**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**
**IN AND FOR NEW CASTLE COUNTY**

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| **STATE OF DELAWARE**, | ) | |
| | ) | |
| Plaintiff, | ) | I.D. NOS. 0211005775 |
| | ) | 0211003661 |
| v. | ) | 0211005782 |
| | ) | 0211005796 |
| **FELIX CARREA, PETER CARREA, THOMAS CARRAFA and LEX PAC, INC.**, | ) | |
| | ) | |
| Defendants. | ) | |

Submitted: April 19, 2004
Decided: August 30, 2004

**MEMORANDUM OPINION**

Defendants' Motion to Dismiss - Denied
Defendants' Motion to Suppress - Denied

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**CARPENTER, J.**

## I. Introduction

Defendants have filed a Motion to Dismiss the criminal charges filed against them on the grounds that the statute they have been charged with violating, 24 *Del. C.* § 1601 *et. seq.*, is unconstitutional. Each defendant has been charged with one count of Operating an Adult Entertainment Establishment without a License and with one count of Conspiracy, Third Degree. In addition, the Defendants have filed a Motion to Suppress arguing that the State's unreasonable detention of legally seized equipment requires that the evidence be suppressed. For the reasons set forth below, both motions are DENIED.

## II. Background

The motions presently before this Court arise from charges filed by the State of Delaware ("State") against the corporate entity Lex Pac, Inc., Felix Carrea, Peter Carrea and Thomas Carrafa (collectively "Defendants") resulting from alleged violations of 24 *Del. C.* Ch. 16, also known as the Adult Entertainment Establishments Act ("Act"). The Defendants own and operate an establishment known as "Hak's". Both parties agree that Hak's operates as a gentleman's club offering live entertainment consisting of female exotic dancing. The State alleges that since June of 2001 the Defendants have been operating Hak's as an adult entertainment establishment without a license. In fact, the Defendants have never

even applied for a license. The Defendants argue that the restrictions of the Adult Entertainment Establishments Act are not applicable to their business.

## III. Procedural Posture

The Defendants filed their motion to dismiss on February 5, 2003. The State filed their answer on May 9, 2003. A hearing was held on May 16, 2003 where both parties agreed that a decision regarding the motion to dismiss should be stayed pending the outcome of this Court's decisions on similar motions to dismiss in the case of *State v. Fantasia.*[1] At the Court's request, both parties submitted additional documents to the Court following the issuance of the *Fantasia* decisions regarding the similarities and dissimilarities of the issues and arguments in the present case and those addressed and decided in the *Fantasia* opinions.[2] Testimony was taken at the May 16, 2003 hearing regarding the motion to suppress.

## IV. Motion to Dismiss

The Defendants present four constitutional arguments in their motion to dismiss. First, the Defendants argue that the Act is overbroad for four reasons: (1) it attempts to restrict the type and extent of clothing that female dancers wear by

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[1] 2004 WL 483649 (Del. Super.); 2004 WL 440220 (Del. Super.).

[2] The Defendants have asked the Court to continue the stay of this litigation pending the decision by the Supreme Court and are willing to waive their right to a speedy trial. The State has asked the Court to decide the Defendants' motion.

requiring their " buttocks" and " breasts below the top of the areola" to be " completely opaquely covered"[3]; (2) it creates an overly broad definition of " specific sexual activities"[4]; (3) it limits a woman' s right to express herself; and (4) it equates a woman' s freedom to express herself through dance, dress attire, or a combination of the two as " specific sexual activities."[5] Second, the Defendants' contend that § 1602(17)(d) of the Act is unconstitutionally vague because it fails to adequately define or describe those areas of the human body that must be " completely opaquely covered." Third, the Defendants assert that the Act is not gender neutral because it discriminates against women by defining a woman dressed in a particular fashion as engaged in " specific sexual activity" while not similarly defining men. Finally, the Defendants argue that the Act serves as an impermissible prior restraint upon expression protected by the First Amendment by requiring a license for female exotic dancing.

In response to the Defendants' arguments, the State contends that the Act is not overbroad because its license requirement is an incidental restriction on First Amendment freedoms and it is no greater than is necessary to the furtherance of the

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[3] 24 *Del. C.* §§ 1602(17)(d)(2) & (3).

[4] 24 *Del. C.* § 1602(17).

[5] *Id.*

State's interest of protecting the health, safety and welfare of its residents. Second, the State argues that the definitions in § 1602(17)(d) are readily understood by a person of ordinary intelligence and there is, therefore, no uncertainty regarding what is meant by "buttocks" and "female breasts below the top of the areola." Third, the State responds that the Act is gender neutral and that the areas of body required to be covered are different for the simple reason that men and women's bodies are anatomically different. Lastly, the State contends that the Act does not serve as an impermissible prior restraint because it does not require a pre-authorization of conduct, materials or activities during the application process for a license. The Court will address each argument seriatim.

**A. Overbreadth**

Under the Act, an "adult entertainment establishment" is defined as "any commercial establishment, business or service, or portion thereof, which offers … specific sexual activities."[6] "Specific sexual activities" is defined to include "the fondling or erotic touching of human genitals, pubic region, buttocks or the female breasts."[7] "Specific sexual activities" also includes the exhibition of "[l]ess than

[6] 24 *Del. C.* § 1602(2).

[7] 24 *Del. C.* § 1602(17)(c).

completely opaquely covered … buttocks [or] [f]emale breasts below the top of the areola."[8]

Any business operating as an adult entertainment establishment must first be issued a license by the Commission on Adult Entertainment Establishments.[9] The Act provides for criminal penalties for any corporation, as well as its principal stockholders, board of directors, officers and persons engaged in the management of an adult entertainment establishment who operate such an establishment without a license.[10]

The Defendants' overbreadth challenge is premised on the First Amendment's protection of freedom of expression in the form of exotic dancing.[11] The First Amendment is made applicable to the states by virtue of the Due Process Clause of the Fourteenth Amendment.[12] First Amendment protection has been

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[8] 24 *Del. C.* §§ 1602(17)(d)(2) & (3).

[9] 24 *Del. C.* § 1606(a).

[10] 24 *Del. C.* § 1606(c).

[11] Despite the Defendants' assertion that Hak's is not an adult entertainment establishment, for the purposes of this opinion, the Court will consider Hak's to be an adult entertainment establishment as defined by 24 *Del. C.* § 1602(2). This assertion was raised by the Defendants in their supplemental letter submitted after the issuance of the *Fantasia* decisions, but not in their motion to dismiss.

[12] *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 52 (1976).

granted, by the Supreme Court, to sexually explicit non-obscene films, printed matter and live presentations.[13] The live entertainment presented at Hak' s is included under this protection. However, it should be noted that nude exotic dancing at issue in this case, while protected, " falls only within the outer ambit of the First Amendment' s protection"[14] and the Supreme Court has held that content-neutral regulations may be placed on nude dancing under the secondary effects doctrine.[15] Here, the stated purpose of the Act' s licensing requirements is to protect the " health, safety and welfare of the people of the State" from the " increasing incidence of the crimes of obscenity, prostitution and of offenses related thereto."[16]

The Defendants contend that the Act is overbroad in its requirements of certain clothing for female dancers, in the overbroad definition of " specific sexual activities," and in limiting a woman' s right to express herself. This Court' s

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[13] *See generally Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 565-66 (1991) (live nude dancing in adult bookstore and nightclub); *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 65 (1981) (live nude dancer in adult bookstore).

[14] *City of Erie v. Pap' s A.M.*, 529 U.S. 277, 289 (2000).

[15] *Id.* at 296.

[16] 24 *Del. C.* § 1601(a).

decision in *State v. Fantasia*[17] dictates the resolution of Defendant's overbreadth challenge in the present case because the defendants in *Fantasia* raised a similar overbreadth argument.

As stated in *Fantasia*, the Act does not impose dress attire requirements for exotic dancers in commercial or business establishments classified as adult entertainment establishments. Subsection 1602(17)(d), which defines the term "specific sexual activities," "is itself a component of the definition of an 'adult entertainment establishment.'"[18] Therefore, as this Court held in *Fantasia*, "the overbreadth challenge fails because the definition of 'specific sexual activities' and the Act itself only apply to businesses and commercial establishments that meet the definition of 'adult entertainment establishment' for purposes of determining whether a license under the Act is required."[19] As an extension of this holding, therefore, the definitions espoused in § 1602 and the Act itself do not restrict what the female dancers can wear once a license is attained, nor do they limit a female dancer's right to express herself.

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[17] 2004 WL 483649.

[18] *Fantasia,* 2004 WL 483649, *3.

[19] *Id.*; *see* 24 *Del. C.* §§ 1602(2) and (17).

## B. Vagueness

The Defendants next challenge the Act's constitutionality under the doctrine of vagueness. Specifically, the Defendants contend that the Act fails to adequately define or describe those areas of the human body that must be "completely opaquely covered."[20] The Court assumes that the Defendants are only challenging the meaning of the terms "buttocks"[21] and "female breasts below the top of the areola"[22] since its live entertainment consists of female dancers, not male.

"A statute is unconstitutionally vague if it fails to give a person of ordinary intelligence fair notice that his contemplated behavior is forbidden by the statute, or if it encourages arbitrary and erratic enforcement."[23] Again, this Court's decision in *Fantasia*[24] controls the resolution of the Defendant's vagueness challenge in the present case because the defendants in *Fantasia* raised the same vagueness argument. In *Fantasia*, this Court held that the terms "buttocks" and "female breasts below

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[20] 24 *Del. C.* § 1602(17)(d).

[21] 24 *Del. C.* § 1602(17)(d)(2).

[22] 24 *Del. C.* § 1602(17)(d)(3).

[23] *United Video Concepts, Inc. v. City of Dover*, 1994 Del. Super. LEXIS 498, *7 (Del. Super.); *see Village of Hoffman Estates*, 455 U.S. at 498.

[24] 2004 WL 483649.

the top of the areola" are not unconstitutionally vague.[25] Therefore, the vagueness claim in the present case must fail as well.

**C. Gender Neutrality**

The Defendant's third challenge in support of their motion is that the Act is not gender neutral because it discriminates against women by defining a woman dressed in a particular fashion as engaged in " specific sexual activity," while not similarly holding for men.

The Defendants' general assertion is incorrect. Section 1602(17)(d)(3) applies to women and defines " specific sexual activities" as the exhibition of " less than completely opaquely covered ... female breasts below the top of the areola." Section 1602(d)(4) applies to men and defines " specific sexual activities" as the exhibition of " less than completely opaquely covered … human male genitals in a discernable turgid state, even if completely and opaquely covered." The State accurately points out that while the body parts to be exposed differ in these two subsections, this is a necessity due to the obvious anatomical differences between the

[25] This Court stated " [s]imply put, a person of ordinary intelligence would know that 'buttocks' clearly refers to only one very specific part of the body and is unambiguous. And while the phrase 'female breasts below the top of the areola' could conceivably be open to some interpretation, this Court believes that a person of ordinary intelligence could reasonably be expected to know that the term refers to the entire area of the entire breast below the top of the areola, not simply the strip of flesh the width of the areola below the top of the areola." *Fantasia*, 2004 WL 483649, *4.

genders.[26] Additionally, §§ 1602(17)(d)(1) and (2) treat both men and women the same because they define " specific sexual activities" as the exhibition of " less than completely opaquely covered … human genitals, pubic region [or] buttocks" without gender specificity.

The definitions of " specific sexual activities" for men and women, under § 1602(17)(d), are different because men and women' s bodies are anatomically different. The Supreme Court has consistently upheld statutes where the gender classification is not invidious, but rather realistically reflects the fact that the sexes are not similarly situated in certain circumstances.[27] The Court concludes that the gender differentiation in § 1602(17)(d) is not invidious and, therefore, the Defendant' s claim must fail.

**D. Impermissible Prior Restraint**

The Defendants' final challenge to the constitutionality of the Act is that it operates as a prior restraint by subjecting expression to government regulation in advance of the time the communication will occur.

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[26] *United States v. Knox*, 32 F.3d 733, 740 n.5 (3rd Cir. 1994). The Court notes that it would be very strange if the Act defined " specific sexual activities" as the exhibition of less than completely opaquely covered male chest.

[27] *Michael v. Superior Court of Sonoma County*, 450 U.S. 464, 469 (1981).

It is well settled that prior restraint claims are " associated with censorship schemes where material is reviewed prior to dissemination by a Board or Commission which judges whether or not it is obscene, with a finding of obscenity generally resulting in an injunction being issued prohibiting the exhibition of such material."[28] In *State v. Huddleston*,[29] the constitutionality of the precursor statute, the Massage Establishment and Adult Book Store Act was challenged based on a prior restraint argument. This Court upheld the constitutionality of that Act deciding that it does not involve the review or pre-authorization of the adult materials to be sold by the licensee. This Court further held in *Huddleston* that the statute did not unreasonably encumber the license process, nor did it impose a lengthy delay in its administration.[30]

Based on this Court' s decision in *Huddleston*, the Defendants' prior restraint challenge fails. The Act does not require nor involve itself with a review, during the application process, of a licensee' s purported adult activities or commercial materials to be sold at its establishment nor is there any evidence to

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[28] *State v. Huddleston*, 412 A.2d 1148, 1151 (Del. Super. Ct. 1980).

[29] 412 A.2d 1148.

[30] *Id*. at 1152.

suggest it procedurally unreasonably encumbers the permit process or there are significant delays.

## V. Motion to Suppress

Defendant's motion to suppress is based upon the statutory language found in 11 *Del. C.* § 2311(b) which states:

> (b) Any papers, articles or things validly seized may be retained by the police for a reasonable length of time for the purpose of apprehending the offender or using the papers, articles or things so seized as evidence in any criminal trial, or both.

Arguing that the materials seized have been retained beyond a reasonable period of time, the Defendant now suggests that the appropriate sanction would be to prevent its use at trial. While a creative and novel argument, the Court finds that the statute does not mandate such a draconian sanction nor has the State continued to possess the materials seized unreasonably.

The primary seized items pertaining to this motion was the business' s operating computer and a control box relating to the business' s video surveillance system called a multiplexor. The State has retrieved the data from the computer and has advised counsel for the defendants that they may retrieve that computer. The real crux of the issue therefore is the continued retention of the multiplexor. At the hearing on May 16, 2003, the State presented evidence that the multiplexor is in

essence " a series of internal computer systems in which the video images that are seen through the [surveillance] cameras are fed through a digital signal into this machine." The images from all the cameras are then stored on the internal hard drives of the multiplexor. To obtain access to the images on the hard drive, the State Police contacted the manufacturer of the equipment who was able to bypass the machine' s password protection and thereafter the authorities were able to display images contained on the hard drive on a monitor. Approximately 48 to 72 hours of video data was stored on the hard drive. However, critical to the argument for keeping the multiplexor is that it appears the State is unable to play the seized data as evidence without this machine. The manufacturer of the equipment has advised the State of this requirement and they have only been able to observe the data through the use of the multiplexor. As such, the Court finds that since videos stored on the hard drive of the multiplexor may be utilized as evidence in the Defendants' criminal case, the continued retention by the State of the only equipment which they are aware will allow it to be presented in the courtroom is clearly reasonable. As such, the Defendants' motion to suppress is denied.[31]

[31] The defendants also filed a motion for bill of particulars which the Court handled and ruled on at the May 16, 2003 hearing. As such, no written opinion will be issued as to that motion.

## VI. Conclusion

Based upon the above, the Defendant' s Motion to Dismiss and Motion to Suppress are DENIED.

IT IS SO ORDERED.

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Judge William C. Carpenter, Jr.