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Electronically Filed
Feb 14 2017 03:53 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

SUPREME COURT
OF THE STATE OF NEVADA

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

Supreme Court Docket: 69886

Appellants,
vs.

**Notice of Clarification and
Request to Correct Caption**

NEVADA DEPARTMENT OF
TAXATION, et al.,

Respondents.

Per this Court's February 7, 2016 order, the undersigned clarifies the following: First, the opening brief (filed October 27, 2016) *does* correctly identify the five parties on whose behalf the brief was filed. Second, this case's current caption does *not* accurately reflect the parties to this appeal, and should be corrected consonant with briefing.

1 There are only five appealing parties in this case (“Appellants”):
2 (1) K-KEL, INC., d/b/a Spearmint Rhino Gentlemen’s Club; (2)
3 OLYMPUS GARDEN, INC., d/b/a Olympic Garden; (3) SHAC, LLC,
4 d/b/a Sapphire; (4) D. WESTWOOD, INC., d/b/a Treasures; and (5) THE
5 POWER COMPANY, INC., dba Crazy Horse Too Gentlemen’s Club.
6
7 This is consistent with the district court order appealed from. *See*
8 Amended Order, 2 (filed 6-23-16) (here, **Ex. 1**). That order—as opposed
9 to the order initially appealed from—was identified in Appellants
10 Amended Notice of Appeal (filed 6-24-16).

11 The confusion stems from the original order appealed from (filed
12 1-15-16), which did not accurately identify the parties remaining in the
13 case at the conclusion of the district court proceeding. That order, for
14 example, failed to reflect that Deja Vu Showgirls of Las Vegas LLC, and
15 Little Darlings of Las Vegas LLC had been voluntarily dismissed with
16 prejudice.¹ Because this appeal’s caption was taken from that order, and
17 it is similarly inaccurate and thus reflects, for example, that Déjà Vu
18 and Little Darlings are parties to this appeal when they are not.

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27 ¹ Likewise, the order did not include as a petitioner THE POWER
28 COMPANY, INC., dba Crazy Horse Too Gentlemen’s Club, even though
 it should have.

1 When Appellants obtained an amended district court order
2 clarifying the parties—e.g., removing Deja Vu and Little Darlings—
3 there was no corresponding request to update this case’s caption, which
4 thus reflected the parties in the original (incorrect) district court order.
5
6 See Notice of Obtaining Final Judgement (filed 6-28-16).
7

8 That oversight resulted in incongruity between the parties in the
9 caption, and the parties filing an opening brief, and so it
10 understandably appeared that, for example, Deja Vu and Little
11 Darlings, despite being appellants, had simply neglected to file an
12 opening brief. Likewise, it appeared that Power Company Inc. dba
13 Crazy Horse Too, although not an appellant, had filed an opening brief.
14
15 The undersigned could have, and should have, exercised more
16 forethought to prevent this confusion.
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20 To clarify, the opening brief was filed on behalf of all five
21 Appellants: (1) K-KEL, INC., d/b/a Spearmint Rhino Gentlemen’s Club;
22 (2) OLYMPUS GARDEN, INC., d/b/a Olympic Garden; (3) SHAC, LLC,
23 d/b/a Sapphire; (4) D. WESTWOOD, INC., d/b/a Treasures; and (5) THE
24 POWER COMPANY, INC., dba Crazy Horse Too Gentlemen’s Club. The
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1 case caption should be updated and amended to reflect that these are
2 the only five Appellants in this case.

3
4 Date: February 13, 2017.

5 Respectfully submitted,

6
7 LAMBROSE | BROWN

8 By: /s/ William H. Brown

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CERTIFICATE OF SERVICE

I certify that on February 14, 2017, I filed and served a copy of **Notice of Clarification and Request to Correct Caption** via the Supreme Court of Nevada's e-filing and e-service system to the following address(es):

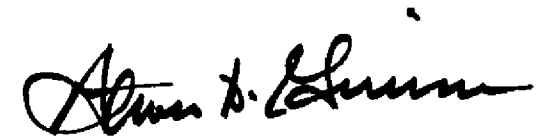
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EXHIBIT 1



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24 [Counsel continued, following page]

25 DISTRICT COURT
26 CLARK COUNTY, NEVADA

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

Petitioners,

vs.

NEVADA DEPARTMENT OF
TAXATION, et al.,

Respondents.

Case No.: A-11-648894-J
Consolidated with A-14-697515-J
Dept. 30

**Notice of Entry of Amended
Order Denying Judicial Review
of Administrative Decision**

1 [counsel continued]

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11 *VEGAS, LLC, d/b/a/ Déjà vu, and*
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13 *LLC, d/b/a Little Darlings*

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24
25 **Notice of Entry of Amended Order Denying Judicial Review of**
26 **Administrative Decision**

27 Please take notice that an amended order denying judicial review of
28 administrative decision was entered on June 23, 2016, a copy of which is
attached hereto.

Dated: June 24, 2016

By: /s/ William H. Brown
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Attorney for Petitioner K-Kel, Inc.

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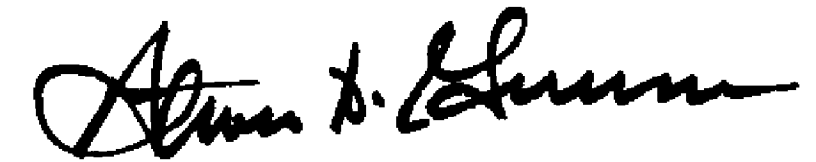
CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Notice of Entry of Amended Order Denying Judicial Review of Administrative Decision** was filed with the Clark County Nevada District Court by way of the Court's electronic filing system, the operation of which will cause service upon:

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Dated: June 24, 2016

/s/ Deidra Hufnagle
An employee of
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DISTRICT COURT

CLARK COUNTY, NEVADA

K-KEL, INC., d/b/a Spearmint Rhino
Gentlemen's Club; OLYMPUS GARDEN,
INC., d/b/a Olympic Garden; SHAC, L.L.C.,
d/b/a Sapphire; D. WESTWOOD, INC.,
d/b/a Treasures; 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

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

AMENDED ORDER DENYING JUDICIAL REVIEW OF ADMINISTRATIVE DECISION

Before the Court are the Consolidated Petitions for Judicial Review of the decisions by the Nevada Tax Commission (hereinafter "Commission"). Originally, eight Petitioners (local erotic dance establishments) were named: K-KEL, INC., dba Spearmint Rhino Gentlemen's Club ("Spearmint Rhino"); OLYMPUS GARDEN, INC., dba Olympic Garden ("Olympic

1 Garden"); SHAC, L.L.C. dba Sapphire ("Sapphire"); THE POWER COMPANY, INC., dba
2 Crazy Horse Too Gentlemen's Club ("Crazy Horse Too"); D. WESTWOOD, INC., dba
3 Treasures ("Treasures"); D.I. FOOD & BEVERAGE OF LAS VEGAS, INC., dba Scores
4 ("Scores"); DEJA VU SHOWGIRLS OF LAS VEGAS, LLC, dba Déjà Vu ("Deja Vu"); and
5 LITTLE DARLINGS OF LAS VEGAS, LLC, dba Little Darlings ("Little Darlings").

6 Pursuant to the parties' stipulation, the claims of Petitioners Déjà Vu, Little Darlings,
7 and Scores are hereby dismissed with prejudice, leaving the claims of Petitioners, K-KEL,
8 INC., d/b/a Spearmint Rhino Gentlemen s Club, OLYMPUS GARDEN, INC., d/b/a Olympic
9 Garden, SHAC, LLC d/b/a Sapphire, D. WESTWOOD, INC., d/b/a Treasures, and THE
10 POWER COMPANY INC. d/b/a Crazy Horse Too (collectively, "Petitioners").

11 Both sides filed briefs, and the Court heard oral argument. The Petitioners were
12 represented by William Brown Esq., Mark Ferrario, Esq. and Bradley Shafer, Esq.(admitted
13 Pro Hac Vice). The Nevada Tax Commission was represented by Vivienne Rakowsky,
14 Deputy Attorney General and David Pope, Senior Deputy Attorney General.

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

19 The procedural history of this matter dates back to a decision by the Nevada Tax
20 Commission dated October 12, 2007 upholding the Live Entertainment Tax ("NLET")(PJR-11-
21 648894-J), a remand in January 2012 to allow the Commission to review additional evidence
22 and determine whether it would amend, affirm or reverse its 2007 decision and re-open
23 discovery to allow depositions (PJR 14-697515-J), and supplemental briefing to determine
24 whether the standard of review for the NLET changed based on the U.S. Supreme Court
25 decision in Reed v. Town of Gilbert, Arizona, 135 S. Ct. 2218 (2015).

26 Based upon the pleadings and papers on file, after hearing oral argument, and good
27 cause appearing, the Court renders the following findings of fact:
28

1. The parties essentially agreed to the procedural history and underlying factual background of this case.
2. The three issues before this Court were:
 - a. Petition for Judicial Review of the Nevada Tax Commission October 12, 2007 decision denying Petitioners requests for refunds of NLET paid, and finding that the NLET does not violate the U.S. Constitution or Nevada Constitution, is not targeted at gentlemen's clubs, and is not a tax based on the content of the taxpayer's message.
 - b. Petition for Judicial Review of the Nevada Tax Commission's decision dated September 6, 2012 finding that discovery would not be reopened to allow depositions, and decision on February 12, 2014 upholding the Hearing Officers Hearing on Remand finding that the more than 1,500 pages of supplemental materials were insufficient to cause the Commission's October 12, 2007 decision to be reversed or amended.
 - c. Petitioner's supplemental briefing claiming that the U.S. Supreme Court decision in Reed v. Gilbert Arizona changed the standard of review for determining the constitutionality of the NLET to strict scrutiny.
3. The Petitioners made the following arguments:
 - a. That the NLET is unconstitutional because it is a direct tax on First Amendment activities and is statutorily gerrymandered to apply only to a narrowly defined group of speakers, and in doing so discriminates based on the content of the entertainment;
 - b. The Commission should have permitted Petitioners to conduct the requested depositions in order to shed further light on the drafting and amending of the NLET and to identify the purpose for each and every one of the exceptions to the definition of live entertainment set forth in NRS 368A; and
 - c. Based on the recent ruling in Reed v. Town of Gilbert, Arizona, __U.S. __, 135

1 S. Ct. 2218 (2015), strict scrutiny applies, and the NLET does not pass the
2 constitutional muster because there is a differentiation of the application of a
3 law based upon the content of the expression.

4 4. The Department made the following arguments:

- 5 a. That the NLET is Constitutional revenue raising tax and not a tax on a First
6 Amendment right, and the tax has not been applied to the Petitioners in an
7 unconstitutional manner. The Nevada Supreme Court found that the NLET is
8 constitutional on its face in Deja Vu Showgirls v. Department of Taxation, 334
9 P.3d 392 (2014). In that case, the Nevada Supreme Court established that
10 the standard of review for the NLET is a rational basis analysis, because it
11 does not regulate live entertainment, it does not discriminate on the basis of
12 the taxpayers' speech, and it does not target a small group of speakers or
13 threaten to suppress viewpoints. Deja vu, 334 P.3d at 401;
- 14 b. That the Commission's decision on remand to deny depositions should be
15 upheld because, while NRS 233B.131(2) provides for additional evidence
16 under very specific conditions, it does not provide for additional evidence
17 after receiving an adverse decision. Moreover, the information that the
18 Petitioners were seeking was available in 2007. On January 24, 2012, the
19 Court remanded the case to the Commission for review of evidence, not to
20 allow additional evidence to be gathered; and
- 21 c. The standard used by the court to review a tax matter has been in place
22 more than 125 years and has not changed on the basis of a sign ordinance
23 case (Reed). The Court in Deja Vu had already ruled that heightened
24 scrutiny does not apply to tax classification unless the classification is hostile
25 and oppressive discrimination against particular person and classes.

26 The Court made the following conclusions of law:

- 27 5. NRS 233B.135 indicates that the Court shall not substitute its judgment for that of
28

- 1 the agency as to the weight of evidence on a question of fact. NRS 233B.135(3).
- 2 6. Pursuant to NRS 233B.135(3), the Court can remand, affirm, or set aside the
- 3 Commission's decision if the substantial rights of the petitioner have been
- 4 prejudiced because the agency's decision is in violation of statutory provisions, in
- 5 excess of the statutory authority of the agency, made upon unlawful procedure,
- 6 affected by other error of law, clearly erroneous, or an arbitrary or capricious abuse
- 7 of discretion.
- 8 7. The Commission did not find Petitioner's argument with respect to reopening
- 9 discovery to allow depositions meritorious because all the information that
- 10 Petitioners sought recently was available prior to 2007, and the information sought
- 11 was consistently determined to be irrelevant. The Commission's decision did not
- 12 violate the constitution or a statute, was not in excess of its statutory authority, was
- 13 not made upon unlawful procedure, was not affected by other error of law, was not
- 14 clearly erroneous, and was not arbitrary, capricious, or an abuse of discretion.
- 15 These findings of fact by the Commission may not be disturbed by this Court. The
- 16 Commission's determination with regard to the request to take depositions is hereby
- 17 AFFIRMED.
- 18 8. The construction of a statute is a question of law, and therefore, independent review
- 19 is appropriate. However, the court will not readily disturb an administrative
- 20 interpretation of statutory language. City of Reno v. Reno Police Protective Ass'n.,
- 21 118 Nev. 889, 900 (2002). The Commission's determination that the NLET is
- 22 constitutional as applied to the Petitioners is supported by the fact that the Nevada
- 23 Supreme Court has determined that the NLET does not regulate live entertainment
- 24 and is simply a tax on a business transaction, and not a tax on the expressive
- 25 activity taking place within the facility.
- 26 9. Petitioners have failed to meet their burden to show that the NLET has attacked the
- 27 content of their message.
- 28

1 10. The Commission did not exceed their authority by concluding that NLET, as applied
2 to Petitioners, is not an impermissible differential tax, and does not place a burden
3 on a narrowly defined group of speakers.

4 11. Reed v Town of Gilbert, Arizona, 135 U.S. 2218 (2015), does not apply to tax
5 classification unless the classification is hostile and oppressive discrimination
6 against particular person and classes. This Court does not find any evidence here
7 that NLET triggers the application of Reed.

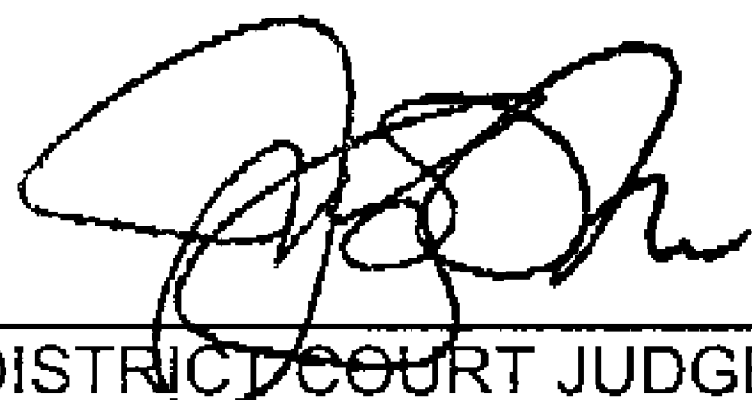
8 12. The Commission's decision that NLET is not a content-based tax on first
9 amendment activity, but a legitimate tax scheme, evenly applied, and used to raise
10 state revenue shall not be disturbed.

11 **ORDER**

12 Based upon the foregoing, this Court Orders that there was substantial evidence
13 supporting the Commission's decisions and that the Commission's decisions did not violate
14 NRS 233B.135, and consequently, the Commission's decisions are hereby AFFIRMED. As to
15 all remaining Petitioners, the Petition for Judicial Review is DENIED.

16 **IT IS SO ORDERED**

17 DATED this 22 day of June, 2016.

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DISTRICT COURT JUDGE

22 Respectfully Submitted By:

23 /s/ Vivienne Rakowsky

24 VIVENNE RAKOWSKY
25 Deputy Attorney General
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27
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