials and information.

6 38. The Defendant Commission, after considering the testimony, argument, and materials
7 submitted on July 9, 2007, and on August 6, 2007, issued a written decision denying Plaintiffs'
8 appeals on October 12, 2007. That ruling is attached hereto as Exhibit 4.

9 39. Pursuant to N.R.S. § 368A.290, "[w]ithin 90 days after a final decision upon a claim filed
10 pursuant to this chapter is rendered" by the Commission, "the claimant may bring an action
11 against the Department on the grounds set forth in the claim." It is pursuant to this provision
12 that Plaintiffs have filed this action.

13 40. Pursuant to N.R.S. 368A.300(3)(b), if the claimant is aggrieved by the decision of the "Nevada
14 Tax Commission rendered on appeal, the claimant may, within 90 days after the decision is
15 rendered, bring an action against the Board on the grounds set forth in the claim for the
16 recovery of the whole or any part of the amount claimed as an overpayment."

17 41. Plaintiffs further filed this action in order to protect their fundamental constitutional rights
18 from infringement by the enforcement of Chapter 368A, which they contend is unconstitutional
19 on its face as it: 1) imposes a tax directly on "live entertainment;" an activity which is
20 protected by Article I, §§ 9 and 10 of the Nevada Constitution as well as the First and
21 Fourteenth to the United States Constitution, therefore constituting a direct tax on "First
22 Amendment" freedoms and in particular on live exotic performance dance entertainment; 2)
23 applies only to a small number and category of speakers; 3) it is in violation of Article 10, §1
24 of the Nevada Constitution; and 4) it is an impermissible discriminatory tax which
25 discriminates based upon the content of speech and expression. In addition, N.R.S.
26
27
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1 368A.200(5)(a) precludes the taxation of live entertainment that "the State is prohibited from
2 taxing under the Constitution, laws or treaties of the United States or the Nevada Constitution."
3 Because the Plaintiffs cannot be so taxed under either the United States or Nevada
4 Constitutions, Plaintiffs are exempt from having to pay the Live Entertainment tax pursuant to
5 this exemption. These are the grounds which Plaintiffs set forth in their requests for refunds.
6

7 **EXCERPTS OF THE TAX ON LIVE ENTERTAINMENT STATUTE**

8 42. Plaintiffs incorporate herein by reference each and every paragraph above as though fully set
9 forth herein.

10 43. Chapter 368A states, at N.R.S. § 368A.200(1), that "[e]xcept as otherwise provided in this
11 section, there is hereby imposed an excise tax on admission to any facility in this State where
12 live entertainment is provided." If the live entertainment is provided at a facility with a
13 maximum occupancy of less than 7,500, the rate of tax is 10% of the admission charge to the
14 facility plus 10% of any amounts paid for food, refreshments and merchandise purchased at the
15 facility. If the live entertainment is provided at a facility with a maximum occupancy of at
16 least 7,500, the rate of the tax is 5% of the admission charged to the facility.
17

18 44. Chapter 368A defines an "[a]dmission charge" in N.R.S. § 368A.020 as:

19 [T]he total amount, expressed in terms of money, of consideration paid for the
20 right or privilege to have access to a facility where live entertainment is
21 provided. The term includes, without limitation, an entertainment fee, a cover
22 charge, a table reservation fee, or a required minimum purchase of food,
refreshments or merchandise.

23 45. Chapter 368A defines a "facility" in N.R.S. § 368A.060 as:

24 "(a) Any area or premises where live entertainment is provided and for which
25 consideration is collected for the right or privilege of entering that area or those
premises if the live entertainment is provided at:

- 26 (1) An establishment that is not a licensed gaming establishment; or
27 (2) A licensed gaming establishment that is licensed for less than 51 slot
28 machines, less than six games, or any combination of slot machines and
games within those respective limits.

1 (b) Any area or premises where live entertainment is provided if the live
2 entertainment is provided at any other licensed gaming establishment."

3 46. "[L]ive entertainment" is defined in N.R.S. § 368A.090 as:

4 "[A]ny activity provided for pleasure, enjoyment, recreation, relaxation,
5 diversion or other similar purpose by a person or persons who are physically
6 present when providing that activity to a patron or group of patrons who are
7 physically present."

8 This definition includes, among other activities, "[d]ancing performed by one or more
9 professional or amateur dancers."

10 47. Chapter 368A states, at N.R.S. § 368A.140(2), that the Defendant Department shall collect the
11 Live Entertainment Tax from non-gaming licensed taxpayers, such as is the case of the
12 Plaintiffs here, and is empowered to "adopt such regulations are necessary to carry out" that
13 collection.

14 48. N.R.S. § 368A.090(b) specifically excludes certain types of entertainment from the definition
15 of "live entertainment," such as: instrumental or vocal music if it "does not routinely rise to the
16 volume that interferes with casual conversation" and would not "generally cause patrons to
17 watch as well as listen"; occasional performances by employees who have primary job
18 functions other than performing; performances in certain licensed gaming establishments "as
19 long as performers stroll continuously throughout the facility" or if they "enhance the theme of
20 the establishment or attract patrons to the areas of the performances"; entertainment that is
21 provided by patrons; animal behaviors for the purpose of education and scientific research; and
22 occasional dancing which, among other things, "primarily serves to provide ambience to the
23 facility."

24
25 49. Pursuant to N.R.S. § 368A.200(5), the tax imposed by Chapter 368 is not applicable to a
26 variety of circumstances. Some of the exemptions include live entertainment that the State is
27 prohibited from taxing under the Constitution, laws or treaties of the United States or Nevada
28 Constitution; live entertainment that is not provided at a licensed gaming establishment if the

1 facility has a maximum seating capacity of less than 200; live entertainment that is provided at
2 a licensed gaming establishment that is licensed for less than 51 slot machines, less than six
3 games, or any combination of slot machines and games within those limits, if the facility has a
4 maximum seating capacity of less than 200; merchandise sold outside the facility in which the
5 live entertainment is provided, unless the purchase of the merchandise entitles the purchaser to
6 admission to the entertainment; and music performed by musicians who move constantly
7 through the audience if no other form of live entertainment is afforded to the patrons.
8

9 50. Overpayments and refunds of the Live Entertainment Tax are addressed in N.R.S. § 368A.250,
10 which provides that if the Defendant Department determines that any tax has been
11 "erroneously or illegally collected or computed," the Defendant Department must record the
12 fact and certify the amount owed and from whom it was collected to Defendant Board of
13 Examiners. If the amount is approved by the Defendant Board of Examiners, it is then credited
14 on any amount that is due from that person under Chapter 368A, with the balance refunded to
15 that person.
16

17 51. Chapter 368A provides, at N.R.S. § 368A.290(1), that the Defendant Nevada Tax Commission
18 is authorized to render a final decision upon claims for refunds under that chapter. Further, at
19 N.R.S. § 368A.300(2), Chapter 368A provides that a claim thereunder that is disallowed by the
20 Defendant Department may be appealed to the Defendant Commission.
21

22 COUNT I - DECLARATORY RELIEF

23 52. Plaintiffs incorporate herein by reference each and every paragraph above as though fully set
24 forth herein.

25 53. Chapter 368A is unconstitutional on its face and as applied to the Plaintiffs under Article I, §§
26 9 and 10, and Article 10, §1, of the Nevada Constitution as well as the First and Fourteenth
27 Amendments to the United States Constitution, for numerous and various reasons, including,
28 but not limited to, the fact that:

- 1 (a) It effectuates an impermissible prior restraint on speech and expression;
- 2 (b) It fails to further any important, substantial or compelling governmental interest;
- 3 (c) It permits restrictions on speech and expression that are greater than are essential to
- 4 further any asserted governmental interests;
- 5 (d) It permits restrictions on speech and expression that are not the least restrictive means
- 6 available;
- 7 (e) It contains criteria that are both arbitrary and capricious and which are not supported by
- 8 any legislative record;
- 9 (f) It contains numerous and various terms and phrases which are impermissibly vague,
- 10 and ambiguous, and the applicable definitions as contained therein are impermissibly
- 11 and substantially overbroad judged in relation to their plainly legitimate sweep;
- 12 (g) It imbues the Defendants with unbridled discretion;
- 13 (h) It impermissibly singles out constitutionally protected businesses for certain
- 14 regulations;
- 15 (i) It violates the procedural and substantive due process rights of the Plaintiffs and others,
- 16 including but not limited to the customers and patrons who frequent Plaintiffs'
- 17 establishments;
- 18 (j) It violates the privacy rights of the customers and patrons who frequent Plaintiffs'
- 19 establishments;
- 20 (k) It violates Plaintiffs' equal protection rights in that it unconstitutionally discriminates
- 21 against expressive businesses based upon the content of speech, and it further creates
- 22 and permits uneven treatment in the exercise of constitutionally protected rights in the
- 23 State of Nevada, and therefore permits differing treatment amongst individuals who
- 24 desire to engage in constitutionally protected speech;
- 25 (l) It is an impermissible direct tax on constitutionally protected freedoms;
- 26 (m) It is a discriminatory tax that only impacts upon a small number and category of
- 27 speakers;
- 28 (n) It is an impermissible discriminatory tax that discriminates based upon the content of
- speech and expression;
- (o) It impermissibly requires a person or business to pay for the right to exercise a right
- guaranteed by the Nevada and United States Constitutions;
- (p) It was enacted upon an insufficient record and is not justified on any factual or legal
- ground;

1 (q) It violates the separation of powers doctrine; and

2 (r) The Nevada Tax Commission violated Plaintiffs' procedural due process rights by
3 failing to provide a fair and impartial hearing.

4 54. Because the Live Entertainment Tax is an impermissible and/or unconstitutional tax upon in
5 violation of Article I, §§ 9 and 10, and Article 10, §1, of the Nevada Constitution as well as the
6 First and Fourteenth Amendments to the United States Constitution, Plaintiffs are not subject
7 to payment of the Live Entertainment Tax pursuant to the provisions of N.R.S. §
8 368A.200(5)(a).

9
10 55. This Court has the authority to declare the rights and other relations of the Plaintiffs and of the
11 Defendants, and should do so here.

12 56. Because of the questioned constitutionality of the Live Entertainment Tax as required by
13 Chapter 368A, and because of the potential application of the exemption as contained in N.R.S.
14 § 368A.200(5)(a) in regard to the Live Entertainment Tax being applied to these Plaintiffs,
15 Plaintiffs are entitled to a declaration by this Court in regard to the constitutionality of Chapter
16 368A as well as the applicability of the exemption as contained in N.R.S. § 368A.200(5)(a).

17
18 57. For the reasons as set forth above, this Court should declare that the Live Entertainment Tax as
19 mandated by Chapter 368A is unconstitutional on its face and as applied to the Plaintiffs. Also
20 for the reasons as set forth above, this Court should declare that Plaintiffs need not pay the
21 Live Entertainment Tax as required by Chapter 368A both as a result of the constitutional
22 violations as enumerated above as well as the specific exemption as set forth in N.R.S. §
23 368A.200(5)(a). In addition, this Court should declare that the Defendants have violated the
24 constitutional rights of the Plaintiffs by requiring them to have paid the Live Entertainment
25 Tax for the tax period of January 2004 through April 2004, which are at issue in this action.

26
27 **COUNT II - REQUEST FOR REFUND**

28 58. Plaintiffs incorporate herein by reference each and every paragraph above as though fully set

1 forth herein.

2 59. Plaintiffs should not have been required to pay the Live Entertainment Tax as mandated by
3 Chapter 368A both because it violates Article I, §§ 9 and 10, and Article 10, §1, of the Nevada
4 Constitution as well as the First and Fourteenth Amendments to the United States Constitution
5 and because Plaintiffs are exempt from paying the Live Entertainment Tax pursuant to the
6 provisions of N.R.S. § 368A.200(5)(a).

7
8 60. Both the Defendant Nevada Department of Taxation and the Defendant Nevada Tax
9 Commission erred in not granting Plaintiffs' requests for refunds.

10 61. This Court has the power to grant Plaintiffs' requests for refunds pursuant to N.R.S. §
11 368A.290 and N.R.S. § 368A.300, and should do so here.

12 62. As a direct and proximate result of Defendants' acts, Plaintiffs have been damaged in an
13 amount in excess of \$10,000, plus interest thereon in an amount to be determined by the trier of
14 fact.

15
16 **COUNT III - INJUNCTIVE RELIEF**

17 63. Plaintiffs incorporate herein by reference each and every paragraph above as though fully set
18 forth herein.

19 64. Any action taken or to be taken by the Defendants to enforce any portion of Chapter 368A
20 against Plaintiffs has been taken and will be taken under color of law, and has deprived and
21 will deprive Plaintiffs of their constitutional rights as set forth herein, and will cause them
22 irreparable harm for which compensatory damages are an inadequate remedy as a matter of
23 law.

24
25 65. The threat of enforcement of Chapter 368A is both great and immediate. In addition, Chapter
26 368A is both flagrantly and patently violative of Plaintiffs' constitutional rights. There is no
27 other remedy at law which would suffice to protect Plaintiffs' interests for the reasons above
28 enumerated.

1 66. The public interest weighs in favor of preventing deprivation of constitutional rights, and is
2 always served by enjoining an unconstitutional law.

3 67. Plaintiffs have a substantial likelihood of success of prevailing on their constitutional claims
4 against Chapter 368A, in that it is blatantly and patently unconstitutional. The Defendants will
5 suffer no harm by the entry of such an injunction, as there can be no legitimate governmental
6 interest in enforcing an unconstitutional law. In addition, the "balancing" of the equities tips in
7 favor of the Plaintiffs and in the entry of a preliminary injunction, due to the paramount
8 position of rights afforded under the First Amendment in comparison to the lack of harm
9 occasioned to the Defendants if such an injunction is granted.
10

11 **PRAYER FOR RELIEF**

12 **WHEREFORE**, Plaintiffs pray that this Honorable Court enter judgment against Defendants,
13 which would include:

- 14
- 15 A. A declaration that the Live Entertainment Tax under Chapter 368A is unconstitutional on its
16 face and as applied to the Plaintiffs; that Plaintiffs need not pay the Live Entertainment Tax as
17 mandated by Chapter 368A both because it violates Article I, §§ 9 and 10, and Article 10, §1,
18 of the Nevada Constitution as well as the First and Fourteenth Amendments to the United
19 States Constitution, and because Plaintiffs are exempt from paying the Live Entertainment Tax
20 pursuant to the provisions of N.R.S. § 368A.200(5)(a); and that the Defendants have violated
21 the Plaintiffs' constitutional rights by having required them to have paid the Live
22 Entertainment Tax in the past;
- 23
- 24 B. A preliminary and permanent injunction restraining the Defendants, as well as their officers,
25 agents, employees and representatives, from enforcing Chapter 368A against the Plaintiffs
26 and/or from collecting the Live Entertainment Tax against the Plaintiffs;
- 27
- 28 C. Entry of an order vacating the determinations of the Nevada Department of Taxation and the
Defendant Nevada Tax Commission denying Plaintiffs' requests for refunds;

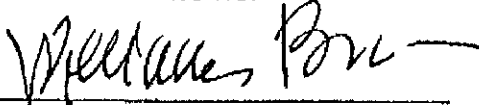
1 D. Entry of an order directing Defendant Nevada Department of Taxation to refund the Live
2 Entertainment Taxes paid by the Plaintiffs for the tax periods of January, February, March and
3 April 2004, together with the statutory interest provided for by N.R.S. § 368A.270 and §
4 368A.310;

5
6 E. A permanent injunction requiring Defendant Nevada Tax Commission to record the payments
7 of the Live Entertainment Tax made by the Plaintiffs during those tax periods and to certify
8 those amounts to the Defendant State Board of Examiners, and further ordering the Defendant
9 State Board of Examiners to approve and authorize the refund from the State Treasury of all
10 such Live Entertainment Tax payments that have been involuntarily made by the Plaintiffs
11 under Chapter 368A during those tax periods, together with interest as required by N.R.S. §
12 368A.270 and § 368A.310; and

13
14 F. Entry of such other and further relief as the Court deems just and proper.

15 DATED this ^{9th} day of ^{December} ~~February~~, 2010
16

17 SULLIVAN BROWN

18 

19 By: WILLIAM H. BROWN, ESQ.

20 Nevada Bar #7623

21 SULLIVAN BROWN

22 332 S. Jones Boulevard

23 Las Vegas, NV 89107

24 Telephone: (702) 471-0112

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26 Counsel for Plaintiffs

27 BRADLEY J. SHAFER, ESQ.*

28 Michigan Bar #P36604

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Co-Counsel for Plaintiffs

*Admitted Pro Hac Vice

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REGISTER OF ACTIONS

CASE No. 06A533273

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

§
§
§
§
§
§

Case Type: Other Civil Filing
Subtype: Other Civil Matters
Date Filed: 12/19/2006
Location: Department 11
Cross-Reference Case Number: A533273
Supreme Court No.: 60037

PARTY INFORMATION

Lead Attorneys

Defendant	Jacobs, Michelle	Blake A. Doerr
Defendant	Nevada Dept Of Taxation	Blake A. Doerr
Defendant	Nevada State Board Of Examiners	Blake A. Doerr
Defendant	Nevada Tax Commission	Blake A. Doerr
Doing	Crazy Horse Too Gentlemen's Club	Dominic P. Gentile
Doing	Deja Vu Showgirls	William H. Brown
Doing	Little Darlings	
Doing	Olympic Garden	Dominic P. Gentile
Doing	Scores	Dominic P. Gentile
Doing	Spearmint Rhino Gentlemen's Club	Dominic P. Gentile
Doing	Treasures	Dominic P. Gentile
Plaintiff	D I Food And Beverage Of Las Vegas LLC	William H. Brown Retained
Plaintiff	D Westwood Inc	William H. Brown
Plaintiff	Deja Vu Showgirls Of Las Vegas LLC	William H. Brown
Plaintiff	K-Kel Inc	William H. Brown
Plaintiff	Little Darlings Of Las Vegas LLC	William H. Brown
Plaintiff	Olympus Garden Inc	

William H. Brown
Retained

Plaintiff Power Company Inc

William H. Brown

Plaintiff Shac LLC

William H. Brown

EVENTS & ORDERS OF THE COURT

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

Minutes

08/23/2011 9:00 AM

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

Parties Present

Return to Register of Actions


CLERK OF THE COURT

1 **ORDR**
2 CATHERINE CORTEZ MASTO
3 Attorney General
4 DAVID J. POPE
5 Senior Deputy Attorney General
6 Nevada Bar No. 008617
7 BLAKE A. DOERR
8 Senior Deputy Attorney General
9 Nevada Bar No. 009001
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19 vrakowsky@ag.nv.gov
20 Attorneys for Nevada Department of Taxation

12 **DISTRICT COURT**
13 **CLARK COUNTY, NEVADA**

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

20 Plaintiffs,

21 vs.

22 NEVADA DEPARTMENT OF TAXATION,
23 NEVADA TAX COMMISSION, NEVADA
24 STATE BOARD OF EXAMINERS, and
25 MICHELLE JACOBS, in her official capacity
26 only,

25 Defendants.

Case No. 06A533273
Dept. No. XI

Coordinated with:

Case No. 08A554970
Dept. No. XI

ORDER

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

1 K-KEL, INC., d/b/a *Spearmint Rhino*)
2 *Gentlemen's Club*; OLYMPUS GARDEN, INC.,
3 d/b/a *Olympic Garden*; SHAC, LLC, d/b/a
4 *Sapphire*; THE POWER COMPANY, INC., d/b/a
5 *Crazy Horse Too Gentlemen's Club*; D.)
6 WESTWOOD, INC., d/b/a *Treasures*; and D.I.)
7 FOOD & BEVERAGE OF LAS VEGAS, LLC,
8 d/b/a *Scores*;

9 Plaintiffs,

10 v.

11 NEVADA DEPARTMENT OF TAXATION;
12 NEVADA TAX COMMISSION; and NEVADA
13 STATE BOARD OF EXAMINERS,

14 Defendants.

Case No. 08A554970
Dept. No. XI

15 ORDER

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

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

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

...

...

...

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

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

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

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

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

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26 ...
27 ...
28 ...

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

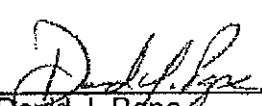
3 IT IS SO ORDERED.

4 DATED this 27th day of October, 2011.

5
6
7
8 
DISTRICT COURT JUDGE
mg

9 Respectfully submitted:

10 CATHERINE CORTEZ MASTO
11 Attorney General

12
13 By: 
14 David J. Pope
15 Senior Deputy Attorney General
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Attorney General's Office
555 E. Washington, Suite 3900
Las Vegas, NV 89101

[Rev. 11/4/2011 9:41:10 AM]

CHAPTER 368A - TAX ON LIVE ENTERTAINMENT

GENERAL PROVISIONS

<u>NRS 368A.010</u>	Definitions.
<u>NRS 368A.020</u>	"Admission charge" defined.
<u>NRS 368A.030</u>	"Board" defined.
<u>NRS 368A.040</u>	"Business" defined.
<u>NRS 368A.050</u>	"Business entity" defined.
<u>NRS 368A.053</u>	"Casual assemblage" defined.
<u>NRS 368A.055</u>	"Commission" defined.
<u>NRS 368A.060</u>	"Facility" defined.
<u>NRS 368A.070</u>	"Game" defined.
<u>NRS 368A.080</u>	"Licensed gaming establishment" defined.
<u>NRS 368A.090</u>	"Live entertainment" defined.
<u>NRS 368A.097</u>	"Shopping mall" defined.
<u>NRS 368A.100</u>	"Slot machine" defined.
<u>NRS 368A.110</u>	"Taxpayer" defined.
<u>NRS 368A.115</u>	"Trade show" defined.
<u>NRS 368A.120</u>	Natural persons who are deemed to be business entities.

ADMINISTRATION

<u>NRS 368A.140</u>	Duties of Board, Commission and Department; applicability of chapters 360 and 463 of NRS.
<u>NRS 368A.150</u>	Establishment of amount of tax liability when Board or Department determines that taxpayer is acting with intent to defraud State or to evade payment of tax.
<u>NRS 368A.160</u>	Maintenance and availability of records for determining liability of taxpayer; liability to taxpayer of lessee, assignee or transferee of certain premises; penalty.
<u>NRS 368A.170</u>	Examination of records by Board or Department; payment of expenses of Board or Department for examination of records outside State.
<u>NRS 368A.180</u>	Confidentiality of records and files of Board and Department.

IMPOSITION AND COLLECTION

<u>NRS 368A.200</u>	Imposition and amount of tax; liability and reimbursement for payment; ticket for live entertainment must indicate whether tax is included in price of ticket; exemptions from tax.
<u>NRS 368A.220</u>	Filing of reports and payment of tax; deposit of amounts received in State General Fund.
<u>NRS 368A.230</u>	Extension of time for payment; payment of interest during period of extension.
<u>NRS 368A.240</u>	Credit for amount of tax paid on account of certain charges taxpayer is unable to collect; violations.

OVERPAYMENTS AND REFUNDS

<u>NRS 368A.250</u>	Certification of excess amount collected; credit and refund.
<u>NRS 368A.260</u>	Limitations on claims for refund or credit; form and contents of claim; failure to file claim constitutes waiver; service of notice of rejection of claim.
<u>NRS 368A.270</u>	Interest on overpayments; disallowance of interest.
<u>NRS 368A.280</u>	Injunction or other process to prevent collection of tax prohibited; filing of claim is condition precedent to maintaining action for refund.
<u>NRS 368A.290</u>	Action for refund: Period for commencement; venue; waiver.
<u>NRS 368A.300</u>	Rights of claimant upon failure of Board or Department to mail notice of action on claim; allocation of judgment for claimant.
<u>NRS 368A.310</u>	Allowance of interest in judgment for amount illegally collected.
<u>NRS 368A.320</u>	Standing to recover.
<u>NRS 368A.330</u>	Action for recovery of erroneous refund; Jurisdiction; venue; prosecution.
<u>NRS 368A.340</u>	Cancellation of illegal determination.

MISCELLANEOUS PROVISIONS

<u>NRS 368A.350</u>	Prohibited acts; penalty.
<u>NRS 368A.360</u>	Revocation of gaming license for failure to report, pay or truthfully account for tax.
<u>NRS 368A.370</u>	Remedies of State are cumulative.

GENERAL PROVISIONS

NRS 368A.010 Definitions. As used in this chapter, unless the context otherwise requires, the words and terms defined in NRS 368A.020 to 368A.115, inclusive, have the meanings ascribed to them in those sections.

(Added to NRS by 2003, 20th Special Session, 146; A 2005, 2480; 2005, 22nd Special Session, 140)

NRS 368A.020 "Admission charge" defined. "Admission charge" means the total amount, expressed in terms of money, of consideration paid for the right or privilege to have access to a facility where live entertainment is provided. The term includes, without limitation, an entertainment fee, a cover charge, a table reservation fee, or a required minimum purchase of food, refreshments or merchandise.

(Added to NRS by 2003, 20th Special Session, 146; A 2005, 2481)

NRS 368A.030 "Board" defined. "Board" means the State Gaming Control Board.

(Added to NRS by 2003, 20th Special Session, 146)

NRS 368A.040 "Business" defined. "Business" means any activity engaged in or caused to be engaged in by a business entity with the object of gain, benefit or advantage, either direct or indirect, to any person or governmental entity.

(Added to NRS by 2003, 20th Special Session, 146)

NRS 368A.050 "Business entity" defined.

1. "Business entity" includes:

(a) A corporation, partnership, proprietorship, limited-liability company, business association, joint venture, limited-liability partnership, business trust and their equivalents organized under the laws of this State or another jurisdiction and any other type of entity that engages in business.

(b) A natural person engaging in a business if that person is deemed to be a business entity pursuant to NRS 368A.120.

2. The term does not include a governmental entity.

(Added to NRS by 2003, 20th Special Session, 146)

NRS 368A.053 "Casual assemblage" defined. "Casual assemblage" includes, without limitation:

1. Participants in conventions, business meetings or tournaments governed by chapter 463 of NRS, and their guests; or

2. Persons celebrating a friend's or family member's wedding, birthday, anniversary, graduation, religious ceremony or similar occasion that is generally recognized as customary for celebration.

(Added to NRS by 2005, 2480)

NRS 368A.055 "Commission" defined. "Commission" means the Nevada Gaming Commission.

(Added to NRS by 2005, 22nd Special Session, 140)

NRS 368A.060 "Facility" defined.

1. "Facility" means:

(a) Any area or premises where live entertainment is provided and for which consideration is collected for the right or privilege of entering that area or those premises if the live entertainment is provided at:

(1) An establishment that is not a licensed gaming establishment; or

(2) A licensed gaming establishment that is licensed for less than 51 slot machines, less than 6 games, or any combination of slot machines and games within those respective limits.

(b) Any area or premises where live entertainment is provided if the live entertainment is provided at any other licensed gaming establishment.

2. "Facility" encompasses, if live entertainment is provided at a licensed gaming establishment that is licensed for:

(a) Less than 51 slot machines, less than 6 games, or any combination of slot machines and games within those respective limits, any area or premises where the live entertainment is provided and for which consideration is collected, from one or more patrons, for the right or privilege of entering that area or those premises, even if additional consideration is collected for the right or privilege of entering a smaller venue within that area or those premises; or

(b) At least 51 slot machines or at least 6 games, any designated area on the premises of the licensed gaming establishment within which the live entertainment is provided.

(Added to NRS by 2003, 20th Special Session, 147; A 2005, 2481)

NRS 368A.070 "Game" defined. "Game" has the meaning ascribed to it in NRS 463.0152.

(Added to NRS by 2003, 20th Special Session, 147)

NRS 368A.080 "Licensed gaming establishment" defined. "Licensed gaming establishment" has the meaning ascribed to it in NRS 463.0169.

(Added to NRS by 2003, 20th Special Session, 147)

NRS 368A.090 "Live entertainment" defined.

1. "Live entertainment" means any activity provided for pleasure, enjoyment, recreation, relaxation, diversion or other similar purpose by a person or persons who are physically present when providing that activity to a patron or group of patrons who are physically present.

2. The term:

(a) Includes, without limitation, any one or more of the following activities:

- (1) Music or vocals provided by one or more professional or amateur musicians or vocalists;
- (2) Dancing performed by one or more professional or amateur dancers or performers;
- (3) Acting or drama provided by one or more professional or amateur actors or players;
- (4) Acrobatics or stunts provided by one or more professional or amateur acrobats, performers or stunt persons;
- (5) Animal stunts or performances induced by one or more animal handlers or trainers, except as otherwise provided in

subparagraph (7) of paragraph (b);

(6) Athletic or sporting contests, events or exhibitions provided by one or more professional or amateur athletes, sportsmen or sportswomen;

(7) Comedy or magic provided by one or more professional or amateur comedians, magicians, illusionists, entertainers or performers;

(8) A show or production involving any combination of the activities described in subparagraphs (1) to (7), inclusive; and

(9) A performance involving one or more of the activities described in this paragraph by a disc jockey who presents recorded music. For the purposes of this subsection, a disc jockey shall not be deemed to have engaged in a performance involving one or more of the activities described in this paragraph if the disc jockey generally limits his or her interaction with patrons to introducing the recorded music, making announcements of general interest to patrons, and explaining, encouraging or directing participatory activities between patrons.

(b) Excludes, without limitation, any one or more of the following activities:

(1) Instrumental or vocal music, which may or may not be supplemented with commentary by the musicians, in a restaurant, lounge or similar area if such music does not routinely rise to the volume that interferes with casual conversation and if such music would not generally cause patrons to watch as well as listen;

(2) Occasional performances by employees whose primary job function is that of preparing, selling or serving food, refreshments or beverages to patrons, if such performances are not advertised as entertainment to the public;

(3) Performances by performers of any type if the performance occurs in a licensed gaming establishment other than a licensed gaming establishment that is licensed for less than 51 slot machines, less than 6 games, or any combination of slot machines and games within those respective limits, as long as the performers stroll continuously throughout the facility;

(4) Performances in areas other than in nightclubs, lounges, restaurants or showrooms, if the performances occur in a licensed gaming establishment other than a licensed gaming establishment that is licensed for less than 51 slot machines, less than 6 games, or any combination of slot machines and games within those respective limits, which enhance the theme of the establishment or attract patrons to the areas of the performances, as long as any seating provided in the immediate area of the performers is limited to seating at slot machines or gaming tables;

(5) Television, radio, closed circuit or Internet broadcasts of live entertainment;

(6) Entertainment provided by a patron or patrons, including, without limitation, singing by patrons or dancing by or between patrons;

(7) Animal behaviors induced by animal trainers or caretakers primarily for the purpose of education and scientific research; and

(8) An occasional activity, including, without limitation, dancing, that:

- (I) Does not constitute a performance;
- (II) Is not advertised as entertainment to the public;
- (III) Primarily serves to provide ambience to the facility; and
- (IV) Is conducted by an employee whose primary job function is not that of an entertainer.

(Added to NRS by 2003, 20th Special Session, 147; A 2005, 2481)

NRS 368A.097 "Shopping mall" defined. "Shopping mall" includes any area or premises where multiple vendors assemble for the primary purpose of selling goods or services, regardless of whether consideration is collected for the right or privilege of entering that area or those premises.

(Added to NRS by 2005, 2480)

NRS 368A.100 "Slot machine" defined. "Slot machine" has the meaning ascribed to it in NRS 463.0191.

(Added to NRS by 2003, 20th Special Session, 147)

NRS 368A.110 "Taxpayer" defined. "Taxpayer" means:

1. If live entertainment that is taxable under this chapter is provided at a licensed gaming establishment, the person licensed to conduct gaming at that establishment.

2. Except as otherwise provided in subsection 3, if live entertainment that is taxable under this chapter is not provided at a licensed gaming establishment, the owner or operator of the facility where the live entertainment is provided.

3. If live entertainment that is taxable under this chapter is provided at a publicly owned facility or on public land, the person who collects the taxable receipts.

(Added to NRS by 2003, 20th Special Session, 147)

NRS 368A.115 "Trade show" defined. "Trade show" means an event of limited duration primarily attended by members of a particular trade or industry for the purpose of exhibiting their merchandise or services or discussing matters of

interest to members of that trade or industry.
(Added to NRS by 2005, 2480)

NRS 368A.120 Natural persons who are deemed to be business entities. A natural person engaging in a business shall be deemed to be a business entity that is subject to the provisions of this chapter if the person is required to file with the Internal Revenue Service a Schedule C (Form 1040), Profit or Loss From Business Form, or its equivalent or successor form, or a Schedule E (Form 1040), Supplemental Income and Loss Form, or its equivalent or successor form, for the business.
(Added to NRS by 2003, 20th Special Session, 147)

ADMINISTRATION

NRS 368A.140 Duties of Board, Commission and Department; applicability of chapters 360 and 463 of NRS.

1. The Board shall collect the tax imposed by this chapter from taxpayers who are licensed gaming establishments. The Commission shall adopt such regulations as are necessary to carry out the provisions of this subsection. The regulations must be adopted in accordance with the provisions of chapter 233B of NRS and must be codified in the Nevada Administrative Code.

2. The Department shall:

- (a) Collect the tax imposed by this chapter from all other taxpayers; and
- (b) Adopt such regulations as are necessary to carry out the provisions of paragraph (a).

3. For the purposes of:

(a) Subsection 1, the provisions of chapter 463 of NRS relating to the payment, collection, administration and enforcement of gaming license fees and taxes, including, without limitation, any provisions relating to the imposition of penalties and interest, shall be deemed to apply to the payment, collection, administration and enforcement of the taxes imposed by this chapter to the extent that those provisions do not conflict with the provisions of this chapter.

(b) Subsection 2, the provisions of chapter 360 of NRS relating to the payment, collection, administration and enforcement of taxes, including, without limitation, any provisions relating to the imposition of penalties and interest, shall be deemed to apply to the payment, collection, administration and enforcement of the taxes imposed by this chapter to the extent that those provisions do not conflict with the provisions of this chapter.

4. To ensure that the tax imposed by NRS 368A.200 is collected fairly and equitably, the Commission, the Board and the Department shall:

(a) Jointly, coordinate the administration and collection of that tax and the regulation of taxpayers who are liable for the payment of the tax.

(b) Upon request, assist the other agencies in the collection of that tax.

(Added to NRS by 2003, 20th Special Session, 149; A 2005, 22nd Special Session, 140)

NRS 368A.150 Establishment of amount of tax liability when Board or Department determines that taxpayer is acting with intent to defraud State or to evade payment of tax.

1. If:

(a) The Board determines that a taxpayer who is a licensed gaming establishment is taking any action with intent to defraud the State or to evade the payment of the tax or any part of the tax imposed by this chapter, the Board shall establish an amount upon which the tax imposed by this chapter must be based.

(b) The Department determines that a taxpayer who is not a licensed gaming establishment is taking any action with intent to defraud the State or to evade the payment of the tax or any part of the tax imposed by this chapter, the Department shall establish an amount upon which the tax imposed by this chapter must be based.

2. The amount established by the Board or the Department pursuant to subsection 1 must be based upon the tax liability of business entities that are deemed comparable by the Board or the Department to that of the taxpayer.

(Added to NRS by 2003, 20th Special Session, 152)

NRS 368A.160 Maintenance and availability of records for determining liability of taxpayer; liability to taxpayer of lessee, assignee or transferee of certain premises; penalty.

1. Each person responsible for maintaining the records of a taxpayer shall:

(a) Keep such records as may be necessary to determine the amount of the liability of the taxpayer pursuant to the provisions of this chapter;

(b) Preserve those records for:

(1) At least 5 years if the taxpayer is a licensed gaming establishment or until any litigation or prosecution pursuant to this chapter is finally determined, whichever is longer; or

(2) At least 4 years if the taxpayer is not a licensed gaming establishment or until any litigation or prosecution pursuant to this chapter is finally determined, whichever is longer; and

(c) Make the records available for inspection by the Board or the Department upon demand at reasonable times during regular business hours.

2. The Commission and the Department may adopt regulations pursuant to NRS 368A.140 specifying the types of records which must be kept to determine the amount of the liability of a taxpayer for the tax imposed by this chapter.

3. Any agreement that is entered into, modified or extended after January 1, 2004, for the lease, assignment or transfer of any premises upon which any activity subject to the tax imposed by this chapter is, or thereafter may be, conducted shall be deemed to include a provision that the taxpayer required to pay the tax must be allowed access to, upon demand, all books, records and financial papers held by the lessee, assignee or transferee which must be kept pursuant to this section. Any person conducting activities subject to the tax imposed by NRS 368A.200 who fails to maintain or disclose his or her records pursuant to this subsection is liable to the taxpayer for any penalty paid by the taxpayer for the late payment or nonpayment

of the tax caused by the failure to maintain or disclose records.

4. A person who violates any provision of this section is guilty of a misdemeanor.

(Added to NRS by 2003, 20th Special Session, 150; A 2005, 22nd Special Session, 141)

NRS 368A.170 Examination of records by Board or Department; payment of expenses of Board or Department for examination of records outside State.

1. To verify the accuracy of any report filed or, if no report is filed by a taxpayer, to determine the amount of tax required to be paid:

(a) The Board, or any person authorized in writing by the Board, may examine the books, papers and records of any licensed gaming establishment that may be liable for the tax imposed by this chapter.

(b) The Department, or any person authorized in writing by the Department, may examine the books, papers and records of any other person who may be liable for the tax imposed by this chapter.

2. Any person who may be liable for the tax imposed by this chapter and who keeps outside of this State any books, papers and records relating thereto shall pay to the Board or the Department an amount equal to the allowance provided for state officers and employees generally while traveling outside of the State for each day or fraction thereof during which an employee of the Board or the Department is engaged in examining those documents, plus any other actual expenses incurred by the employee while the employee is absent from his or her regular place of employment to examine those documents.

(Added to NRS by 2003, 20th Special Session, 151)

NRS 368A.180 Confidentiality of records and files of Board and Department.

1. Except as otherwise provided in this section and NRS 239.0115 and 360.250, the records and files of the Board and the Department concerning the administration of this chapter are confidential and privileged. The Board, the Department and any employee of the Board or the Department engaged in the administration of this chapter or charged with the custody of any such records or files shall not disclose any information obtained from the records or files of the Board or the Department or from any examination, investigation or hearing authorized by the provisions of this chapter. The Board, the Department and any employee of the Board or the Department may not be required to produce any of the records, files and information for the inspection of any person or for use in any action or proceeding.

2. The records and files of the Board and the Department concerning the administration of this chapter are not confidential and privileged in the following cases:

(a) Testimony by a member or employee of the Board or the Department and production of records, files and information on behalf of the Board or the Department or a taxpayer in any action or proceeding pursuant to the provisions of this chapter, if that testimony or the records, files or information, or the facts shown thereby, are directly involved in the action or proceeding.

(b) Delivery to a taxpayer or his or her authorized representative of a copy of any report or other document filed by the taxpayer pursuant to this chapter.

(c) Publication of statistics so classified as to prevent the identification of a particular person or document.

(d) Exchanges of information with the Internal Revenue Service in accordance with compacts made and provided for in such cases.

(e) Disclosure in confidence to the Governor or his or her agent in the exercise of the Governor's general supervisory powers, or to any person authorized to audit the accounts of the Board or the Department in pursuance of an audit, or to the Attorney General or other legal representative of the State in connection with an action or proceeding pursuant to this chapter, or to any agency of this or any other state charged with the administration or enforcement of laws relating to taxation.

(Added to NRS by 2003, 20th Special Session, 151; A 2007, 2093)

IMPOSITION AND COLLECTION

NRS 368A.200 Imposition and amount of tax; liability and reimbursement for payment; ticket for live entertainment must indicate whether tax is included in price of ticket; exemptions from tax.

1. Except as otherwise provided in this section, there is hereby imposed an excise tax on admission to any facility in this State where live entertainment is provided. If the live entertainment is provided at a facility with a maximum occupancy of:

(a) Less than 7,500 persons, the rate of the tax is 10 percent of the admission charge to the facility plus 10 percent of any amounts paid for food, refreshments and merchandise purchased at the facility.

(b) At least 7,500 persons, the rate of the tax is 5 percent of the admission charge to the facility.

2. Amounts paid for:

(a) Admission charges collected and retained by a nonprofit religious, charitable, fraternal or other organization that qualifies as a tax-exempt organization pursuant to 26 U.S.C. § 501(c), or by a nonprofit corporation organized or existing under the provisions of chapter 82 of NRS, are not taxable pursuant to this section.

(b) Gratuities directly or indirectly remitted to persons employed at a facility where live entertainment is provided or for service charges, including those imposed in connection with the use of credit cards or debit cards, which are collected and retained by persons other than the taxpayer are not taxable pursuant to this section.

3. A business entity that collects any amount that is taxable pursuant to subsection 1 is liable for the tax imposed, but is entitled to collect reimbursement from any person paying that amount.

4. Any ticket for live entertainment must state whether the tax imposed by this section is included in the price of the ticket. If the ticket does not include such a statement, the taxpayer shall pay the tax based on the face amount of the ticket.

5. The tax imposed by subsection 1 does not apply to:

(a) Live entertainment that this State is prohibited from taxing under the Constitution, laws or treaties of the United States or the Nevada Constitution.

(b) Live entertainment that is provided by or entirely for the benefit of a nonprofit religious, charitable, fraternal or other organization that qualifies as a tax-exempt organization pursuant to 26 U.S.C. § 501(c), or a nonprofit corporation organized or existing under the provisions of chapter 82 of NRS.

(c) Any boxing contest or exhibition governed by the provisions of chapter 467 of NRS.

(d) Live entertainment that is not provided at a licensed gaming establishment if the facility in which the live entertainment is provided has a maximum occupancy of less than 200 persons.

(e) Live entertainment that is provided at a licensed gaming establishment that is licensed for less than 51 slot machines, less than 6 games, or any combination of slot machines and games within those respective limits, if the facility in which the live entertainment is provided has a maximum occupancy of less than 200 persons.

(f) Merchandise sold outside the facility in which the live entertainment is provided, unless the purchase of the merchandise entitles the purchaser to admission to the entertainment.

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

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

(i) Live entertainment that is provided at a licensed gaming establishment at private meetings or dinners attended by members of a particular organization or by a casual assemblage if the purpose of the event is not primarily for entertainment.

(j) Live entertainment that is provided in the common area of a shopping mall, unless the entertainment is provided in a facility located within the mall.

(k) Food and product demonstrations provided at a shopping mall, a craft show or an establishment that sells grocery products, housewares, hardware or other supplies for the home.

(l) Live entertainment that is incidental to an amusement ride, a motion simulator or a similar digital, electronic, mechanical or electromechanical attraction. For the purposes of this paragraph, live entertainment shall be deemed to be incidental to an amusement ride, a motion simulator or a similar digital, electronic, mechanical or electromechanical attraction if the live entertainment is:

(1) Not the predominant element of the attraction; and

(2) Not the primary purpose for which the public rides, attends or otherwise participates in the attraction.

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

(n) An outdoor concert, unless the concert is provided on the premises of a licensed gaming establishment.

(o) Beginning July 1, 2007, race events scheduled at a race track in this State as a part of the National Association for Stock Car Auto Racing Nextel Cup Series, or its successor racing series, and all races associated therewith.

(p) Beginning July 1, 2007, a baseball contest, event or exhibition conducted by professional minor league baseball players at a stadium in this State.

(q) Live entertainment provided in a restaurant which is incidental to any other activities conducted in the restaurant or which only serves as ambience so long as there is no charge to the patrons for that entertainment.

6. The Commission may adopt regulations establishing a procedure whereby a taxpayer that is a licensed gaming establishment may request an exemption from the tax pursuant to paragraph (q) of subsection 5. The regulations must require the taxpayer to seek an administrative ruling from the Chair of the Board, provide a procedure for appealing that ruling to the Commission and further describe the forms of incidental or ambient entertainment exempted pursuant to that paragraph.

7. As used in this section, "maximum occupancy" means, in the following order of priority:

(a) The maximum occupancy of the facility in which live entertainment is provided, as determined by the State Fire Marshal or the local governmental agency that has the authority to determine the maximum occupancy of the facility;

(b) If such a maximum occupancy has not been determined, the maximum occupancy of the facility designated in any permit required to be obtained in order to provide the live entertainment; or

(c) If such a permit does not designate the maximum occupancy of the facility, the actual seating capacity of the facility in which the live entertainment is provided.

(Added to NRS by 2003, 20th Special Session, 147; A 2005, 2483; 2005, 22nd Special Session, 142; 2007, 3433)

NRS 368A.220 Filing of reports and payment of tax; deposit of amounts received in State General Fund.

1. Except as otherwise provided in this section:

(a) Each taxpayer who is a licensed gaming establishment shall file with the Board, on or before the 24th day of each month, a report showing the amount of all taxable receipts for the preceding month or the month in which the taxable events occurred. The report must be in a form prescribed by the Board.

(b) All other taxpayers shall file with the Department, on or before the last day of each month, a report showing the amount of all taxable receipts for the preceding month. The report must be in a form prescribed by the Department.

2. The Board or the Department, if it deems it necessary to ensure payment to or facilitate the collection by the State of the tax imposed by NRS 368A.200, may require reports to be filed not later than 10 days after the end of each calendar quarter.

3. Each report required to be filed by this section must be accompanied by the amount of the tax that is due for the period covered by the report.

4. The Board and the Department shall deposit all taxes, interest and penalties it receives pursuant to this chapter in the State Treasury for credit to the State General Fund.

(Added to NRS by 2003, 20th Special Session, 149; A 2005, 2484)

NRS 368A.230 Extension of time for payment; payment of interest during period of extension. Upon written application made before the date on which payment must be made, the Board or the Department may, for good cause, extend by 30 days the time within which a taxpayer is required to pay the tax imposed by this chapter. If the tax is paid during the period of extension, no penalty or late charge may be imposed for failure to pay at the time required, but the taxpayer shall

pay interest at the rate of 0.75 percent per month from the date on which the amount would have been due without the extension until the date of payment, unless otherwise provided in NRS 360.232 or 360.320.

(Added to NRS by 2003, 20th Special Session, 150; A 2011, 3144)

NRS 368A.240 Credit for amount of tax paid on account of certain charges taxpayer is unable to collect; violations.

1. If a taxpayer:

(a) Is unable to collect all or part of an admission charge or charges for food, refreshments and merchandise which were included in the taxable receipts reported for a previous reporting period; and

(b) Has taken a deduction on his or her federal income tax return pursuant to 26 U.S.C. § 166(a) for the amount which the taxpayer is unable to collect,

→ the taxpayer is entitled to receive a credit for the amount of tax paid on account of that uncollected amount. The credit may be used against the amount of tax that the taxpayer is subsequently required to pay pursuant to this chapter.

2. If the Internal Revenue Service disallows a deduction described in paragraph (b) of subsection 1 and the taxpayer claimed a credit on a return for a previous reporting period pursuant to subsection 1, the taxpayer shall include the amount of that credit in the amount of taxes reported pursuant to this chapter in the first return filed with the Board or the Department after the deduction is disallowed.

3. If a taxpayer collects all or part of an admission charge or charges for food, refreshments and merchandise for which the taxpayer claimed a credit on a return for a previous reporting period pursuant to subsection 2, the taxpayer shall include:

(a) The amount collected in the charges reported pursuant to paragraph (a) of subsection 1; and

(b) The tax payable on the amount collected in the amount of taxes reported,

→ in the first return filed with the Board or the Department after that collection.

4. Except as otherwise provided in subsection 5, upon determining that a taxpayer has filed a return which contains one or more violations of the provisions of this section, the Board or the Department shall:

(a) For the first return of any taxpayer that contains one or more violations, issue a letter of warning to the taxpayer which provides an explanation of the violation or violations contained in the return.

(b) For the first or second return, other than a return described in paragraph (a), in any calendar year which contains one or more violations, assess a penalty equal to the amount of the tax which was not reported.

(c) For the third and each subsequent return in any calendar year which contains one or more violations, assess a penalty of three times the amount of the tax which was not reported.

5. For the purposes of subsection 4, if the first violation of this section by any taxpayer was determined by the Board or the Department through an audit which covered more than one return of the taxpayer, the Board or the Department shall treat all returns which were determined through the same audit to contain a violation or violations in the manner provided in paragraph (a) of subsection 4.

(Added to NRS by 2003, 20th Special Session, 152)

OVERPAYMENTS AND REFUNDS

NRS 368A.250 Certification of excess amount collected; credit and refund. If the Department determines that any tax, penalty or interest it is required to collect has been paid more than once or has been erroneously or illegally collected or computed, the Department shall set forth that fact in its records and shall certify to the State Board of Examiners the amount collected in excess of the amount legally due and the person from whom it was collected or by whom it was paid. If approved by the State Board of Examiners, the excess amount collected or paid must, after being credited against any amount then due from the person in accordance with NRS 360.236, be refunded to the person or his or her successors in interest.

(Added to NRS by 2003, 20th Special Session, 153; A 2009, 66)

NRS 368A.260 Limitations on claims for refund or credit; form and contents of claim; failure to file claim constitutes waiver; service of notice of rejection of claim.

1. Except as otherwise provided in NRS 360.235 and 360.395:

(a) No refund may be allowed unless a claim for it is filed with:

(1) The Board, if the taxpayer is a licensed gaming establishment; or

(2) The Department, if the taxpayer is not a licensed gaming establishment.

→ A claim must be filed within 3 years after the last day of the month following the reporting period for which the overpayment was made.

(b) No credit may be allowed after the expiration of the period specified for filing claims for refund unless a claim for credit is filed with the Board or the Department within that period.

2. Each claim must be in writing and must state the specific grounds upon which the claim is founded.

3. Failure to file a claim within the time prescribed in this chapter constitutes a waiver of any demand against the State on account of overpayment.

4. Within 30 days after rejecting any claim in whole or in part, the Board or the Department shall serve notice of its action on the claimant in the manner prescribed for service of notice of a deficiency determination.

(Added to NRS by 2003, 20th Special Session, 153)

NRS 368A.270 Interest on overpayments; disallowance of interest.

1. Except as otherwise provided in this section and NRS 360.320, interest must be paid upon any overpayment of any amount of the tax imposed by this chapter in accordance with the provisions of NRS 368A.140.

2. If the overpayment is paid to the Department, the interest must be paid at the rate set forth in, and in accordance with the provisions of, NRS 360.2937.

3. If the Board or the Department determines that any overpayment has been made intentionally or by reason of carelessness, the Board or the Department shall not allow any interest on the overpayment.
(Added to NRS by 2003, 20th Special Session, 153; A 2007, 913)

NRS 368A.280 Injunction or other process to prevent collection of tax prohibited; filing of claim is condition precedent to maintaining action for refund.

1. No injunction, writ of mandate or other legal or equitable process may issue in any suit, action or proceeding in any court against this State or against any officer of the State to prevent or enjoin the collection under this chapter of the tax imposed by this chapter or any amount of tax, penalty or interest required to be collected.

2. No suit or proceeding may be maintained in any court for the recovery of any amount alleged to have been erroneously or illegally determined or collected unless a claim for refund or credit has been filed.

(Added to NRS by 2003, 20th Special Session, 154)

NRS 368A.290 Action for refund; Period for commencement; venue; waiver.

1. Within 90 days after a final decision upon a claim filed pursuant to this chapter is rendered by:

(a) The Commission, the claimant may bring an action against the Board on the grounds set forth in the claim.

(b) The Nevada Tax Commission, the claimant may bring an action against the Department on the grounds set forth in the claim.

2. An action brought pursuant to subsection 1 must be brought in a court of competent jurisdiction in Carson City, the county of this State where the claimant resides or maintains his or her principal place of business or a county in which any relevant proceedings were conducted by the Board or the Department, for the recovery of the whole or any part of the amount with respect to which the claim has been disallowed.

3. Failure to bring an action within the time specified constitutes a waiver of any demand against the State on account of alleged overpayments.

(Added to NRS by 2003, 20th Special Session, 154; A 2005, 22nd Special Session, 143)

NRS 368A.300 Rights of claimant upon failure of Board or Department to mail notice of action on claim; allocation of judgment for claimant.

1. If the Board fails to mail notice of action on a claim within 6 months after the claim is filed, the claimant may consider the claim disallowed and file an appeal with the Commission within 30 days after the last day of the 6-month period.

2. If the Department fails to mail notice of action on a claim within 6 months after the claim is filed, the claimant may consider the claim disallowed and file an appeal with the Nevada Tax Commission within 30 days after the last day of the 6-month period.

3. If the claimant is aggrieved by the decision of:

(a) The Commission rendered on appeal, the claimant may, within 90 days after the decision is rendered, bring an action against the Board on the grounds set forth in the claim for the recovery of the whole or any part of the amount claimed as an overpayment.

(b) The Nevada Tax Commission rendered on appeal, the claimant may, within 90 days after the decision is rendered, bring an action against the Department on the grounds set forth in the claim for the recovery of the whole or any part of the amount claimed as an overpayment.

4. If judgment is rendered for the plaintiff, the amount of the judgment must first be credited towards any tax due from the plaintiff.

5. The balance of the judgment must be refunded to the plaintiff.

(Added to NRS by 2003, 20th Special Session, 154; A 2005, 22nd Special Session, 143)

NRS 368A.310 Allowance of interest in judgment for amount illegally collected. In any judgment, interest must be allowed at the rate of 3 percent per annum upon the amount found to have been illegally collected from the date of payment of the amount to the date of allowance of credit on account of the judgment, or to a date preceding the date of the refund warrant by not more than 30 days. The date must be determined by the Board or the Department.

(Added to NRS by 2003, 20th Special Session, 154; A 2011, 3144)

NRS 368A.320 Standing to recover. A judgment may not be rendered in favor of the plaintiff in any action brought against the Board or the Department to recover any amount paid when the action is brought by or in the name of an assignee of the person paying the amount or by any person other than the person who paid the amount.

(Added to NRS by 2003, 20th Special Session, 155)

NRS 368A.330 Action for recovery of erroneous refund; Jurisdiction; venue; prosecution.

1. The Board or the Department may recover a refund or any part thereof which is erroneously made and any credit or part thereof which is erroneously allowed in an action brought in a court of competent jurisdiction in Carson City or Clark County in the name of the State of Nevada.

2. The action must be tried in Carson City or Clark County unless the court, with the consent of the Attorney General, orders a change of place of trial.

3. The Attorney General shall prosecute the action, and the provisions of NRS, the Nevada Rules of Civil Procedure and the Nevada Rules of Appellate Procedure relating to service of summons, pleadings, proofs, trials and appeals are applicable to the proceedings.

(Added to NRS by 2003, 20th Special Session, 155)

NRS 368A.340 Cancellation of illegal determination.

1. If any amount in excess of \$25 has been illegally determined, either by the person filing the return or by the Board or the Department, the Board or the Department shall certify this fact to the State Board of Examiners, and the latter shall authorize the cancellation of the amount upon the records of the Board or the Department.

2. If an amount not exceeding \$25 has been illegally determined, either by the person filing a return or by the Board or the Department, the Board or the Department, without certifying this fact to the State Board of Examiners, shall authorize the cancellation of the amount upon the records of the Board or the Department.

(Added to NRS by 2003, 20th Special Session, 155)

MISCELLANEOUS PROVISIONS

NRS 368A.350 Prohibited acts; penalty.

1. A person shall not:

(a) Make, cause to be made or permit to be made any false or fraudulent return or declaration or false statement in any report or declaration, with intent to defraud the State or to evade payment of the tax or any part of the tax imposed by this chapter.

(b) Make, cause to be made or permit to be made any false entry in books, records or accounts with intent to defraud the State or to evade the payment of the tax or any part of the tax imposed by this chapter.

(c) Keep, cause to be kept or permit to be kept more than one set of books, records or accounts with intent to defraud the State or to evade the payment of the tax or any part of the tax imposed by this chapter.

2. Any person who violates the provisions of subsection 1 is guilty of a gross misdemeanor.

(Added to NRS by 2003, 20th Special Session, 155)

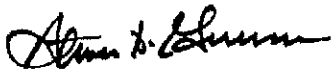
NRS 368A.360 Revocation of gaming license for failure to report, pay or truthfully account for tax. Any licensed gaming establishment liable for the payment of the tax imposed by NRS 368A.200 who willfully fails to report, pay or truthfully account for the tax is subject to the revocation of its gaming license by the Commission.

(Added to NRS by 2003, 20th Special Session, 155; A 2005, 22nd Special Session, 144)

NRS 368A.370 Remedies of State are cumulative. The remedies of the State provided for in this chapter are cumulative, and no action taken by the Commission, the Board, the Department or the Attorney General constitutes an election by the State to pursue any remedy to the exclusion of any other remedy for which provision is made in this chapter.

(Added to NRS by 2003, 20th Special Session, 153; A 2005, 22nd Special Session, 144)

DISTRICT COURT
CLARK COUNTY, NEVADA


CLERK OF THE COURT

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

Petitioners,

v.

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

Respondents.

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

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

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

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

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

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

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

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

5 **IT IS SO ORDERED.**

6 DATED this 24 day of January, 2012.
7

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10 DISTRICT COURT JUDGE
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LAMBROSE | BROWN

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August 13, 2013

Via U. S. Mail and Email

Hon. Dena C. Smith
Administrative Law Judge
Nevada Department of Taxation
1550 College Parkway, Suite 115
Carson City, NV 89706
Email: dcsmith@tax.state.nv.us

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

Dear Judge Smith:

Thank you for your email of August 7, 2013. The Taxpayers have been awaiting notice of their opportunity to present the additional evidence since the Nevada Tax Commission Hearing of June 22, 2012 and the Decision Letter of September 6, 2012 (the "Decision Letter"). Now that this matter has been assigned to Your Honor, I would like to address the proceeding.

Specifically, I would like to address the record before Your Honor, and how this matter will proceed.

The Record Before Your Honor

On August 7, 2013, Mr. Blake Docrr, Senior Deputy Attorney General, on behalf of the Department of Taxation contacted co-counsel for the Taxpayers Shafer & Associates, P.C.¹, to verify that the record transmitted to Your Honor is complete. Based on Mr.

¹ William H. Brown, Esq., of LAMBROSE BROWN, and Shafer & Associates, P.C., represent all Taxpayers herein with the exception of SHAC, LLC, which is represented by Mark Ferrario, Esq., of Greenberg Traurig, LLP.

Doerr's representations it is the Taxpayers understanding the record includes (and, if not, should include) without limitation the following documents:

- APPLICATION FOR LEAVE TO PRESENT ADDITIONAL EVIDENCE TO THE NEVADA TAX COMMISSION – Filed 09/28/2011
- OPPOSITION TO PETITIONERS' APPLICATION FOR LEAVE TO PRESENT ADDITIONAL EVIDENCE TO THE NEVADA TAX COMMISSION – filed 10/21/2011
- REPLY IN SUPPORT OF APPLICATION FOR LEAVE TO PRESENT ADDITIONAL EVIDENCE TO THE NEVADA TAX COMMISSION – filed 11/07/2011
- Transcript of Proceedings before the Honorable Jerry A. Weise, II, Department XXX, Friday, December 9, 2011, pp. 5:8-6:1 (emphasis added).
- ORDER GRANTING PLAINTIFFS' APPLICATION FOR LEAVE TO PRESENT ADDITIONAL EVIDENCE TO THE NEVADA TAX COMMISSION – Filed 02/01/2012 – Notice of Entry filed 02/02/2012
- Correspondence of William Brown to William Chisel, Executive Director, Nevada Tax Commission (enclosing CD containing documents DV00001-DV001510) – dated 04/26/2012
- Correspondence of William Brown to William Chisel, Executive Director, Nevada Tax Commission (NAC 360.135 Request for Subpoenas to Dino DiCianno, Michelle Jacobs, and Tesa Wanamaker) – Dated 06/14/2012
- Correspondence of David J. Pope, Senior Deputy Attorney General, to William Chisel, Executive Director, Nevada Tax Commission (Opposition to Request for Subpoenas) – Dated 06/15/2012
- Correspondence of William Brown to William Chisel, Executive Director, Nevada Tax Commission (Reply to Opposition to Request for Subpoenas) – dated 06/19/2012 (also misdated on its face as 04/26/2012)
- Correspondence of Vivienne Rakowsky, Deputy Attorney General, to William Chisel, Executive Director, Nevada Tax Commission (Sur-Reply Opposing Request for Subpoena) – Dated 06/20/2012
- NEVADA DEPARTMENT OF TAXATION'S BRIEF ON REMAND TO CONSIDER ADDITIONAL EVIDENCE – Dated 06/19/2012
- Transcript of the Nevada Tax Commission, Teleconferenced Open Meeting, June 25, 2012

- **DECISION LETTER** – dated September 6, 2012.

The last document (the Decision Letter) denies the Taxpayers request for discovery because the Taxpayers “waived” this right. Originally, the Taxpayers requested discovery from Judge Weise in their Application for Leave to Present Additional Evidence (the “Application”). As discussed below, both parties submitted proposed orders granting the Taxpayer’s Application: the Taxpayers’ order granted discovery; the Department’s did not. Judge Weise signed neither order.

Based on that fact, coupled with Judge Weise’s comments (again, discussed below), it appears Judge Weise intended for the Commission and thus, Your Honor, to determine whether discovery is appropriate. Accordingly, to fully inform Your Honor of how this issue was litigated before Judge Weise, the record should also include two letters the Department sent to Judge Weise objecting to Taxpayers’ proposed order and in support of the Department’s proposed order (which denied discovery, and which Judge Weise chose not to sign. Therefore, the record before Your Honor should also include:

- Correspondence of Vivienne Rakowsky, Deputy Attorney General, to Judge Weise – dated 01/18/2012 (Exhibit 1); and
- Correspondence of Vivienne Rakowsky, Deputy Attorney General, to Judge Weise – dated 01/19/2012 (Exhibit 2).

How the Matter Will Proceed Before Your Honor

Going forward, the Taxpayers’ understanding (based on Your Honor’s August 7, 2012, email) is that Your Honor will review the additional documents submitted for incorporation into the record (DV00001 – DV001510 (the “Additional Evidence”)). Then, Your Honor will amend, as appropriate, the Findings of Fact, Conclusions of Law, and Decision dated October 12, 2007; and either (a) reverse that Decision; or (b) affirm that Decision.

If that is in fact the case, the Taxpayers request both a hearing and the ability to conduct limited discovery.

The Taxpayers Request a Hearing, as Contemplated by the Commission, and Required by NRS 233B.121(1).

The Taxpayers expected an opportunity to present evidence to the Commission at the hearing on June 25, 2012 (or at a subsequent hearing, depending on how the Commission ruled upon the Taxpayers’ subpoena requests). However, the Commission did not allow the Taxpayers to present additional evidence at the hearing and instead decided the

Taxpayers would have the opportunity before Your Honor (which, of course, was agreeable to the Taxpayers).

This was resolved via a passing motion by Member Johnson proposing the Commission deny the Taxpayers' request for discovery,

"[a]nd ... following our practice of what we did in the Harrah's matter, remanding or taking that additional evidence, presenting it to the ALJ to review, *have the parties participate or make their presentation to the ALJ* and then have the ALJ come up with a proposed decision that either amend, modifies or sustains our original decision."²

Thus, the Commission remanded this matter for a proceeding in which the parties "participate or make their presentation to [Your Honor]." (Notably, this language is absent from the Decision Letter and, to that extent, the Decision Letter does not accurately reflect the Commission's decision.)

Also, this is consistent with what Nevada law requires. *See, e.g.,* NRS 233B.121(1) ("[i]n a contested case, all parties must be afforded an opportunity for hearing after reasonable notice.")

And finally, a hearing would simply make this process simpler and more efficient. Without a hearing, Your Honor will be required to review and analyze 1500 pages of additional materials. The Taxpayers would not presume to impose such a task on Your Honor when they have the ability to distill and clarify exactly what portions of these documents are relevant, and why. (Of course, the Department would, and should, have the same opportunity.) Thus, a hearing would simply result in a more efficient use and allocation of Your Honor's time and resources.

For all of these reasons, the Taxpayers seek a hearing before Your Honor to present the Additional Evidence.

Judge Weise Contemplated Your Honor Would Decide Discovery Issues.

As discussed above, the Taxpayers requested Judge Weise allow them to conduct discovery, i.e., to conduct depositions in the Application Judge Weise granted.

In support of their Application, the Taxpayers argued that prior to the Nevada Supreme Court's decision in *Southern California Edison v. First Judicial District*,³ *de novo* review and discovery was available in district court. The Taxpayers, like the taxpayers in *Edison*,

² Transcript of Nevada Tax Commission Hearing of June 25, 2012, pp. 97:7-21 (emphasis added).

³ 255 P.3d 231 (Nev. 2011).

were relying on the current state and understanding of the law including, at times, advice from the Department itself. The *Edison* court explained:

It appears that the Department has adopted a new policy for refund cases. The Department and the Attorney General's office admitted at oral argument that, in the past, they had advised some taxpayers who contested the denial of a refund that trial de novo before the district court would be available. They also admitted that there was no consistent position taken regarding whether a taxpayer is entitled to trial de novo or a petition for judicial review. In one case, an administrative law judge stated in a letter that: "[i]n the event that this matter is appealed to district court, it will be reviewed de novo and additional discovery will likely be allowed at that time." However, in its answer to the writ petition, the Department states that "going forward, [it] is challenging refund actions filed as civil actions in district court after an administrative proceeding."⁴

Thus, before Judge Weise the Taxpayers argued that they were analogous to the taxpayers in *Edison*, i.e., they filed a de novo action before Judge Gonzalez⁵ expecting to conduct discovery at the district court level based on the current state of the law. In turn, the Taxpayers argued, they were unfairly denied the right to conduct discovery when Judge Gonzalez (relying on *Edison*) dismissed their case (but allowed them to file it as a petition for judicial review before Judge Weise). As such, to achieve the same equitable result sought by the *Edison* court, the Taxpayers argued Judge Weise should allow them to present additional evidence and should allow them to conduct the discovery in the case before him they were denied in their case before Judge Gonzalez.

Judge Weise granted the Taxpayers' Application, noting:

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

⁴ *S. California Edison*, 255 P.3d at 234 (Nev. 2011), *reh'g denied* (Sept. 20, 2011).

⁵ *Deja Vu Showgirls of Las Vegas, L.L.C, et al. v. Nevada Department of Taxation, et al.* (Case No. A554970).

My inclination is that there is good cause and the evidence is material, and I would prefer that the tax commission review everything before I review it.⁶

After the hearing, both parties submitted proposed orders—the Taxpayers’ allowing discovery (citing *Edison*/equity principles⁷); the Department’s precluding it (citing the “waiver” argument the Commission appears to have later adopted.)⁸

Judge Weise entered neither proposed order. Instead, he entered an order that neither expressly permitted, nor expressly precluded, discovery.⁹ However, his comments (cited above) suggest he expected the Administrative Agency would decide if something should be in the record or not.¹⁰ Accordingly, the Taxpayers requested the Commission allow them to conduct discovery (depositions).

The Commission denied this request in its Decision Letter.¹¹ But the supporting findings of fact and conclusions of law are problematic for two reasons. First, they mirror the argument the Department made to Judge Weise, and which Judge Weise considered, and rejected, i.e., the taxpayers had an opportunity to conduct discovery and present the evidence in 2007, but did not.¹² And second, the Decision Letter endorses the Department’s Catch-22 argument: the district court must specifically consider evidence to determine it is material; the Taxpayer have not taken depositions; thus, the district court could not have found the depositions material or remanded to consider them.¹³

In sum, the Commission’s denial of the Taxpayers request to conduct depositions appears based on arguments and reasoning that Judge Weise considered, and rejected (a fact the Decision Letter omits.) Also omitted are Judge Weise’s comments indicating he expected the administrative agency (and by implication, Your Honor) would decide what the record should include. As such, for the sake of fairness, and in the interest of creating a complete factual record, the Taxpayers request Your

⁶ Transcript of Proceedings before the Honorable Jerry A. Weise, II, Department XXX, Friday, December 9, 2011, pp. 5:8-6:1 (emphasis added).

⁷ Exhibit D (p. 7) to Correspondence of Vivienne Rakowsky, Deputy Attorney General, to William Chisel, Executive Director, Nevada Tax Commission (Sur-Reply Opposing Request for Subpoena) – Dated 06/20/2012.

⁸ Correspondence of Vivienne Rakowsky, Deputy Attorney General, to Judge Weise – dated 01/18/2012 (Exhibit 1 hereto) (specifying that the only additional evidence to be considered was that attached to the Application to Present Additional Evidence).

⁹ Order of 2/1/2012.

¹⁰ Decision Letter, Findings of Fact ¶ 15.

¹¹ Decision Letter, Findings of Fact ¶¶ 6-17, Conclusions of Law ¶¶ 3-5.

¹² Compare Decision Letter, Findings of Fact ¶¶ 6-17, Conclusions of Law ¶¶ 3-5 with, generally, OPPOSITION TO PETITIONERS’ APPLICATION FOR LEAVE TO PRESENT ADDITIONAL EVIDENCE TO THE NEVADA TAX COMMISSION – filed 10/21/2011. Also, the Decision Letter omits the fact that the Department’s order was not entered either, repeats the procedural arguments over which the Application was granted, and decides that discovery was “waived.” Conclusions of Law ¶ 4.

¹³ Finding of Fact ¶ 13.

Honor issue deposition and/or hearing subpoenas for: Dino DiCianno, Michelle Jacobs, and Tessa Wannamaker.¹⁴

Conclusion

In conclusion, the Taxpayers seek a hearing and to conduct discovery. A hearing will bring focus and clarity to what may otherwise be a needlessly onerous task and will allow Your Honor to allocate time and resources more efficiently. Likewise, conducting discovery now will not only allow Your Honor the benefit of informative testimony, but is clearly preferable to the alternative: an appeal of Your Honor's decision to the Commission¹⁵, an appeal of the Commission's decision to Judge Weise, then requesting discovery from Judge Weise (again).

In short, the Taxpayers are asking Your Honor for a hearing and for the right to conduct discovery not to needlessly prolong or complicate this matter, but to shorten and simplify it. Thus, the Taxpayers respectfully request:

- (1) The opportunity to present the Additional Evidence at a hearing, and
- (2) The opportunity to depose Dino Dicianno; Michelle Jacobs; and Tessa Wannamaker.

Obviously, we welcome the opportunity to discuss these matters further with Your Honor at a status conference with the Department present.

Sincerely,

/s/ William Brown

LAMBROSE | BROWN

Enc: as noted.
cc: Client (via email; sans enclosure);
Brad Shafer, Esq. (via email and e-service);
Matt Hoffer, Esq. (via email and e-service);
Mark Ferrario, Esq. (via email and e-service);
David Pope, Esq. (via email and s-service);
Blake Doer, Esq. (via email and s-service);
Vivienne Rakowsky, Esq.; (via email and s-service); and
File

¹⁴ The basis for this request, and the relevance of the discovery and/or testimony, is set forth and discussed in the Correspondence of William Brown to William Chisel, Executive Director, Nevada Tax Commission (NAC 360.135 Request for Subpoenas to Dino DiCianno, Michelle Jacobs, and Tessa Wannamaker) – Dated 06/14/2012. This is already in the record and thus, for brevity's sake, is hereby adopted, not repeated.

¹⁵ Decision Letter, Decision ¶ 4.

EXHIBIT 1



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

CATHERINE CORTEZ MASTO
Attorney General

KEITH G. MUNRO
Assistant Attorney General

GREGORY M. SMITH
Chief of Staff

January 18, 2012

Honorable Jerry H. Wiese, II
301 East Clark Avenue
Las Vegas, Nevada 89101

Re: K-Kel, Inc. dba Spearmint Rhino, et al. v. State of Nevada, et al.
Case No. A-11-648894-J

Dear Judge Wiese:

The Petitioners and Respondents could not reach an agreement on a proposed Order from the December 9, 2011 hearing on the Petitioner's Application for Leave to Present Additional Evidence to the Nevada Tax Commission. Therefore, we are submitting the enclosed proposed Order along with Exhibit "A" taken from the transcript of the hearing, and anticipate that the Petitioners will also submit a proposed Order.

If you have any questions, please do not hesitate to contact me.

Sincerely,

CATHERINE CORTEZ MASTO
Attorney General

By:

Vivienne Rakowsky
Vivienne Rakowsky
Deputy Attorney General
(702) 486-3103

VR:tap

Enclosures

cc: William H. Brown, Esq.
Bradley J. Shafer, Esq.
Mark E. Ferrario, Esq.

1 **ORDR**
2 CATHERINE CORTEZ MASTO
3 Attorney General
4 DAVID J. POPE
5 Senior Deputy Attorney General
6 Nevada Bar No. 008617
7 BLAKE A. DOERR
8 Senior Deputy Attorney General
9 Nevada Bar No. 009001
10 VIVIENNE RAKOWSKY
11 Deputy Attorney General
12 Nevada Bar No. 009160
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14 Las Vegas, Nevada 89101
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17 dpope@ag.nv.gov
18 bdoerr@ag.nv.gov
19 vrakowsky@ag.nv.gov
20 Attorneys for Respondents

21 **DISTRICT COURT**
22 **CLARK COUNTY, NEVADA**

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

Petitioners,

v.

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

Respondents.

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

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

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

...

...

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

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

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

8 PETITIONERS' APPLICATION FOR LEAVE TO PRESENT ADDITIONAL EVIDENCE
9 TO THE NEVADA TAX COMMISSION is GRANTED SO THE ADMINISTRATIVE AGENCY
10 CAN LOOK AT THE ADDITIONAL EVIDENCE THAT HAS BEEN INCLUDED IN THE
11 PETITIONERS' MOVING PAPERS FOR THE SOLE PURPOSE TO EITHER AMEND THE
12 ADMINISTRATIVE FINDINGS OF FACT AND CONCLUSIONS OF LAW DATED OCTOBER
13 12, 2007, CHANGE THE DECISION, OR STATE THAT THE ORIGINAL DECISION
14 APPLIES. See Exhibit "A".

15 **IT IS SO ORDERED.**

16 DATED this ____ day of January, 2012.

17
18
19 DISTRICT COURT JUDGE

20
21 Respectfully submitted:

22 CATHERINE CORTEZ MASTO
23 Attorney General

24
25 By: *Vivienne Rakowsky*
26 VIVIENNE RAKOWSKY
27 Deputy Attorney General
28

EXHIBIT "A"

1 CASE NO. A648894

2 DEPT. NO. 30

3 DOCKET U

4

DISTRICT COURT

5

CLARK COUNTY, NEVADA

6

* * * * *

7 K-KEL, INC., d/b/a Spearmint)
Rhino Gentlemen's Club:)
8 OLYMPUS GARDEN, INC., d/b/a)
Olympic Garden; SHAC, LLC,)
9 d/b/a Sapphire; THE POWER)
COMPANY, INC., d/b/a Crazy)
10 Horse Too Gentlemen's Club; D.)
WESTWOOD, INC., d/b/a)
11 Treasures; D.I. FOOD &)
BEVERAGE OF LAS VEGAS, LLC,)
12 d/b/a Scores, DEJA VU)
SHOWGIRLS OF LAS EGAS, LLC)
13 d/b/a Deja vu; and LITTLE)
DARLINGS OF LAS VEGAS, LLC,)
14 d/b/a Little Darlings,)
15 Petitioners,)
16 vs.)
17 STATE OF NEVADA, ex rel.)
DEPARTMENT OF TAXATION and TAX)
18 COMMISSION,)
19 Respondents.)
20

21

REPORTER'S TRANSCRIPT OF PROCEEDINGS

22

BEFORE THE HONORABLE JERRY A. WIESE, II

23

DEPARTMENT XXX

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DATED FRIDAY, DECEMBER 9, 2011

25

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

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

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

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

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

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

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

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

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

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

18 MR. BROWN: That's correct.

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

24 THE COURT: Appreciate that.

25 MR. FERRARIO: Thanks, Your Honor.

EXHIBIT 2



STATE OF NEVADA
OFFICE OF THE ATTORNEY GENERAL

555 East Washington Avenue, Suite 3900
Las Vegas, Nevada 89101

CATHERINE CORTEZ MASTO
Attorney General

KEITH G. MUNRO
Assistant Attorney General

GREGORY M. SMITH
Chief of Staff

FAX TRANSMITTAL MEMORANDUM

TO : Honorable Jerry H. Wiese, II DATE: January 19, 2012

CC : William H. Brown, Esq.
Bradley J. Shafer, Esq.
Mark E. Ferrario, Esq.

FAX NO. : 368-1409 TIME FAXED:
474-1320
517-886-6565
792-9002

FROM : Vivienne Rakowsky PHONE: (702) 486-3426
Deputy Attorney General

SUBJECT : K-Kel, Inc. dba Spearmint Rhino, et al. v. State of Nevada, et al.
Case No. A-11-648894-J

REMARKS : To follow is my January 19, 2012 letter regarding the above-referenced matter.

This fax consists of 4 pages, including this cover sheet.

If you have any difficulties with this transmission, please telephone Traci Plotnick, Legal Secretary II at (702) 486-3897. Thank you.

RECEIVED
JAN 19 2012



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

CATHERINE CORTEZ MASTO
Attorney General

KEITH G. MUNRO
Assistant Attorney General

GREGORY M. SMITH
Chief of Staff

January 19, 2012

VIA FACSIMILE

Honorable Jerry H. Wiese, II
301 East Clark Avenue
Las Vegas, Nevada 89101

Re: K-Kel, Inc. dba Spearmint Rhino, et al. v. State of Nevada, et al.
Case No. A-11-648894-J

Dear Judge Wiese:

The purpose of this correspondence is to Object to the proposed Order submitted by the Petitioners. The Respondents believe that the scope of the Petitioners' proposed Order exceeds the scope of the Petitioners' Application for Leave to Present Additional Evidence to the Nevada Tax Commission, and includes findings of facts and conclusions of law for matters related to the substantive legal matters in the underlying case, that were not before this honorable Court at that time.

The Respondents hereby enclose a copy of an email sent to the Petitioners upon receiving their proposed Order, which details the Respondents Objections for your consideration.

If you have any questions, please do not hesitate to contact me.

Sincerely,

CATHERINE CORTEZ MASTO
Attorney General

By: Vivienne Rakowsky
Vivienne Rakowsky
Deputy Attorney General
(702) 486-3103

VR:tap

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

title

Vivienne Rakowsky

From: Vivienne Rakowsky
Sent: Wednesday, January 18, 2012 11:55 AM
To: 'Matt Hoffer'; Blake A. Doerr; David J. Pope
Cc: Brad Shafer; Will Brown; MarkFerrario [ferrario@gtlaw.com]; Brandon Roos
Subject: RE: K-Kel PJR - Proposed Order Granting Application for Leave

Thank you for sending us a copy of your proposed order for review. We have several objections to your draft.

Your motion was for Leave to present additional evidence to the Nevada Tax Commission. The purpose of the order is to reflect the Court's decision on your motion. However, you have included an argument in this case as if it is a findings of fact and conclusions of law, which clearly did not occur here. There is no reason to include your argument with regards to the constitutionality of the Tax. That issue is not before this court and was not discussed at the hearing. The Judge did not make any factual findings with respect to the merits of your case.

In addition, your statement on page 3, line 25 does not adequately reflect the facts. The hundreds of pages submitted by you to the Nevada Tax Commission in 2007 when the Commission gave you the opportunity to submit any documents that you wanted considered during the administrative process bears witness to that fact.

Your statement on page 3, line 26 additionally does not seem to adequately reflect the facts. The "limited constitutional" argument was not presented to this court, and the Respondents dispute that contention since all the constitutional issues that you have argued the last 5 years were addressed by the Commission in 2007.

In addition, this Court did not make any findings that are included in your Order such as page 3, line 28 "precedent established that administrative agencies were not the appropriate forum in which to litigate constitutional challenges." Precedent at the time established that the petitioners would be afforded a de novo judicial review ... and in fact established that the filing of a limited petition for judicial review was procedurally improper ... "the judicial redress statute contained in Chapter 368A appeared to provide for the filing of an original action..." and "the conduct and repetitions of the respondents in the federal proceedings lead Petitioners to believe that following an adverse ruling by the Commission, they could, in fact, initiate judicial redress by filing an original action for refund..."

Accordingly, your argument section -- labeled Facts and Procedural Background should be removed in its entirety. Page 2, lines 15 - 28, page 3, lines 1-28, page 4, lines 1-13 have no place in this Order.

Moreover, there is no reason for your analysis... your analysis section does not represent the findings or the transcript of this Hearing. The Court did not make any findings with respect to your challenge of the constitutionality based on Murdock or Minneapolis Star or Leathers. Accordingly, page 6, lines 1-9 and this section should also be removed.

The transcript additionally does not state that the Judge found inconsistencies in the law and in the Department as you contend on page 6, line 13, and this statement should likewise be removed.

Therefore, we are requesting that you remove the above sections from your proposed order so that the Order addresses the issues decided by the Court on December 9, 2011.

Yesterday, the Respondents sent a copy of the proposed Order that we had submitted to you last week to the Court along with a letter explaining that the parties were not able to agree on an Order and that both sides would submit a proposed order.

If you have any questions, please do not hesitate to contact me.

Sincerely,

1/19/2012

title

Vivienne

Vivienne Rakowsky, Deputy Attorney General
State of Nevada
Office of the Attorney General
555 East Washington Avenue, Suite 3900
Las Vegas, Nevada 89101
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From: Matt Hoffer [<mailto:Matt@bradshaferlaw.com>]
Sent: Wednesday, January 18, 2012 7:30 AM
To: Blake A. Doerr; David J. Pope; Vivienne Rakowsky
Cc: Brad Shafer; Will Brown; MarkFerrario [ferrariom@gtlaw.com]; Brandon Roos
Subject: K-Kel PJR - Proposed Order Granting Application for Leave

David, Blake, and Vivienne,

Enclosed please find Petitioners' Proposed Order Granting Application for Leave to Present Additional Evidence.

Please let me know any feedback you have, so that it can be taken into account prior to the proposed order being submitted.

Thank you for your attention.

Yours,

Matt Hoffer

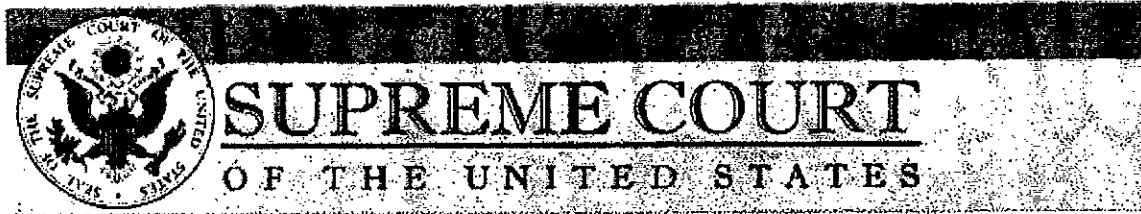
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01/19/2012 THU 13:13 [JOB NO. 7846] 0004

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No. 14-727

Title: SHAC, LLC, dba Sapphire, et al., Petitioners

v.

Nevada Department of Taxation, et al.

Docketed: December 19, 2014

Lower Ct: Supreme Court of Nevada

Case Nos.: (60037)

Decision Date: September 18, 2014

~~~Date~~~ ~~~~~Proceedings and Orders~~~~~

Dec 17 2014 Petition for a writ of certiorari filed. (Response due January 20, 2015)

Jan 13 2015 Waiver of right of respondents Nevada Department of Taxation, et al. to respond filed.

Jan 28 2015 DISTRIBUTED for Conference of February 20, 2015.

Feb 13 2015 Supplemental brief of petitioners SHAC, LLC, et al. filed. (Distributed)

Feb 23 2015 Petition DENIED.

~~~Name~~~~~ ~~~~~Address~~~~~ ~~~~~Phone~~~

**Attorneys for Petitioners:**

Bradley J. Shafer

Counsel of Record

Shafer &amp; Associates, P.C.

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Party name: SHAC, LLC, et al.

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Party name: Nevada Department of Taxation, et al.

February 23, 2015 | Version 2014.1

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**Supreme Court of the United States**