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TESTIMONY TO THE NEVADA STATE LEGISLATURE ASSEMBLY JUDICIARY COMMITTEE
SENATE BILL 134 (REPEAL OF NEVADA REVISED STATUTE 463.3669)

Remarks of Bob Faiss
Adjunct Professor, William S. Boyd School of Law
University of Nevada, Las Vegas
Before the Assembly judiciary Committee
In support of S. B. 134
May 6, 2003

Chairman Anderson, we thank you for the courtesies you have extended in connection with this bill and for your continuing support of gaming legal education in Nevada. Members of the Committee, I am Bob Faiss of the firm of Lionel Sawyer & Collins, appearing in my capacity as Adjunct Professor of the William S. Boyd School of Law at UNLV. My partner Tony Cabot and I, under the direction of Dean Richard Morgan, teach gaming law and policy, with the assistance of our associate, Joe Cain.

One of the goals Dean Morgan set for us was not just to teach our students about gaming law and policy but also to provide the opportunity for them to influence creation of law and policy.

Accordingly, one of the class assignments this school year was to identify and bring forward a necessary amendment to the Nevada Gaming Control Act. The students identified and wrote that amendment, which appears before you this morning as Senate Bill 134.

It is necessary for me to say we are not here as official spokespersons of the law school. Our remarks are as individuals.

This event has a special meaning for us because your Vice Chairman, John Ocegüera, is a stellar member of the institution we represent.

We thank Senator Terry Care for making introduction of S.B. 134 possible and for his guidance in the matter.

We also express appreciation for his cooperation and support Chairman Dennis Neilander of the Gaming Control Board.

ASSEMBLY JUDICIARY

DATE: 5/6/03 ROOM 3138 EXHIBIT F

SUBMITTED BY: BOB FAISS

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One thing our students learn early in the year is that the primary forces shaping Nevada gaming law and policy over the years are the Nevada Assembly and Senate Judiciary Committees. Other law classes study how courts have interpreted law and policy. Our class looks at the creation of law and policy in the Legislature and those who have been instrumental in creating it. Other law students learn about judges; our students learn about the members of the Assembly and Senate Judiciary Committees.

I want to submit my remarks for the record with a list of the student's names so that they will be a lasting part of legislative history. In addition to the witness team present, they are Kevin Bumstead, Anthony Celeste, Zachary Fritz, Edward McGaw, Nathan Miller and Shannon Okada, most of whom are present in support of their classmates. I would also like it noted that our faculty advisor is with us. He is Professor Steve Johnson, one of the leading authorities in the U.S. on tax law.

We are pleased to have with us as a resource witness Mark Lerner, who is a former deputy attorney general for gaming and the Senior Vice President for Law and Government and General Counsel for Alliance Gaming Corporation, a leading manufacturer of gaming devices.

We asked Mr. Lerner to join us just in case the Committee has some general questions in the field of wide-area progressive slot machines and periodic jackpot payments that may be beyond the research conducted by our student witnesses.

Our student witnesses today have worked hard in preparation for today. I believe you will find their testimony to be succinct, to the point and persuasive.

The captain of our legislative team is Jeremy Aguero, who has been named to Who's Who in Southern Nevada Business and recognized as one of the Top Business People Under 40 in Las Vegas. He is a principal of Applied Analysis. Mr. Aguero was the principal analyst for the Governor's Task Force on Tax Policy and is co-author of its 1,200-page report. He will be our closing witness and will coordinate the responses to any questions you may have.

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Our second witness will be Douglas Walker, who holds a Master's Degree in Business Administration from UNLV. He is a former adjunct professor at the UNLV College of Hotel Administration. A 21-year executive in the gaming industry, he serves as Operations Controller of the Mirage Casino Hotel.

It is my pleasure to introduce our opening witness, a former law clerk in the 8th Judicial District Court, Jennifer Stallard.

Jennifer Stallard

Mr. Chairman, members of the Assembly Judiciary Committee, as Professor Faiss mentioned, my name is Jennifer Stallard and I feel it is both a pleasure and a privilege to have the opportunity to testify here this morning. I thank you. I will outline Senate Bill 134 would accomplish.

Senate Bill 134 seeks to repeal NRS 463.3669, which prohibits a gaming patron's from assigning periodic payments of mega slot machine jackpots, with the exception of the estate of a deceased patron or a divorce settlement. This statute has not been necessary since the 1998 adaptation of Internal Revenue Code § 451 (h), which eliminated federal income tax liability for patrons who had the option of assigning jackpot winnings.

NRS 463.3669 also conflicts with Nevada's 1999 adoption of Uniform Commercial Code provisions. By prohibiting the assignment of periodic payments, NRS 463.3669 is contrary to NRS 104.9406. NRS 104.9406, among other things, is concerned with restrictions on assignment of accounts, which include gaming winnings. Subsection (6) specifically renders any rule, statute, or regulation prohibiting, restricting, or requiring governmental consent for assignment ineffective. This conflict with the UCC has impliedly repealed NRS 463.3669 by invalidating the prohibition on assignment.

My colleagues, Jeremy Aguero and Doug Walker will address the following three issues in their comments:

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1. *What gave rise to NRS 463.3669 in 1995?*
2. *What changes have occurred since 1995, which have eliminated the need for NRS 463.3669?*
3. *Why is Senate Bill 134 necessary to eliminate a conflict of existing laws?*

I will now turn the testimony over to Jeremy Aguero, who along with Doug Walker will address what gave rise to NRS 463.3669 as well as the two compelling reasons for repealing it. We will then be happy to answer any questions you may have.

Jeremy Aguero

Mr. Chairman, members of the Assembly Judiciary Committee, as Jennifer mentioned, my name is Jeremy Aguero. I would also like to extend my thanks to the Chairman for allowing us the opportunity to testify before you today. In my comments, I will attempt to briefly address what gave rise to NRS 463.3669 and what changes have occurred since 1995, eliminating the need for NRS 463.3669.

WHAT GAVE RISE TO NRS 463.3669?

The intent of NRS 463.3669 was to protect jackpot winners against incurring unintended federal income tax consequences when receiving installment payments over an extended period (e.g., 20 years). Perhaps the easiest way to demonstrate the problem is through an example of what might have happened to a hypothetical jackpot winner prior to NRS 463.3669's enactment.

Suppose a patron won a \$10 million jackpot payable in 20 annual installments. If this right were assignable, the patron could be deemed to have had "constructive receipt" of the present value of the entire \$10 million. Thus, although the patron would receive only \$500,000 in the first year, that same patron would potentially have federal income tax liability of \$2 million.

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Recognizing the state had an interest in protecting casino patrons from facing this dilemma; NRS 463.3669 was passed in 1995. The theory of “constructive receipt” turns on the concept of “unqualified demand.” By eliminating the patron’s right to assign her payments to a third party demand to the funds became limited or “qualified,” and thus, no unintended tax liability was created. Similar statutes were passed in a number of states where lottery prize winners were facing similar problems.

WHAT CHANGES HAVE OCCURRED SINCE 1995, WHICH HAVE ELIMINATED THE NEED FOR NRS 463.3669?

The tenuous nature of this distinction, which effectively elevated form over substance, was, at least part, a driving force behind the development of Internal Revenue Code § 451 (h) in 1998. Section 451 (h), which was an element of the 1998 Tax and Trade Relief Extension Act, provides that a jackpot winner who is granted the option of choosing between a lump sum or periodic payments is not required to include the winnings as gross income merely because the option to take a lump sum exists.

In a 2000 Private Letter Ruling, the Service noted that § 451 (h) is not affected by the mere presence of a state law permitting a prize winner to assign award payments. The IRS explained that “constructive receipt” requires the amount credited to the winners account be subject to unqualified demand. Where a winner’s right to receive payments are not accelerated or otherwise altered by state law, a jackpot is not subject to “unqualified demand” and no federal income tax liability follows.

If a state law allowing the assignment of winnings did not trigger the unintended federal income tax consequences giving rise to NRS 463.3669, the repeal of a statute prohibiting such assignments would clearly not lead to the emergence of such consequences. Thus, NRS 463.3669 has served its purpose well, but is no longer required. I will now turn the testimony over to Doug Walker, who will analyze the conflict of laws that exists between NRS 463.3669 and the Uniform Commercial Code.

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Doug Walker

Mr. Chairman, members of the Assembly Judiciary Committee, as Jeremy mentioned, my name is Doug Walker and I feel privileged to have the opportunity to testify here this morning. I thank you. I will explain the conflict of laws that Senate Bill 134 eliminates and conclude our testimony with some closing remarks.

WHY IS SENATE BILL 134 NECESSARY TO ELIMINATE A CONFLICT OF EXISTING LAWS?

As Jennifer noted earlier, a second reason supporting the repeal of NRS 463.3669 is that it currently conflicts with NRS 104.9406. NRS 104.9406, which was adopted in 1999, updated Nevada's statutes to reflect the most current provisions of the Uniform Commercial Code. Subsection (6) of the statute, however, provides that any law prohibiting the assignment of an "account" is void to the extent of the prohibition. The definition of "account" includes gaming winnings; and thus, any law prohibiting the assignment of gaming winnings is void.

NRS 463.3669 prohibits the assignment of gaming winnings on its face. Thus, not only is the statute no longer required it also stands opposed to a more recently adopted statute. While this conflict may invalidate NRS 463.3669, it certainly adds confusion and uncertainty to Nevada law.

For this and the other reasons addressed by my colleagues, Mr. Chairman, we respectfully recommend that the Nevada State Legislature repeal NRS 463.3669.

Mr. Chairman, with your indulgence, I would like to conclude by taking a moment to thank the Legislative Counsel Bureau's Research Division, which was remarkably helpful in support of our efforts. Additionally, I would also like to publicly thank Professors Bob Faiss and Tony Cabot. These two gentlemen, who I think we all recognize as being instrumental in the development and refinement of a modern gaming law, very clearly demonstrate a long-run commitment to our community by taking time out of their extraordinary schedules to impart the value of their wisdom and experience on a generation of Nevadans who aspire to work along side

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them, and, hopefully, will do an equal service to our great state. I would like to thank Mr. Lerner. His counsel and insights were of great benefit to this process. Finally, I would like to thank Dean Richard Morgan, who epitomizes the dean of a law school, for encouraging us to pursue this type of practical application of the law.

Mr. Chairman, with that, we conclude our presentation. We thank you again for your time, and we would be pleased to address any comments or question the Committee may have.