LOUISIANA DEPARTMENT OF ECONOMIC DEVELOPMENT MOTION PICTURE TAX CREDITS



COMPLIANCE AUDIT ISSUED MARCH 7, 2012

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March 7, 2012

MR. STEPHEN MORET, SECRETARY DEPARTMENT OF ECONOMIC DEVELOPMENT STATE OF LOUISIANA

Baton Rouge, Louisiana

We have audited certain transactions of the Department of Economic Development. Our audit was conducted in accordance with Title 24 of the Louisiana Revised Statutes to determine the credibility of certain allegations regarding the issuance of motion picture tax credits.

Our audit consisted primarily of inquiries and the examination of selected financial records and other documentation. The scope of our audit was significantly less than that required by *Government Auditing Standards*.

The accompanying report presents our findings and recommendations as well as management's response. This is a public report. Copies of this report have been delivered to the District Attorney for the Orleans and Nineteenth Judicial Districts of Louisiana and others as required by law.

Respectfully submitted

Daryl G. Purpera, CPA, CFE

Legislative Auditor

DGP:ch

LED 2012

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EXECUTIVE SUMMARY

The Louisiana Department of Economic Development (LED) appears to have issued \$935,114 in motion picture tax credits for ineligible expenditures made from April 1, 2006, through June 3, 2009, relating to the production of *Blaine Kern's Mardi Gras: Building of the Greatest Free Show on Earth* (documentary). LED issued these tax credits for the following expenditures totaling \$3,420,863:

Expenditures Certified by LED for Blaine Kern's Mardi Gras: Building of the Greatest Free Show on Earth				
Expended because of:	Expenses Claimed			
Normal Operations of Blaine Kern Artists, Inc. (BKA) - Fulfilling Contractual Agreements	\$2,947,362			
Outflows to Members of Louisiana Entertainment and Production, LLC (LEAP)	209,648			
Duplicated or Returned Expenditures	90,900			
Subtotal: Ineligible Expenditures	3,247,910			
Tax Credit Submission - Audit	42,398			
Documentary - Accounting	12,965			
Documentary - LEAP Producing	59,662			
Documentary - Filming	34,452			
Documentary - Editing	23,476			
Subtotal: Other Expenditures	172,953			
Total	\$3,420,863			

Our review indicated that expenditures totaling \$3,247,910 (94.8%) were not eligible production expenditures. The eligible production expenditures totaled only \$172,953 (less than the \$300,000 required by state law to receive motion picture tax credits). This indicates that members of LEAP and/or BKA may have violated state laws by misrepresenting the nature of these expenditures to LED and, as a result, depriving the state of tax revenues totaling \$935,114. LEAP and BKA later sold the tax credits for \$821,343.

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¹ R.S. 14§133(A) states that "Filing false public records is the filing or depositing for record in any public office or with any public official, or the maintaining as required by law, regulation, or rule, with knowledge of its falsity, of any of the following: (1) Any forged document. (2) Any wrongfully altered document. (3) Any document containing a false statement or false representation of a material fact."

R.S. 14§67(A) states that "Theft is the misappropriation or taking of anything of value which belongs to another, either without the consent of the other to the misappropriation or taking, or by means of fraudulent conduct, practices, or representations. An intent to deprive the other permanently of whatever may be the subject of the misappropriation or taking is essential."

BACKGROUND AND METHODOLOGY

The Louisiana Department of Economic Development (LED) was created by Louisiana law² to foster the growth of industry and other commercial enterprises in Louisiana that contribute to the improvement of the economy of the state. LED's Office of Entertainment Industry Development administers Motion Picture Investor Tax Credit incentives, the primary purpose of which is to encourage development in Louisiana of a strong capital and infrastructure base for motion picture production to achieve an independent, self-supporting industry. LED encourages development by issuing tax credits for funds invested in state-certified productions.³

According to state law, 4 state-certified productions are productions that LED has approved that have a viable multi-market commercial distribution plan and are produced by a motion picture production company domiciled and headquartered in Louisiana. To receive tax credits, the total base investment (cash or cash equivalent made and used for production expenditures in the state) must be greater than \$300,000. Production expenditures are preproduction, production, and postproduction expenditures directly incurred in the state that are directly used in a state-certified production. An independent certified public accountant must audit and certify these production expenditures before they are submitted to LED. For statecertified productions approved by LED between January 1, 2006, and July 1, 2009, investors earned 25% on all production expenditures and an additional 10% on amounts expended on payroll for Louisiana residents employed in connection with a state-certified production. As of July 29, 2011, LED has issued \$844,846,945 in motion picture tax credits.

In 2009, a total of \$935,114 in motion picture tax credits were issued for the production of Blaine Kern's Mardi Gras: Building of the Greatest Free Show on Earth (documentary).

The Louisiana Legislative Auditor (LLA) received information alleging improper issuance of state tax credits for the documentary. As a result, the LLA reviewed available records to determine the credibility of the allegation. The procedures performed during this review included:

- (1) interviewing employees of the LED;
- (2) interviewing other persons as appropriate;
- (3) examining selected documents and records of the LED;
- (4) gathering and examining documents and records from external parties; and
- (5) reviewing applicable state laws and regulations.

³ R.S. 4786007

² R.S. 36§101

⁴ R.S. 47§6007(B)(14)

FINDING AND RECOMMENDATIONS

Motion Picture Tax Credits Issued for Ineligible Expenditures

The Louisiana Department of Economic Development (LED) appears to have issued \$935,114 in motion picture tax credits for ineligible expenditures made from April 1, 2006, through June 3, 2009, relating to the production of Blaine Kern's Mardi Gras: Building of the Greatest Free Show on Earth (documentary). State law³ allows motion picture tax credits for preproduction, production, and postproduction expenditures directly used for state-certified productions that have a total base investment of at least \$300,000. LED certified the documentary and then issued tax credits for expenditures totaling \$3,420,863; however, our review indicated that according to LED rules⁵ and state law, expenditures totaling \$3,247,910 (94.8%) were not eligible production expenditures. These expenditures included payments made by Blaine Kern Artists, Inc. (BKA) in the course of normal business operations (\$2,947,362), payments to the related parties of Louisiana Entertainment and Production, LLC (LEAP) with little documentation of actual services rendered (\$209,648), and payments that were either duplicated or returned (\$90,900). The eligible production expenditures totaled only \$172,953 (less than the \$300,000 required by state law to receive motion picture tax credits). This indicates that members of LEAP and/or BKA may have violated state laws by misrepresenting the nature of these expenditures to LED and, as a result, depriving the state of tax revenues totaling \$935,114. LEAP and BKA later sold the tax credits for \$821,343.

On September 15, 2006, Barry Kern on behalf of BKA and Michael Arata on behalf of LEAP executed a Letter of Intent (agreement) to produce the documentary. BKA is a privately held company that creates, designs, and builds floats and organizes parades. LEAP is a company specializing in financing and brokering Louisiana state tax credits. According to the agreement between BKA and LEAP, the documentary was to be about "...the history, design, building, and production of New Orleans' Carnival and Mardi Gras" and would focus on the 2007 carnival season. On September 27, 2006, LEAP submitted a Motion Picture Investor and Labor Tax Credit application along with the additional required documentation to LED to become a state-certified production. LED staff issued an initial certification letter stating that on December 11, 2006, the documentary qualified as a state-certified production. LEAP engaged a producer, director, videographer, sound mixer, and electricians to film the documentary in February 2007 and an editor from February 2007 through September 2007 to assemble the documentary. LEAP also engaged an accountant to compile a cost report and an auditor to conduct an audit of the cost report.

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⁵ **LED Director of Film & Television** stated that "normal business expenses" that would be incurred regardless of a production do not qualify for tax credits.

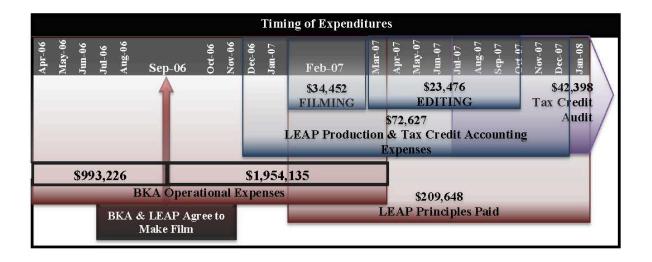
From February 6, 2009, through July 21, 2009, LEAP submitted two audited cost reports to LED requesting tax credit incentives for production expenses relating to the documentary. On April 22, 2009, and July 29, 2009, LED certified LEAP expenditures totaling \$3,420,863 and issued motion picture tax credits totaling \$935,114 to BKA (see table below). LEAP later sold these tax credits to 23 individuals and received \$821,343.

Calculation of LED Tax Credits Issued for Blaine Kern's Mardi Gras: Building of the Greatest Free Show on Earth				
Year	Type	Production Expenses	Rate	Credits Earned
2006	Certified Expenses	\$1,385,935	25%	\$346,484
2006	Certified LA Payroll	458,922	35%	160,623
2007	Certified Expenses	1,193,552	25%	298,388
2007	Certified LA Payroll	340,056	35%	119,019
Total	s (1st Submission)	3,378,465		924,514
2007	Certified Expenses	5,900	25%	1,475
2008	Certified Expenses	6,900	25%	1,725
2009	Certified Expenses	29,598	25%	7,400
Total	s (2nd Submission)	42,398		10,600
То	tal Base Investment	\$3,420,863		\$935,114

Records reviewed indicated that the expenditures claimed by LEAP for the documentary were actually expended by BKA and LEAP. BKA expended \$3,155,484 (April 1, 2006, through January 31, 2008) and LEAP expended \$265,379 (December 2, 2006, through June 3, 2009). We found that these expenditures were made for the following primary purposes:

Expenditures Certified by LED for Blaine Kern's Mardi Gras: Building of the Greatest Free Show on Earth				
Expended because of:	Expenses Claimed			
BKA Normal Operations - Fulfilling Contractual Agreements	\$2,947,362			
Outflows to LEAP Members	209,648			
Duplicated or Returned Expenditures	90,900			
Subtotal: Ineligible Expenditures	3,247,910			
Tax Credit Submission - Audit	42,398			
Documentary - Accounting	12,965			
Documentary - LEAP Producing	59,662			
Documentary - Filming	34,452			
Documentary - Editing	23,476			
Subtotal: Other Expenditures	172,953			
Total	\$3,420,863			

During our review, we noted that LEAP claimed production expenses for the documentary as early as April 1, 2006, five and one-half months before BKA and LEAP agreed that LEAP would produce the documentary. This indicates that \$993,226 claimed by LEAP, as production expenses before the September 15, 2006, agreement between BKA and LEAP, was actually BKA normal business operating expenses.



According to Christopher Stelly, LED Office of Entertainment Industry Development Director, LED determines whether expenditures qualify for tax credits by using a "but for" rule to verify that expenses were not incurred through standard business operations. Although not in writing by LED, this rule, as stated by Mr. Stelly, requires qualifying expenditures to be expenditures that would not have occurred "but for" the production. However, Michael Arata (LEAP member) stated that his research of tax credits issued by LED for past films and discussions with LED management illustrated that LED has consistently allowed all expenditures, including normal business expenses, as eligible production expenses.

During our review of LED and LEAP e-mail records, we were unable to locate any instances of LED management stating that standard business expenses were eligible; however, these records did contain e-mails where Mr. Stelly questioned expenditures that appeared to be for standard business operations for building floats. These e-mails indicate that after continued discussions with LED counsel and Mr. Arata, Mr. Stelly requested and received signed statements from Mr. Arata, Barry Kern, and Patrick Calhoun (LEAP member), which asserted that only costs directly associated with the production were included in the submission. According to Mr. Stelly, LEAP and BKA members eventually convinced him that the expenses submitted were not incurred for BKA's standard business operations. He stated that if they were in fact for BKA's normal operations, he was misled.

Independent CPA firm, Malcolm M. Dienes, LLC (auditor) audited all tax credit submissions for the documentary. According to the auditor's engagement letter with LEAP, his responsibility was to issue an opinion as to whether the production expenditures were fairly presented, in all material respects, in conformity with accounting practices prescribed and/or permitted by the LED and the Office of Entertainment Industry Development. This should include applying the "but for" rule as described by Mr. Stelly.

According to Mr. Stelly, he and his staff rely heavily upon the auditor's report and opinion as a basis in issuing the movie tax credits. The auditor issued an opinion stating that the cost report presents fairly in all material respects the costs of LEAP for the documentary. According to the auditor, they confirmed that the transactions occurred in Louisiana and had

economic substance. They also verified that the expenses were directly related to the production by confirming basic information about the film to determine what reasonable expenses would apply to the documentary and by relying on the production's management representations that the expenses were production related. However, based on our review of the expenditures, it appears that the auditor's procedures did not consider whether LEAP's expenditures complied with LED's "but for" rule. As a result, the auditor's opinion appears to be incorrect.

LED and LEAP records indicate that LED certified and issued tax credits for ineligible expenditures totaling \$2,947,362 made in the ordinary course of BKA business operations, \$993,226 of which was incurred before BKA and LEAP's written agreement to produce the documentary. These expenses, which would have occurred regardless of the documentary, consisted of float construction, parade management, salary, building rental, insurance, and other general administrative costs paid by BKA to satisfy outstanding contractual agreements for parades in the Greater New Orleans area. These expenditures included \$839,028 in rental payments, \$612,002 of which was paid to parties related to BKA or LEAP, and salary and miscellaneous payments to parties related to BKA totaling \$126,809.

LEAP's principal members. LEAP paid Mr. Arata, Patrick Calhoun, and John Calhoun (LEAP member) \$209,648 for "producer fees," which were not substantiated by adequate documentation of services rendered. In addition, this amount is substantially greater than what we found to be reasonable for producer service fees. A review of LED production cost records for several other motion pictures indicated that producer fees usually account for between 3% and 12% of the total production cost. This would indicate that reasonable producer fees for the documentary should have totaled between \$5,189 and \$20,754. Further supporting our analysis, we located a \$7,800 payment that LEAP made to an external individual for producer services for the production.

Lastly, LED and LEAP records indicate that LED certified and issued tax credits for \$90,900 in expenditures that either were returned to BKA, appear to be returned to BKA, or were duplicated. These expenses included a building rental deposit of \$60,000 that was returned to BKA the month after the payment was made and a duplicated expenditure for audit services of \$5,900. In addition, BKA paid LEAP \$25,000 for "Story rights fees," which LEAP bank records indicate may have been returned to BKA after the tax credits were received. These bank records included a check made payable to BKA with a memo line stating, in part, "Story Rights – GFSOE." These three transactions indicate that tax credits were issued for expenditures totaling \$90,900, which did not actually occur.

Our review of available records indicated actual qualifying production expenses for the documentary totaled only \$172,953, not \$3,420,863. Because this amount is less than the \$300,000 threshold set by state law, the documentary did not qualify to receive motion picture tax credits. This indicates that members of LEAP and/or BKA may have violated state laws¹ by misrepresenting the nature of these expenditures to LED and, as a result, depriving the state of tax revenues totaling \$935,114 and allowed LEAP to sell the tax credits for \$821,343.

Recommendations

LED should adopt policies and procedures to ensure tax credits are issued in accordance with state law. Such procedures should include the following:

- 1. Recapture the tax credits issued for ineligible expenses.
- 2. Educate the entertainment industry as to acceptable production expenditures.
- 3. Document all rules in writing and provide these rules to all program participants.
- 4. Require that only expenditures made directly by the production company are eligible.
- 5. Require detailed documentation of all goods and services rendered through related party transactions.
- 6. Require documentation and assurances that all expenses occurred because of the production and not because of normal business operations.

ADDITIONAL INFORMATION GATHERED IN RESPONSE TO LEAP AND BKA LEGAL COUNSELS' STATEMENTS

February 16, 2012

LEAP and BKA legal representatives maintained that former government officials (Sherri McConnell and Richard House) have confirmed that during the time of the documentary, LED interpreted the applicable statute to allow 100% of event expenditures to qualify. As a result, LLA auditors contacted Ms. McConnell and Mr. House regarding this statement and found the following:

According to Ms. McConnell, when she arrived at LED in 2007, she found that tax credits were being issued on festival expenses. She considered the initial certification⁶ of a production by LED to be a contractual obligation that should be honored. She began implementing policies to tighten up the program and ensure that tax credits were being issued in accordance with the applicable law. She also stated that each production was analyzed on a case-by-case basis. She remembered speaking with Mr. Stelly about the documentary and making the determination that costs to build or re-create floats for parade purposes should not qualify. In addition, auditors located e-mails between Ms. McConnell and a writer from The Times-Picayune that referenced the "but for" test and LED's application of it to the documentary.

It should be noted that Mr. House was not employed by LED during the period which the documentary's submissions were being reviewed. With that in mind, Mr. House provided the following statement to LEAP and BKA representatives, which was congruent with the statements he made to LLA auditors:

"Mr. House, as Executive Counsel for the Department, provided legal counsel, upon direction and request, for all of the Department's programs, including the Film and Television Tax Credit Program. In the spring of 2007, Sherry McConnell advised him that the expenses eligible for tax credits for productions arising from certain festivals had been broadly interpreted in the past and that she intended to more narrowly interpret eligible expenses for tax credits under the program. Mr. House believes that, generally, under the applicable statute, the Department was to consider productions on a case by case basis and that it had the authority to review and revise its interpretations of such credits regardless of past application. However, Mr. House was not made aware of the details of such changes, or their applicability to any production, before leaving the Department on July 31, 2007."

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⁶According to our review of LED records, LED's initial certification certifies that the production meets the criteria to be a state-certified production; it does not certify that previous, current, or future expenses will qualify as state-certified production expenditures. Subsequent certifications are given upon determination by LED that expenses qualify as state-certified production expenditures.

APPENDIX A

Managements' Responses

Note:

LEAP and BKA representatives submitted responses that contained 266 and 276 pages, respectively, of exhibits that are not included within Managements' Responses. These documents are available for public inspection at the office of the Louisiana Legislative Auditor.



March 5, 2012

Daryl G. Purpera, CPA, CFE Louisiana Legislative Auditor Post Office Box 94397 Baton Rouge, LA 70804-9397

Re: Compliance Audit Report of Motion Picture Tax Credit Program – *Blaine Kern's Mardi Gras* (documentary; initial certification dated December 11, 2006)

Dear Mr. Purpera:

The production at issue in this compliance audit of Louisiana's Motion Picture Tax Credit Program, *Blaine Kern's Mardi Gras - Building of the Greatest Free Show on Earth* (hereinafter referred to as "Kern"), applied in 2006 and was initially certified on December 11, 2006 under a prior administration.

When our administration took office in January 2008, we commenced an internal, department-wide, six-month performance audit of the Louisiana Department of Economic Development (LED) to develop a baseline assessment of existing business processes and to identify opportunities for improving performance, efficiency, and service delivery while reducing costs. One of the focus areas of that performance audit was the Office of Entertainment Industry Development (OEID), which administers LED's incentive programs related to the entertainment industry, including the Motion Picture Tax Credit Program. Dated July 28, 2008, that internal performance audit noted that OEID "...has been stretched by the level of activity associated with incentive programs under its management...With the number of newly created incentives, the complexities associated with many of the programs, and the volume of activity, the Office of Entertainment Industry Development has fallen behind in a number of worthwhile activities that could further develop Louisiana's entertainment and cultural economies."

In response to that finding, the July 2008 performance audit specifically recommended that we augment the capacity of OEID and establish clear performance expectations to handle its ever-expanding set of opportunities (and responsibilities). Specifically, that internal audit noted that increased staffing resources (an expanded OEID staff) would "...allow LED to improve its responsiveness, accelerate the implementation of rules governing some of the newer incentive programs, and increase its proactive, outbound marketing efforts in the entertainment and cultural industries. The new resources will also provide improved coverage of the myriad legal issues and questions that are associated with new, high-profile incentive programs."

Commencing with our internal 2008 performance audit, LED pursued a focused, multiyear effort to improve administration of the various incentive programs managed by OEID, including the Motion Picture Tax Credit Program. Following are a few examples of the significant improvements that have been made since 2008 to ensure efficient, appropriate processing of tax credit applications, including efforts to ensure that tax credits are issued only in accordance with state law:

- We funded a new legal position dedicated to supporting OEID programs in 2008 (previously we had no dedicated legal staff to support OEID, including the Motion Picture Tax Credit Program);
- We added several staff positions in 2008 dedicated to administrating OEID programs not associated with the Motion Picture Tax Credit Program, which enabled OEID staff members handling the Motion Picture Tax Credit Program to focus exclusively on administering and marketing that program (whereas before they had to divide their time across multiple incentive programs);
- Following years of negotiations and hearings with industry stakeholders and the
 legislative oversight committees, as well as multiple changes in related state law
 (in 2003, 2004, 2005, 2007, 2009 and 2010) that followed enactment of the
 modern-day Motion Picture Tax Credit Program in 2002, program rules were
 promulgated in 2010, and since promulgation they have been regularly issued to
 all applicants;
- With extensive input from the Louisiana Society of CPAs, audit guidelines for the Motion Picture Tax Credit Program, which are provided as an attachment to initial certifications, were strengthened and made more specific to the particular nature of the program in both 2009 and 2011;
- Following the creation of a new mechanism to authorize and fund additional audits (at the direction of LED) when appropriate, we entered into a three-year professional services contract with a forensic auditor who conducts such audits of Motion Picture Tax Credit Program applicants on a case-by-case basis on behalf of the State:
- OEID launched an updated website (LouisianaEntertainment.gov) in 2010 with an enhanced focus on informational notices, audit guidelines and FAQs designed to better educate the entertainment industry on the Motion Picture Tax Credit Program (and other OEID programs), such as eligible and non-eligible expenditures.

Considering the above items, it is clear that OEID's administration of the Motion Picture Tax Credit Program has vastly improved compared to its operations at the time when the Kern documentary was initially certified in late 2006.

We agree with the general theme of the recommendations presented in the compliance audit of OEID regarding the Motion Picture Tax Credit Program, and in fact most of the related administrative improvements already were implemented from 2008 through 2011, as noted above.

The vast majority of film program applicants are feature-length films and other scripted

projects in which substantially all of the applicant's expenses are for the purpose of producing the subject film. A small minority of applications concerns filming real-life events (e.g., festivals; documentaries; and, in the unique case of Kern, Mardi Gras) that ordinarily incur operating expenses irrespective of the filming. LED has analyzed these applications under a targeted policy for film production of real-life events that has been tightened considerably from early 2008 to date, to limit qualifying expenses to those unique to the filming, and to disqualify other costs more appropriately characterized as event expenses.

For the Kern project, float construction and ordinary expenses to host Mardi Gras were a focus of OEID. In dealing with Kern through 2009, OEID staff made efforts to limit qualifying expenses to those incurred directly for film production expenditures. For example, in a February 26, 2009 e-mail, OEID staff specifically excluded float building expense as qualifying production costs:

"From looking over the bible runs and reviewing the audit, I cannot discern or differentiate the costs to build the floats (standard business operations) versus the production costs. The direct (or seemingly direct) production costs are vastly over-shadowed by the construction costs. Most of the costs outlined in the bible you sent were attributed to various parades. Again, this is the same issue we had with the first submission, where I need to be 100% certain that only the production costs are earning the credits. This submission is double the first one, so I need to be absolutely certain that we aren't issuing credits on the standard business operations."

OEID staff repeatedly questioned Kern and required written statements to verify that the expenditures submitted were eligible direct production costs, rather than standard business operation costs such as float building.

Despite OEID's directives, based upon information obtained by the Legislative Auditor it now appears that material misrepresentations may have been made in the audit and attestations submitted by Kern, by including standard business operation expenses of float building as production expenses.

In response to your specific recommendations:

- 1) **LLA Recommendation 1:** Recapture the tax credits issued for ineligible expenses.
 - **LED Response:** LED will re-examine the Kern file and any new available evidence, and will seek recovery of the amount of any wrongful tax credits from the individual(s) and/or entity(ies) that committed the misrepresentation.
- 2) **LLA Recommendation 2:** Educate the entertainment industry as to acceptable production expenditures.

- **LED Response:** LED agrees that additional clarification would be helpful and already has updated its audit guidelines as noted above. LED continuously provides guidance to the industry in this regard. Such outreach efforts include but are not limited to: 1) program rules provided to all applicants with their initial certification letter; 2) FAQs posted on LED's website with illustrative examples of qualifying expenditures; and 3) accounting workshops hosted by LED in conjunction with the Louisiana Society of CPAs and the Louisiana State Bar Association.
- 3) **LLA Recommendation 3:** Document all rules in writing and provide these rules to all program participants.
 - **LED Response:** Program rules were written in 2007 and finally promulgated in January 2010 after several years of public debate and legislative oversight committee hearings and approval. Rules are provided to all program applicants upon initial certification; they are available at any time on the websites of LED and the Louisiana Register, or upon request.
- 4) **LLA Recommendation 4:** Require that only expenditures made directly by the production company are eligible.
 - **LED Response:** We respectfully disagree. LED rules follow the statutory intent of qualifying all expenditures directly related to a state-certified production. Due to the unique characteristics of the motion picture industry and intellectual property concerns, film projects are often financed and produced by a group of companies. Therefore, current program rules state that "actual payments of cash or cash equivalent paid by <u>or on behalf of</u> a state certified production company" may be eligible for credits. All such expenditures must be clearly identified in the audit and LED scrutinizes all expenditures, whether by the production company itself or its affiliates. Nevertheless, LED will consider how best to respond to the spirit of the LLA's recommendation on this issue.
- 5) **LLA Recommendation 5:** Require detailed documentation of all goods and services rendered through related party transactions.
 - **LED Response:** LED has always required support documentation for related party transactions (RPTs), and both LED audit guidelines and Generally Accepted Auditing Standards provide procedures that should be considered by an auditor to satisfy themselves that related party transactions are properly accounted for and adequately disclosed in financial statements. LED recognized that such transactions require heightened scrutiny and adopted stricter RPT policies in March 2011 and November 2011. When appropriate, LED also requires an additional audit by a forensic auditor retained by LED to provide additional assurances of qualifying expenditures.
- 6) **LLA Recommendation 6:** Require documentation and assurances that all

expenses occurred because of the production and not because of normal business operations.

LED Response: Only expenditures directly related to a state-certified production are eligible for tax credits, and LED's audit guidelines clearly state that only expenditures actually expended for the production can be recorded by the CPA as production costs. LED has historically interpreted the law conservatively in this respect and has consistently required documentation and assurances to support the issuance of tax credits (Kern's production being a case in point). In reviewing the CPA's cost report and request for final certification of tax credits, LED staff typically engage in detailed question and answer sessions with both the applicant and the CPA, striving to confirm that only eligible, direct costs of film production are being submitted, and that ineligible costs such as general overhead and general operating expenditures are not. In this particular production, LED staff required and obtained signed statements attesting that only production-related expenditures were being claimed by the applicant.

Please let me know if you have any further questions regarding this matter.

Sincerely,

Stephen Moret Secretary

February 9, 2012

Daryl G. Purpera, CPA, CFE Louisiana Legislative Auditor Post Office Box 94397 Baton Rouge, LA 70804-9397

RE: Louisiana Entertainment and Production, LLC

State Certified Production #0272-2006,

Blaine Kern's Mardi Gras: Building of the Greatest Free Show on Earth

Dear Mr. Purpera:

Malcolm M. Dienes, LLC (MMD) is pleased to submit its response to the Preliminary Draft Compliance Audit Report on the Department of Economic Development submitted to MMD on January 23, 2012 (Draft Report).

MMD is committed to the highest standards of audit quality and compliance with the professional standards guiding our audits. We continually monitor our internal quality processes to, among other things, identify and properly address audit risk. As a result of our internal quality monitoring process, we make changes to our methodologies, policies and procedures when we identify improvements that could enhance audit quality.

MMD is supportive of the inspection process, and to that end we candidly submit the following responses:

- a) With respect to the "but for" rule described in the Draft Report, we performed audit procedures we believed were sufficient to provide a reasonable basis for our opinion. Additionally, we obtained representations and assurances from management that these costs were Production related based on our understanding of the accounting practices prescribed and/or permitted by the Louisiana Department of Economic Development and the Office of Entertainment Industry Development in Louisiana Revised Statute 47:6007 in existence at the time of our audit. At the time of our audit, we were not aware of any authoritative guidance related to a "but for" standard referenced in the Louisiana Legislative Auditor's Draft Report.
- b) Concerning Page 2 of the Draft Report, the Draft Report may indicate a letter clarifying audit fees was considered as an audit report. MMD issued the audit report dated January 20, 2009. It should be noted that MMD prepared a letter to Mr. Christopher Stelly, dated July 21, 2009, which detailed the total audit fees for this Cost Report. We believe this letter may have been misinterpreted as an audit report.

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c) Finally, concerning the reference made to a duplicated expenditure for audit services of \$5,900, it appears that all charges for services performed for the audit described in our letter to Mr. Stelly were added to the amount reflected on the cost report. The letter detailing our fees included the \$5,900 that was already included in the cost report.

We appreciate the opportunity to provide our response to the Draft Report and look forward to continuing to work with the LED and the Louisiana Legislative Auditor in support of your efforts to ensure that Cost Reports of Production Expenditures are prepared in conformity with the accounting practices prescribed and/or permitted by the Louisiana Department of Economic Development and the Office of Entertainment Industry Development in Louisiana Revised Statute 47:6007.

We are available to you to discuss our responses in further details.

With kindest regards, we remain,

Very truly yours,

Malcolm M. Dienes, LLC

MANDY MENDOZA GAGLIARDI, PARTNER BOARD CERTIFIED TAX LAW SPECIALIST Certified by the Louisiana Board of Legal Specialization New Orleans Office

February 24, 2012

Direct Dial No: (504) 585-7018 Direct Fax No: (504) 585-7075 E-mail: gagliardi@chaffe.com

Via U.S. Express Mail and E-mail: dpurpera@lla.la.gov Daryl G. Purpera, CPA, CFE Louisiana Legislative Auditor Post Office Box 94397 Baton Rouge, Louisiana 70804-9397

Re:

Blaine Kern Artists, Inc. Our File No. 40557

Dear Mr. Purpera:

Enclosed please find two copies of the response of Blaine Kern Artists, Inc. ("Kern Artists") to the January 23, 2012 Draft Report of Compliance Audit of the Louisiana Department of Economic Development's Office of Entertainment Industry Development and February 16, 2012 Additional Information Gathered in Response to LEAP and BKA's Legal Counsels' Statements. We ask that you please destroy the previously supplied response and exhibits and replace them in their entirety with the enclosed response and exhibits.

Sincerely.

Mandy Mendoza Gagliard

Thank you.

MMG/sbr Enclosures

cc:

Jenifer Schaye (via email: jschaye@lla.la.gov)

Dan Daigle (via email: ddaigle@lla.la.gov)
Allen Brown (via email: abrown@lla.la.gov)
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Mr. Barry Kern Robert S. Rooth, Esq. Walter F. Becker, Jr., Esq.

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G. PHILLIP SHULER, III* ROBERT B. FISHER, JR. CORINNE A. MORRISON WILLIAM F. GRACE, JR. *† ROBERT S. ROOTH HARRY R. HOLLADAY DEREK A WALKER JONATHAN C. MCCALL KATHLEEN S. PLEMER THOMAS D. FORBES IOHN F OLINDE* E. HOWELL CROSBY DOUGLAS L. GRUNDMEYER I GREGORY WYRICKT CHARLES P. BLANCHARD BRENT A. TALBOT

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OF COUNSEL DONALD A. LINDQUIST ROBERT B DEANE * PETER A. FERINGA, JR.4 J. DWIGHT LEBLANC, JR. CHARLES L. CHASSAIGNAC* ALLAIN C. ANDRY, III

February 24, 2012

*A PROFESSIONAL CORPORATION †BOARD CERTIFIED TAX LAW SPECIALIST Certified by the Louisiana Board of Legal Specialization

Via U.S. Express Mail and email to dpurpera@lla.la.gov

Daryl G. Purpera, CPA, CFE Legislative Auditor 1600 North Third Street P.O. Box 94397 Baton Rouge, Louisiana 70804-9397

> January 23, 2012 Draft Report of Compliance Audit of the Louisiana Re: Department of Economic Development's Office of Entertainment Industry Development and February 16, 2012 Additional Information Gathered in Response to LEAP and BKA's Legal Counsels' Statements

We submit this response on behalf of Blaine Kern Artists, Inc. ("Kern Artists") to the report of the Louisiana Legislative Auditor ("LLA") and its subsequent "additional information" section dated February 16, 2012 as it relates to the documentary film entitled Blaine Kern's Mardi Gras: Building of the Greatest Free Show on Earth (the "Production") and the motion picture investor and employment tax credits that the Louisiana Office of Entertainment Industry Development ("Development Office") certified for the Production under La. R. S. 47:6007 (the "Program"). The January 23, 2012 draft report of Compliance Audit of the Louisiana Department of Economic Development's Office of Entertainment Industry Development and the February 16, 2012 Additional Information Gathered in Response to LEAP and BKA's Legal Counsels' Statements incorporated into the draft report shall be referred to herein as the "LLA's Report."

As we explained to you during our meeting on February 6, 2012, Kern Artists submits that the LLA's Report is manifestly incorrect in many of its key factual assertions and in its conclusions insofar as they affect Kern Artists. Moreover, the report omits crucial facts necessary to a complete understanding of how the Development Office

itself was actually administering the Program when the Production was initially certified and while the expenditures in question were made during 2006 and early 2007.

Public records and applicable law clearly demonstrate that:

- ➤ In December 2006 the Development Office initially certified our Production as a state-certified production.¹ The Production's expenditures occurred during April 1, 2006 through March 31, 2007.
- During that same period of time, the Development Office certified more than \$44 million of expenditures submitted by other production companies filming live events similar to ours, such as the Jazz Fests, Voo Doo Fests and Essence Fests. The Development Office did not limit these companies to the actual costs of film crews and equipment. Instead, the Development Office certified the entire costs of putting on public events that were also filmed including payments to performers, construction costs, event management, producer's fees, salaries, insurance, and other general and administrative costs, irrespective of whether or not these costs would have been incurred "but for" the filming of the events. The LLA's report has ignored the fact that the Development Office's consistent policy at the time our Production was being filmed was to certify all such costs as eligible for tax credits. Both the former head of the Development Office and the former general counsel of LED who were in charge of the Program at that time have confirmed that was truly the policy of the Development Office during that time. The public records we are providing to you with this response will prove this conclusively.
- > Our Production is entitled to the same treatment all other live entertainment productions contemporaneously received. Our Production should not be singled out for disparate treatment.
- In fact, our Production based its submissions of expenditures on what types of costs the Production's representatives knew the Development Office was authorizing other productions to include in calculating their "base investments" at the time our Production was initially certified. Pursuant to a 2006 public records request, a professional representative retained by our Production actually obtained records from the Development Office on a number of live entertainment productions for which tax credits had previously been certified. These included the 2005 New Orleans Jazz and Heritage Festival, a 2004 concert, and the 2004 and 2006 Voo Doo Festivals. These records showed that tax credits were certified on the total costs of producing these events, not just the costs of cameras and crews.
- > According to published news reports, in December 2007 the Development Office stated publicly that it would tighten its policies on live entertainment events, but would not apply these policy changes retroactively. Indeed, the Development Office

¹ We refer to the Louisiana Department of Economic Development's Office of Entertainment Industry Development as the "Development Office."

continued to certify 100% of expenditures as eligible for tax credits for productions, like ours, that had already received initial certifications. The then head of the Development Office acknowledged at that time that it would be unfair to change the rules retroactively.

- In contrast to what other live entertainment productions were doing during this same period of time, <u>our Production's independent accountants actually eliminated a substantial portion of expenditures from the calculation</u> before submitting the remainder to the Development Office for review and certification. Our Production eliminated costs that might properly have been considered capital costs because they were incurred for assets that had a useful life beyond the period when the Production was produced.
- ➤ The Louisiana Constitution requires that tax laws be applied equally to all taxpayers. Treating our Production differently from other contemporaneous productions would violate the Constitution.
- ➤ The LLA's report advocates a "but for" rule suggesting that tax credits should only be earned on dollars that would not have been spent "but for" the filming of a live event. However, the Development Office never has adopted a "but for" rule or "normal business expense" rule to determine whether expenditures count for tax credit purposes.
- ➤ Even though the Program statute expressly required the Development Office to publish rules for the Program, the Development Office never adopted any formal written rules for the Program before 2010. Even those 2010 rules did not contain a "but for" rule or "normal business expense" rule. The Development Office's failure to promulgate written rules is not the fault of the Production.
- In the absence of published rules, production companies <u>had to rely on guidance from Development Office officials</u> to tell them what categories of expenses would qualify for credits. Our Production engaged an experienced production company to create the film, apply for the credits and interact with the Development Office throughout the certification process.
- ➤ In the early years of the Program, the Development Office did not even require that costs be audited; it simply accepted the cost reports that production companies tendered. Our Production not only submitted its own internally-generated cost reports, but also retained an outside accountant and had the <u>expenditures audited by independent CPAs who had audited other live entertainment productions that earned tax credits under the Program</u>.
- ➤ The Production's representatives and its independent accountant and auditor <u>fully disclosed</u> to the LED and the Development Office the nature and amounts of all expenditures that the Development Office later certified as eligible for tax credits.

- The Development Office not only reviewed the audited expenditures but also asked for underlying backup documentation of most of the expenses. Representatives of the Production <u>provided reams of backup</u> the Development Office requested. This documentation plainly described how money had been spent, broken down into at least 60 separate categories.
- Over a 22-month period, the Development Office corresponded with, and met with, representatives of the Production to discuss what costs would be allowed.
- ➤ Only after conferring with the Development Office's General Counsel, did the Director of the Development Office agree what expenses would be eligible.
- When the Development Office eventually certified the credits, its own in-house lawyer acknowledged that she had fully satisfied herself that all of the certified expenditures were eligible for tax credits. She thanked the Production's representatives for their thorough presentation.
- The Development Office's standard practice has always been to apply to each production the Development Office's policies and practices that were in effect as of the date it initially certified a production, rather than retroactively "change the rules" after production companies had already spent money in reliance on them. The Program statute itself mandates this approach because it ties the availability of tax credits to the date of initial certification of a production. Moreover, established law prohibits an administrative agency from "changing the rules" retroactively.
- ➤ On February 10, 2012, the Development Office's issued a prospective-only Notice entitled "Notice: Revised Accounting Guidelines For Motion Picture Investor Tax Credit" demonstrates that it has maintained its historical practice of not changing its policies retroactively. The Notice expressly states that it is "effective for initial certification letters issued on or after 1/1/12." By its own terms, the Notice does not apply to our Production, which was initially certified in December 2006.
- ➤ In attempting to interpret the Program statute the LLA should honor the rule applied by the courts to defer to the policies and practices established by the agency (here, the Development Office) that was statutorily charged with the responsibility for administering the Program. The agency itself was in the best position to determine what the statute authorized when it certified these credits after thorough review.
- ➤ If LED and the Development Office were to begin clawing back tax credits retroactively, years after having certified them through a rigorous process of audit and careful review, this would discourage, if not deal a fatal blow to, investment in the highly-successful Louisiana motion picture industry. Moreover, retroactive application of changes to established policies would be contrary to established law.

For these reasons and others discussed below, we object to the LLA's Report.

The Program Provides Incentives to Encourage Investment

Tax credits for motion picture investors in Louisiana were first provided for in 1992 with the enactment of La. R.S. 47:6007. The motion picture investor tax credit was created "to encourage development in Louisiana of a strong capital base for motion picture film, videotape, and television program productions, in order to achieve a more independent, self-supporting industry." The State's objectives in passing this legislation were to attract private investment for the production of motion pictures, videotape productions, and television programs which contain substantial Louisiana content; develop a tax infrastructure which encourages private investment; develop a tax infrastructure utilizing tax credits which encourage investments in multiple state-certified production projects; encourage increased employment opportunities within the film sector and increase competition with other states in fully developing economic development options within the film and video industry; and encourage new education curricula in order to provide a labor force trained in all aspects of film productions. Id. As originally enacted in 1992, this statute provided for tax credits to offset investment base losses for state-certified productions. La. R.S. 47:6007 (1992). In 2002, La. R.S. 47:6007 was amended to allow credits on investments by Louisiana companies in film to offset certain state tax liabilities on a dollar-for-dollar basis, regardless of whether there was a loss on that investment.³ The statute was amended again in 2003, 2004, 2005, and 2007.4

The Program is administered by the Development Office, an office within the Louisiana Department of Economic Development ("LED"). After review and approval of an application for certification of a production as a "state-certified production," the Development Office and LED issue an initial certification to the applicant, approving the production as a state-certified production on terms and conditions set by the agencies. After an initial certification letter is issued and accepted by the applicant, it becomes a "contract" between the production company and the State. Since January 2006 all applicants have been required to submit a cost report of production expenditures audited and certified by an independent certified public accountant to LED and the Development Office for review. After determining whether the production expenditures qualify for tax credits, LED and the Development Office will certify the tax credits based upon the approved Louisiana production expenditures.

The Production

The Production was a documentary about the history, design, building, and production of New Orleans Carnival and Mardi Gras and focused on the 2007 carnival season. The Production was a joint effort by Kern Artists, the company responsible for creating, designing and building the parade floats and organizing the parades, and

² La. R.S. 47:6007(A)(1992).

³ Acts 2002, 1st Ex. Sess., No. 6, § 1, eff. July 1, 2002.

⁴ Acts 2003, No. 551, §§ 3, 6, eff. Aug. 15, 2003; Acts 2003, No. 1240, § 3, eff. July 1, 2003; Acts 2004, 1st Ex. Sess., No. 7, § 1, eff. Mar. 25, 2004; Acts 2005, No. 456, § 1, eff. Aug. 15, 2005; Acts 2007, No. 456, § 2, eff. July 1, 2007.

Louisiana Entertainment and Production Company, LLC ("LEAP"), a company specializing in providing film production services including financing services.

The Program Statute Only Requires that Expenditures be "Directly Used" in a Production

The Program statute, La. R.S. 47:6007, specifically allows tax credits to be earned on expenditures "directly used" in the production of a film. The statute (as in effect in 2006, the year relevant to this matter) enumerated specific examples of expenditures that would definitely qualify as part of the "base investment" on which production tax credits can be earned. These included, for example, "set construction and operation," "rental of facilities and equipment," "food and lodging," "payroll," etc. as long as these costs were expended in Louisiana.

The statute did not, however, provide any further guidance to help define the term "directly used" in a production. LED and the Development Office, which were charged with the administration of the Program, interpreted the statute. Indeed, the Louisiana Department of Revenue has expressly ruled that LED and the Development Office "have the exclusive authority to determine whether a production qualifies as a state-certified production" and that the Development Office "has the exclusive authority... to determine whether funds were properly expended with respect to a state-certified production prior to issuing a Tax Credit Certificate."

Indeed, the LLA itself has characterized the Program as a "non-discretionary" incentive, "one that a business receives as long as it meets the statutorily imposed criteria." The Development Office certified that our Production met the statutory requirements to receive the tax incentives it was applying for.

The Development Office has never tried to judge whether a film would be successful or whether money was "well spent" on particular goods or services. It has left these subjective determinations to the production companies who are spending their investors' money. Instead, the Development Office has correctly focused on whether money was, in fact, expended in Louisiana on goods and services used in a production, since these expenditures create jobs and tax revenues for the state. There is no doubt that the certified expenditures of our Production were so used, because the end results of the expenditures are depicted in the film's footage.

⁵ See La. R.S. 47:6007 (B)(1): "Base investment" shall mean the actual investment made and expended by: (a) A state-certified production in the state as production expenditures incurred in this state that are *directly used* in a state-certified production or productions.

⁶ See Ex. 1, LDR Private Letter Ruling No. 07-001 (Investor Tax Credit Ruling B). The many ambiguities in the Program statute prompted dozens of taxpayers to seek private letter rulings from the Department of Revenue. The department published some of these rulings in "redacted" form on its website.

⁷ *Id.* (Investor Tax Credit Ruling I).

⁸ Ex. 2, excerpt from the LLA's report of a Performance Audit of LED dated April 21, 2010.

The Development Office Had Promulgated No Written Rules in 2006

The Program statute required the Development Office to promulgate rules for the administration of the Program. Prior to adoption, any such rules had to be approved in advance by the House Ways and Means Committee and the Senate Committee on Revenue and Fiscal Affairs. 10

In 2004 the Program statute first made motion picture production tax credits available on "base investments" in productions. However, it was not until March 2007 that the Development Office first proposed any written rules for the Program. By that time, the Development Office had already certified our Production (in December 2006) as a state-certified production. Thus, there were not even any proposed rules published for the Program at the time our Production was initially certified. Moreover, even the March 2007 proposed rules did not attempt to impose a "but for" or "normal business expense" test that the LLA has only recently conjured. Similarly, the proposed rules did not attempt to define what expenditures would qualify.

In 2007, the Development Office attempted to use the "emergency" rule-making process to adopt its first set of proposed rules, but failed to obtain prior legislative committee approval of its proposal. On April 20, 2007 the Development Office's emergency rule was deemed unacceptable for, among other things, lack of prior legislative approval and failure to provide "equal and fair treatment" to everyone in the industry. 12

Thus, it was obviously the intent of the Legislature that <u>all productions be treated equally</u>. Indeed, the Louisiana Constitution requires equal application of tax laws. "[A]ll taxes shall be uniform upon the same class of subjects throughout the territorial limits of the authority levying the tax". La. Const. (1921) Art. X, § 1.¹³

Beginning in July 2007 and continuing through December 2010, the Development Office published proposed rules, took public comments, and eventually adopted rules for the Program effective January 20, 2010.¹⁴

In none of the proposed rules or the rules as finally adopted in 2010 was there any mention of a "but for" rule or a "normal business expense" rule such as the one the LLA suggests. During the Development Office's administration of the Program its internal policies appear to have gradually evolved over time with respect to what types of expenses a "live entertainment" production could count as eligible for tax credits.

⁹ See La. R. S. 47:6007(D).

¹⁰ See La. R.S. 47:6007(D)(1)(a)-(b).

¹¹ 33 L.R. 405, 3/20/07.

¹² 33 L.R. 728, 4/20/07.

¹³ La. Const. 1921, Art. X, § 1 was continued as a statute by La. Const. Art. XIV, § 16(A)(7).

¹⁴ 36 L.R. 1928, 1/20/10.

Our Production Had to Rely on the Development Office for Guidance

In the absence of any written rules in 2006, producers of live entertainment events such as Kern Artists could only seek and rely on guidance from officials in the Development Office. Not only was the Development Office already administering the Program in a manner completely different than the LLA now suggests, but had been doing so for at least two years. The Development Office's contemporaneous construction of the Program statute is certainly entitled to great weight, both because the Program statute itself lacked a definition of the term "directly used" and because there were no written rules.

Before applying for certification of the Production as a state-certified production, a professional representative of our Production asked the Development Office to provide records that would show how the Development Office had been treating other productions involving the filming of live events. The Development Office produced records for a 2004 Jimmy Buffet concert, the 2005 New Orleans Jazz and Heritage Festival ("Jazz Fest"), as well as the 2004 and 2006 Voo Doo Festivals. The largest of these productions was the Jazz Fest, for which the Development Office had certified tax credits in July 2005 based on more than \$11.8 million of production expenditures incurred and \$3.1 million of payroll paid to Louisiana residents to put on this festival. These records revealed that the Development Office had approved tax credits for all of the money spent to build sets, pay performers and staff, hire security, pay for insurance, and other costs, as well as an additional 20% for producer's fees and overhead expenses. These are some of the very same categories of expenses that the LLA has belatedly criticized the Development Office for certifying for our Production.

Thereafter, for the 2006 and 2007 Jazz Fests, the 2006 and 2007 Voo Doo Festivals, the 2007 Essence Festival, as well as other live entertainment productions, the Development Office continued to use that same methodology – allowing credits to be earned on 100% of the costs of producing the events. Notably, these were the very same years during which our Production was initially certified and was incurring all of its expenses. Although the LLA is apparently now aware of how the Development Office treated other productions that were contemporaneous with our Production, it chose to omit any mention whatsoever of this contemporaneous regulatory policy in the LLA's Report. The LLA thus ignores the clear precedent the Development Office itself had set in its regulation of other productions.

In a December 2007 article¹⁵ in the New Orleans Times-Picayune, Sherri McConnell, the then Director of the Development Office, was quoted extensively on the important policy reasons against making retroactive changes to the Development Office's policies. The article reported that:

McConnell said that even though the film office's policy has changed, the department will not seek to rescind or

¹⁵ The article, entitled "State's film incentive program helped bankroll music fests," 12/8/07 is available at http://blog.nola.com/times-picayune/2007/12/states film incentive program.html.

recapture tax credits granted to festivals in the past. The department will also honor its "precertifications" -- letters sent before the policy change that indicate the department's intention to grant a certain number of credits. This year for their 2007 festivals, Jazzfest was pre-certified for about \$2.9 million and Essence was pre-certified for nearly \$1.9 million. The credits for those festivals have not yet been awarded but are expected to be. "We don't think it would be fair -- when they had planned and budgeted based on their 'precerts' -- to change," McConnell said. "If we had an agreement, we're going to stand with our agreement." (emphasis added).

Our Production had been pre-certified <u>a year prior to</u> this newspaper article. The Development Office publicly stated in this article that any production, including our Production, could rely on the pre-certification letter issued by the Development Office even though they were considering a change in their policy.

As Ms. McConnell stated in December 2007, the Development Office considered pre-certification letters to be binding contracts between the State and the production company, and prospective changes to policy do not abrogate these binding contracts.

There Was Never Any "But For" or "Normal Business Expense" Rule

The LLA's suggestion that the Development Office was applying an unwritten "but for" or "normal business expense" rule is patently incorrect. If we correctly understand the LLA's interpretation of this unwritten, non-existent "rule," it would disqualify any expenditure that would have been incurred if the live event were not filmed at all. Thus, for example, whatever amounts of money the producer of the 2005, 2006 and 2007 Jazz Fests would have spent to produce the festivals (without anyone filming them) could not have earned any credits.

There was no unwritten "but for" or "normal business expense" rule. The Development Office never proposed, adopted or enforced such a rule during 2005-2007, or, indeed, at any time thereafter. The Development Office never publicly announced or adopted such a policy.

Furthermore, the written audit guidelines the Development Office issued for our Production contained no such rule or requirement. Moreover, the Legislature has amended the Program statute numerous times, but has never adopted any such rule in the statute itself. Thus, for the LLA to suggest that the independent auditors should have "audited for" such a rule is untenable.

¹⁶ See Ex. 3, "Audit Guidelines" attached as Exhibit C to the Initial Certification Letter for the Production.

As the Development Office's own records reveal, for live entertainment productions initially certified during 2005 – 2007, the Development Office certified more than \$44.7 million of expenditures as eligible for motion picture investor tax credits for the Jazz Fests, Voo Doo Festivals and Essence Festival alone, allowing expenditures for the costs of the events far in excess of the costs of film crews and equipment. The following chart shows the numbers for just the 2005-2007 Jazz Fests, the 2007 Voo Doo Festival and the 2007 Essence Festival:

New Orleans	Total	Total Investor	Total Payroll	Total Credits
Jazz and	Expenditures	Credits	Credits	Certified
Heritage	Certified	Certified	Certified	
Festival				
200517	\$11,825,088.00	\$1,182,508.80	\$621,648.80	\$1,804,157.60
2006	\$10,361,609.00	\$2,590,402.25	\$279,255.40	\$2,869,657.65
2007	\$10,142,869.00	\$2,535,717.25	\$236,971.80	\$2,772,689.05
Voo Doo Fest				
2006	\$2,826,994.90	\$706,748.73	\$31,702.59	\$738,451.32
2007	\$2,390,024.44	\$597,506.11	\$34,981.66	\$632,487.77
Essence Fest				
2007	\$7,170,761.00	\$1,792,690.25	\$275,253.30	\$2,067,943.55
TOTALS	\$44,717,346.34	\$9,405,573.39	\$1,479,813.55	\$10,885,386.94

Notably, the Development Office's initial certification letters show that it initially certified the 2006 Jazz Fest on April 13, 2006, then certified both our Production and the 2006 Voo Doo Festival on December 11, 2006, and later certified the 2007 Jazz Fest on April 27, 2007 and the 2007 Essence Fest on July 13, 2007. This illustrates plainly that the Development Office's routine policy when it initially certified our Production was to allow credits on all the very same categories of expenses that the LLA now attacks, many years later.

The Development Office's Contemporaneous Interpretation of the Statute Is Entitled to Great Weight

The Program statute was designed to provide incentives to produce films and other media in the State of Louisiana. It was reasonable for the Development Office to interpret the statute as it did. The law itself drew no "bright line" on types of costs that might be incurred to produce a film. The Development Office certainly had the discretion to interpret the statute liberally to maximize its impact as an incentive program, especially during the years 2006 and 2007, when New Orleans and the rest of the state of Louisiana were recovering from the devastation of Hurricanes Katrina and Rita. As the producer of the 2006 Jazz Fest has stated, without the tax credits it earned the 2006 Jazz Fest might not have occurred at all.

¹⁷ In 2005, credits were based on 10% of base investment and 20% of Louisiana payroll. In 2006 and 2007, credits were based on 25% of base investment and 10% of Louisiana payroll.

An administrative agency's interpretation of a statutory scheme that the agency is entrusted to administer is entitled to great weight, and the agency's construction and interpretation should control unless they are found to be arbitrary, capricious, or manifestly contrary to its own rules and regulations. ¹⁸ If the evidence, as reasonably interpreted, supports the determination of an administrative agency, its decisions are accorded great weight and will not be reversed or modified in the absence of a clear showing that the administrative action was arbitrary and capricious. ¹⁹ Hence, the test for determining whether the action is arbitrary and capricious is whether the action taken is reasonable under the circumstances. ²⁰ Stated differently, the question is whether the action taken was without reason. ²¹

We submit that the Development Office's policy to certify credits based on expenditures used in productions was entirely reasonable. Indeed, all of the expenditures claimed were directly used in the Production.

The Program statute itself states that it is only meant to provide "general guidelines," not a clear statement of rules.²² The Legislature clearly intended for the Development Office to make rules for the Program to clarify what the statute meant. Where a statute is ambiguous "a long settled contemporaneous construction by those charged with administering the statute is given substantial and often decisive weight in its interpretation."²³ The facts show that the Development Office adhered to its own longstanding practice when it certified credits for our Production.

Our Production's Experienced Professionals Made Full Disclosure to the Development Office

The documented history of dealings between our Production's professional representatives and the Development Office shows that the certified amounts of credits was the end result of a rigorous process of audit and analysis of reams of information

Delahoussaye v. Board of Supervisors of Community and Technical Colleges, 2004-0515, p. 5
 (La. App. 1st Cir. 3/24/05), 906 So.2d 646, 649 (citing Matter of Recovery I, Inc., 93-0441 (La. App. 1st Cir. 4/8/94), 635 So.2d 690, 696, writ denied, 94-1232 (La. 7/1/94), 639 So.2d 1169.
 Recovery I, 635 So.2d at 699 (citing Blackett v. Louisiana Department of Environmental

Quality, 506 So.2d 749, 752 (La. App. 1st Cir. 1987)).

Recovery I, 635 So.2d at 699-700 (citing *Castle Investors, Inc. v. Jefferson Parish Council*, 472 So.2d 152, 154 (La. App. 5th Cir.), writ denied, 474 So.2d 1311 (La. 1985)).

²¹ Recovery I, 635 So.2d at 700.

²² See La. R. S. 47:6007(D)(3) "The secretary of the Department of Revenue, in consultation with the Department of Economic Development and the director of the Governor's Office of Film and Television Development, shall promulgate such rules and regulations as are necessary to carry out the intent and purposes of this Section in accordance with the *general guidelines* provided herein."

²³ Traigle v. PPG Indus., Inc., 332 So.2d 777, 782 (La. 1976) (citations omitted); See also Sales Tax Dist. No. 1 of Lafourche Parish v. Express Boat Co., Inc., 500 So.2d 364, 370 (La. 1987); Jurisich v. Jenkins, 99-0076 (La. 11/17/99); 749 So.2d 597, 602 (citations omitted); Bd. of Trs. of State Emps. Grp. Benefits Program v. St. Landry Parish Bd., 2002-0393 (La. App. 1 Cir. 2/14/03); 844 So.2d 90, 100 (citations omitted).

over a period of many months. During that process, our Production's accountants actually eliminated substantial amounts of expenditures from the tax credit equation. This resulted in our Production receiving a lesser amount of tax credits than it would have received if our Production used the same methodology that other live entertainment productions were using at the same time.

Kern Artists itself had no prior experience with the Program. Experienced representatives of LEAP handled the details of applying for initial certification, dealt directly with the Development Office, and provided whatever information the Development Office requested. LEAP's representatives included an accomplished attorney who had already had extensive involvement with the Program and on whose advices Kern Artists reasonably relied.

When LEAP applied for certification of the Production on September 27, 2006²⁴ it estimated that the Production would cost between \$5 and \$15 million to produce. The Development Office initially certified our Production as a state-certified production on December 11, 2006.²⁵ Our Production incurred its production expenditures during the period from April 1, 2006 through March 31, 2007.

As the Program statute expressly allowed,²⁶ the Development Office permitted production companies to submit interim cost reports to gain certification of expenditures before completion of a production. In July 2007, the Production sent the Development Office an audit report of only those expenses it had incurred in 2006. This first audit report clearly showed the methodology the Production was using to calculate eligible expenditures.

All of the independent audit work on the Production was performed by Malcolm M. Dienes, LLC ("MMD"), a highly-respected accounting firm that had performed many audits of Louisiana motion picture productions, including the 2007 Voo Doo Festival.²⁷ When the Production submitted this first audit, MMD had not yet completed its audit of the expenditures the Production had made during 2007, when 2007 Mardi Gras was celebrated and most of the filming activity occurred.

Chris Stelly, who was then the Director of the Development Office, reviewed this first audit report and asked questions about the types of costs that were incurred in 2006. The Production's representatives offered to provide to Mr. Stelly all of the costs that had already been incurred in 2007, but had not yet been audited. He stated, however, that he would "feel a lot safer" certifying expenditures if the Production waited until all of its

²⁴ See Ex. 4, LEAP's application for initial certification.

²⁵ See Ex. 3, Development Office initial certification letter dated December 11, 2006.

²⁶ See La. R. S. 47:6007(C)(1), which provides: "For state-certified productions, expenditures shall be certified *no more than twice* during the duration of a state-certified production unless the motion picture production company agrees to reimburse the office for the costs of any additional certifications."

²⁷ The Development Office itself has recommended to many production companies that they retain MMD to perform such audits.

costs were expended and audited.²⁸ Accordingly, the Production agreed to withdraw the initial audit report and to have MMD re-audit the Production from scratch once the filming was complete and all monies had been expended. In August 2007 the Production's representatives and Mr. Stelly agreed that a new audit report would be prepared and submitted for the life of the Production to include all production-related related costs.

The Production then submitted a new audit report prepared by MMD dated January 20, 2009 and requested certification of credits for the expenditures listed in the new audit report. Once again, the Development Office corresponded with representatives of the Production to discuss what costs would be approved. When the Development Office asked for backup documentation of costs, the Production's representatives supplied it promptly.

Our review of correspondence and emails revealed that the Development Office studied this additional information in detail. Mr. Stelly corresponded with professionals representing the Production, asked questions, and received answers. In an exchange of emails in March 2009,³⁰ the Production sent Mr. Stelly answers to a series of written questions and provided more backup documentation.

In reaching its conclusions, the LLA appears to have overlooked the vast amount of documentation the Production had <u>already</u> supplied to Mr. Stelly before that date.

For example, the Production's independent auditors had supplied to Mr. Stelly a so-called "bible run" of expenditures on February 6, 2009.³¹ The bible run, like the final audit report, described 60 separate categories of expense. This detailed categorization of costs could have left no doubt whatsoever in Mr. Stelly's mind about the precise nature of these costs.

On April 2, 2009 and April 15, 2009, Mr. Stelly made additional inquiries about the costs of property leased by the Production. By April 17, 2009, LEAP had provided Mr. Stelly with copies of all the leases and the nature of the lease obligations. Mr. Stelly conferred with the Development Office's general counsel, Stephanie Le Grange, about the production expenditures. She too asked questions and reviewed backup documentation that the Production supplied.

On April 21, 2009, after almost two years of audit and review, Ms. Le Grange issued the tax credit certification letter, stating: "Thank you to all for your diligent

²⁸ See Ex. 5, Emails between Chris Stelly and Michael Arata dated August 7, 2007.

²⁹ See Ex. 6, Audit report of MMD dated January 20, 2009.

³⁰ See Ex. 7, Emails exchanged in February and March 2009.

³¹ See Ex. 8, Email dated February 6, 2009 with attached "bible run". (Because the "bible run" is a large Excel file with numerous worksheets, we have enclosed a CD that contains this email and the "bible run" instead of a printed copy.)

³² See Ex. 9, Emails between Mr. Stelly, Ms. Le Grange and Mr. Arata from April 2, 2009 to April 17, 2009.

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responses to my questions. The documents sent did indeed resolve all my outstanding questions and I will approve your certification forthwith. Thank you for your patience, I know bureaucracy can be maddening."³³

The Audit Report and Backup Documentation Clearly Described the Expenditures

It is clear beyond a shadow of a doubt that during the review process, the Development Office became intimately familiar with the amounts and the types of expenditures which were incurred and used in the Production. The January 20, 2009 MMD audit report itself described <u>sixty specific categories</u> of expenditures, including:

Producer & Staff
Prop Shop

Director & Staff Equipment Rental
Meals & Entertainment Parade/Tolls/Dumpsters

Artists Insurance
Construction Police escorts
Drivers Salaries

Electrical Security Expenses
Maintenance Tractor expense

Paint Utilities

Project Manager Accounting Fees

As discussed below, these categories are virtually identical to those categories of expenditures for which other live entertainment productions, such as the 2005-2007 Jazz Fests, the 2006-2007 Voo Doo Festivals, and the 2007 Essence Fest earned credits.

The Production Was Extensively Audited

By the time MMD had completed its extensive audit work, MMD had audited approximately 80% of the total expenditures of the Production. Such a high percentage is unusual, because an audit, by its nature, usually involves only review and testing of a much smaller "sample" of the transactions under audit.

The Production paid MMD more than \$40,000 in audit fees for its comprehensive audit work. Much of this audit work was performed at the behest of the Development Office, which asked the Production to submit a second audit report.

The Production Eliminated Capital Items From Its Expenditures

As the Production's representatives explained to Chris Stelly of the Development Office, the Production's accountants eliminated from the amount included as "base investment" certain items of costs that were properly treated as "capital costs."

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³³ See Ex. 10, Email from Ms. Le Grange to Mr. Arata dated April 21, 2009.

Eliminated costs included the value of the chassis of floats and other items that were deemed to have a useful life beyond their use in the Production.

This sort of interaction between the Development Office and production companies regarding eligibility of expenditures was apparently typical at the time. The Development Office actually negotiated with the producers of other festivals to reach a final number on costs that would be allowed for purposes of computing tax credits.³⁴

As the MMD audit report and the tax credit certification letter issued by the Development Office to the Production show, out of more than \$9.8 million of actual expenditures, only \$3,391,271 of the total expenditures (approximately 34.5%) were even qualified as eligible for tax credits. This is a far lesser percentage than the 100% that the Development Office qualified for other similar productions.

Evolving Treatment of Live Entertainment Productions

As discussed above, the Development Office allowed producers to include virtually 100% of the costs in "base investment" for live entertainment productions such as ours which it had initially certified in the years 2004 through 2007. In late 2008, however, the Development Office began issuing a different form of initial certification letter. The new form allowed producers of live entertainment events to include in "base investment" 100% of filming costs, plus an across-the board 50% of the cost of "talent" (i.e., the money paid to performers). Thus, even for productions initially certified in 2008-2011 the Development Office was not using a "but for" or "normal business expense" test because it was allowing half of the cost of paying performers (who would have performed "but for" the filming of these events and whose compensation would have been a "normal business expense" for the festival).

The Development Office's Policies In Effect at the Time of Initial Certification Are the Policies That Must Be Applied

The LLA's Report incorrectly suggests that the changes which the LLA now advocates to the Development Office's actual 2004-2007 policies should be applied retroactively. Such retroactive application would be unfair, contrary to the purpose of the Program statute, and contrary to law.

First of all, the Program statute itself ties the allowable amount of tax credits to the date on which the Development Office <u>initially approves a production</u> as a state-certified production. See, e.g., La. R. S. 47:6007(C)(1)(b), which provides: "For state-certified productions approved by the office and the secretary on or after January 1, 2006, but before July 1, 2010..." (a tax credit of 25% of the base investment allowed). Although the statute has been amended many times, the statute has since 2002 always

³⁴ See Ex. 11, Audit Report for 2008 Jazz Fest dated December 9, 2008, at p. 6 (auditor's note that the amounts of expenditures for performers' costs were arrived at through negotiation).

contained this fundamental principle: that the percentage of credits is determined as of the date of initial certification.

Second, the Development Office has consistently taken this approach in administering the Program. Thus, when the Development Office has changed its internal policies, it has applied them only prospectively to those productions initially certified after the policy changed, not to productions previously certified. This makes regulatory sense and is the only fair way to regulate the industry. After all, a production company makes large financial commitments based on the law and rules in effect at the time of initial certification. Given the inherently risky nature of the business of making motion pictures, no one would invest in a production if the regulators were changing the rules retroactively.

When a person expressly relies on standards established by an administrative agency, the agency cannot change the rules and apply them retroactively.³⁵ The rationale for limiting an agency's power to act retroactively is that such retroactive action results in "a species of entrapment."³⁶ Persons who have relied on the agency's stated policy suddenly find themselves penalized for their conduct.³⁷

According to internal documents of the Development Office, in April 2008 it even began considering a change to the "100%" policy it had previously applied to live entertainment productions. In a memo to then Director, Sherri McConnell, Mr. Stelly suggested that the Development Office consider changing to a 50% policy for costs of "talent" (performers) and 100% of filming costs.³⁸

By that time, of course, our Production had long since been certified and completed. The Development Office did not give our Production a copy of this suggested new approach, nor did the Development Office publish it on its website. The Development Office did not apply this new suggested policy to our Production, to the 2005-2007 Jazz Fests, to the 2006 and 2007 Voo Doo Festivals or to the 2007 Essence Fest. We submit that the Development Office acted properly in applying to all of these productions the policies in effect as of the dates these productions were initially certified.

The Development Office's Contemporaneous Treatment of Other Live Entertainment Productions

<u>Prior to, during and after</u> the dates our Production was initially certified and incurred its expenses, the Development Office certified millions of dollars of motion picture tax credits for other live entertainment productions similar to ours. All of these other live entertainment events would have taken place even if nobody had made films of them. Their producers were in the business of producing these live entertainment events.

³⁵ Columbia Heights Nursing Home and Hospital, Inc. v. Weinberger. 380 F. Supp. 1066 (M.D.La. 1974).

³⁶ *Id.* at 1072.

³⁷ *Id*.

³⁸ See Ex. 12, Mr. Stelly's memo to Ms. McConnell dated April 18, 2008.

Their costs of putting on these festivals were certainly their "normal business expenses," and the Development Office clearly knew exactly that when it certified these costs as part of the "base investment" for producing films of the events. These other productions included the New Orleans Jazz and Heritage Festival, the Voo Doo Festival, the Essence Festival, and others.

The 2005 Jazz Fest

For example, on July 11, 2005, the Development Office certified \$1,182,508.80 of investor tax credits and \$621,648.80 of payroll tax credits in connection with the 2005 Jazz Fest. At the time, the Program allowed investor tax credits at 10% of "base investment" and payroll tax credits at 20% of payroll paid to Louisiana residents. Accordingly, the Development Office allowed the 2005 Jazz Fest to count expenditures in the amount of \$11,825,800 as "base investment" purpose and expenditures of payroll in the amount of \$3,108,244 for employment tax credits.

Documents produced by the Development Office in response to public information requests have revealed that the Development Office allowed the producer of the Jazz Fest to earn investor tax credits on the **total** cost of producing the festival. No "but for" or "normal business expense" rule applied. The Development Office did not even require an audit when it certified the credits for the 2005 Jazz Fest.

The 2006 Voo Doo Festival

The 2006 Voo Doo Festival received its initial certification on December 11, 2006 – the exact same date on which the Development Office initially certified our Production. By the initial certification date, the Voo Doo Festival had already taken place. Thereafter, the Voo Doo Festival submitted an audit report dated July 23, 2007. This audit was performed by MMD, the same firm that audited our Production's expenditures.

The Development Office certified the tax credits for the 2006 Voo Doo Fest on October 25, 2007. According to the certification letter, the Development Office certified a base investment of \$2,826,994.90, resulting in \$706,748.73 of investor tax credits (25% of base investment). It also certified Louisiana payroll of \$317,025.85, resulting in employment tax credits of \$31,702.59.

Comparing the audit report to the final certified base investment amount, it appears that the Development Office deleted only \$36,550.83, representing travel not booked through a Louisiana travel agent (and therefore not an eligible expenditure for any production) and monies received as a grant from the Louisiana Office of Tourism.

³⁹ See Ex. 13, Initial Certification Letter dated December 11, 2006 issued by the Development Office to Voo Doo Music Experience 2006, State Project No. 0275-2006.

⁴⁰ See Ex. 14, Audit Report prepared by MMD and dated July 23, 2007.

⁴¹ See Ex. 15, Tax Credit Certification Letter dated October 25, 2007.

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The Development Office allowed credits on the following categories of expenditures:

Talent (the performers)

Stage management Insurance

Auto expenses
Catering management

Sales commissions on items sold at the

festival

Hotel expense Office expenses

Transportation and parking

Art production Audio production Bank charges

Banners

Equipment rental (including tents,

bleachers, and fencing)

Storage

Police and security Barricades and risers

Licensing fees Contract labor

Credit card processing fees

Cleanup costs

Electricity and generators

Soft drinks

Film and video costs

Hospitality Décor

Media (including advertising)

Production costs

Ticket sales (pre-box office charges by

TicketMaster)

The production report attached to the audit report submitted to the Development Office shows that the 2006 Voo Doo Fest's actual film and video costs (approximately \$240,000) were less than 10% of the total amount that the Development Office allowed to qualify as "base investment" for the event. In the final tax credit certification letter, LED and the Development Office expressly waived their "respective rights to conduct any further or additional review, examination or audit of the investments or expenditure (or the categorization thereof) or other matters addressed in the Auditor's Report."

Just as the Development Office had done in connection with the 2005, 2006 and 2007 Jazz Fests, it allowed almost 100% of the costs of producing the 2006 Voo Doo Festival to qualify for credits.

The 2006 Jazz Fest

The Development Office initially certified the 2006 Jazz Fest on April 13, 2006. The Shreveport CPA firm of Robertson, Bailes, & McClelland, LLP audited the 2006 Jazz Fest and issued an audit report dated July 21, 2007. The audit report covered expenditures made between January 15, 2006 and July 21, 2006. Some of our Production's expenditures were incurred during this same window of time. A representative of the 2006 Jazz Fest's production company submitted the audit report to Alex Schott and Chris Stelly of the Development Office via email on September 15, 2006, stating:

⁴² See Ex. 16, Initial Certification Letter dated April 13, 2006 issued to "AEG Festival and Concert Series 2006.

⁴³ See Ex. 17, Audit Report dated July 21, 2006 by Robertson, Bailes, & McClelland, LLP.

"Attached please find the report from our auditors which sets forth <u>the total expenditures for [the] event</u>, broken down to specifically address in-state spending and local labor coasts, as is required under the new incentive laws." A week later, the Development Office certified the credits for the 2006 Jazz Fest by letter dated September 22, 2006, granting investor tax credits on a base investment of \$10,361,609.00. (emphasis added).

The audit report for the 2006 Jazz Fest contained the following categories and amounts of expenditures:

Cost Report of Production Expenditures
For the period January 15, 2006 through July 21, 2006

Fair music production	\$3,809,426
Fair production	2,520,854
Staff	1,044,902
Festival Productions, Inc. producer fee and direct expenses	800,000
Insurance	520,474
Pre-production promotion, advertising, sponsorship fulfillment	411,420
Louisiana Tourism sponsorship expenses	350,000
Film production	315,926
Administration	218,941
Finance	128,225
Crafts	90,894
American Express grant expenses	80,928
Commissions	30,000
Mentorship, internship program	20,772
Educational programs	18,847
Total Louisiana Production Expenditures	\$10,361,609

Accordingly, the Development Office certified 100% of the total Louisiana expenditures the producer of the 2006 Jazz Fest incurred to put on the event, with no deductions whatsoever. Notably, the 2006 Jazz Fest was the first recurrence of this festival after the devastation of Katrina and Rita. When he emailed the audit report to Alex Schott and Chris Stelly, the producer's representative stated: "Without the incentives, the 2006 Jazz Fest might not even have taken place. But, because of them, we were able to put on the best festival in recent memory and show the world that New

⁴⁵ See Ex. 19, Tax Credit Certification Latter dated September 22, 2006.

⁴⁴ See Ex. 18, Email dated September 15, 2006 to Alex Schott and Chris Stelly.

Orleans was open for business and able to handle large-scale events such as the Jazz Fest."46

The 2007 Jazz Fest

The Development Office initially certified the 2007 Jazz Fest on April 27, 2007. Again, the Shreveport CPA firm of Robertson, Bailes, & McClelland, LLP audited the 2007 Jazz Fest and issued an audit report dated September 5, 2007. The audit report covered expenditures made September 9, 2006 through August 10, 2007. Most of our Production's expenditures were incurred during this same window of time. The Development Office certified the credits for the 2007 Jazz Fest by letter dated December 14, 2007. (By that date, all of the costs for our Production had already been expended.)

The audit report for the 2007 Jazz Fest contained the following categories and amounts of expenditures:

Cost Report of Production Expenditures
For the period September 1, 2006 through August 10, 2007

Total Louisiana Production Expenditures	\$12,066,954
Mentorship, internship program	\$22,917
Educational programs	\$36,372
Crafts ⁻	\$159,668
Finance; tickets and concessions operations	\$192,538
Film production	\$294,375
Administration	\$303,214
Pre-production promotion, advertising, sponsorship fulfillment	\$333,940
Insurance	\$524,281
Festival Productions, Inc. producer fee and direct expenses	\$761,472
Staff	\$1,201,753
Fair production	\$2,840,920
Fair music production	\$5,395,504

When analyzing the Jazz Fest's 2007 audit report, someone at the Development Office made a marginal note that <u>filming costs represented only 2.4% of the total costs</u> the production company was seeking to have certified.⁵⁰

⁴⁶ See Ex. 18, Email dated September 15, 2006 to Alex Schott and Chris Stelly.

⁴⁷ See Ex. 20, Initial Certification Letter dated April 27, 2007 issued for 2007 New Orleans Jazz & Heritage Festival.

⁴⁸ See Ex. 21, Audit Report dated September 5, 2007 by Robertson, Bailes, & McClelland, LLP.

⁴⁹ See Ex. 22, Tax Credit Certification Letter dated December 14, 2007.

⁵⁰ See Ex. 21, pg. 5 of Audit Report dated September 5, 2007 by Robertson, Bailes, & McClelland, LLP.

The Development Office apparently disallowed some categories⁵¹ of the costs listed in the audit report, but eventually certified \$2,772,689 of credits based on a qualified "base investment" of \$10,976,305 and Louisiana payroll of \$2,369,718.

The 2007 Essence Fest

The 2007 Essence Festival received almost identical treatment to the 2006 and 2007 Voo Doo Festivals and the 2006 and 2007 Jazz Fests. On May 24, 2007 representatives of the 2007 Essence Music Festival filed an initial certification application with the Development Office. The Development Office certified the 2007 Essence Music Festival as a "state-certified production" on July 13, 2007. 52

MMD audited the books and records of the 2007 Essence Music Festival and issued an audit report dated November 6, 2008 stating that \$7,170,761.00 in Louisiana production expenditures had been expended in accordance with the Program. A few weeks later, the Development Office reviewed the MMD audit and Chris Stelly posed written questions to representatives of the Essence Festival to verify certain expenditures. Mr. Stelly's questions were similar to those he posed to our Production. 53

Prior to issuing a tax credit certification letter, a representative of the Development Office made handwritten notes showing how the expenditures were reviewed.⁵⁴ These handwritten notes confirm that the Development Office fully understood that 100% of "all talent fees" were included in the cumulative expenditure numbers listed in the MMD audit report dated November 6, 2008.

On January 12, 2009 (a few months prior to the date our Production's credits were certified), Mr. Stelly issued a tax credit certification letter for the 2007 Essence Festival. This further confirms that as of early 2009 the Development Office was continuing to allow tax credits on 100% of costs incurred for productions that had been initially certified in 2007 and earlier years. Thus, it was entirely proper for the Development Office to accord our Production similar treatment.

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⁵¹ The Development Office apparently disallowed \$333,940 for pre-production promotion, advertising and sponsorship fulfillment, \$137,882 for finance, tickets and concession operations, \$159,668 for "crafts," \$36,372 for educational programs, and \$22,917 for mentorship/internship programs, thus allowing all expenditures in other categories to qualify.

⁵² See Ex. 23, Initial Certification Letter dated July 13, 2007.

⁵³ See Ex. 24, Emails between Mr. Stelly and Mr. Robert Wollfarth dated December 18, 2008 through December 20, 2008.

⁵⁴ See Ex. 25, Draft tax credit certification letter dated "December 2008" with handwritten notations by Development Office.

⁵⁵ See Ex. 26, Tax Credit Certification Letter dated January 12, 2009.

The 2011 Bayou Country Superfest

Even though the Development Office later modified its 100% policy, even in 2011 it continued to allow tax credits on expenditures that could be viewed as "normal operating expenses" of producing live entertainment events, i.e., costs that would have been incurred if the events were not filmed. For example, the same production company that has produced the Jazz Fest since 2005 also produced the newest music festival in Louisiana, the 2011 Bayou Country Superfest. This music festival was held in Baton Rouge at Tiger Stadium and included such international acts as Tim McGraw, Kenny Chesney, and Sugarland. The performers at the 2011 Superfest were paid more than \$3.3 million for their performances.

The application for the 2011 Bayou Country Superfest stated that this production was to be a "Live Concert and Broadcast." The initial certification letter issued for this production specifically stated that 50% of the talent cost was eligible to be included in the base investment for tax credit purposes. The audit report for this production dated September 20, 2011 was performed by RBM, LLC and only included three categories of expenditures:

Talent Fees	\$1,687,500.00
Film Production	\$92,721.00
Professional Fees	\$2,000.00

Only 5% of the costs certified by the Development Office were for the filming of the live event. Nevertheless, according to the final tax credit certification letter dated November 9, 2011, the Development Office certified \$535,606.30 in investor tax credits and payroll tax credits for this production. It is clear that even in 2011 the Development Office still believed that live entertainment productions with a relatively small portion of costs attributable to filming should receive tax credits under the Program.

Expenditures Prior to the Initial Certification Date Qualify As "Base Investment"

The LLA's Report incorrectly suggests that our Production was not entitled to earn credits on expenditures made prior to the date LEAP agreed in writing to produce the film. However, in the initial certification letter issued to the Production, the Development Office specifically authorized the Production to include as part of its "base

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⁵⁶ See Ex. 27, Application for initial certification dated June 10, 2011.

⁵⁷ See Ex. 28, Initial Certification Letter dated July 29, 2011.

⁵⁸ See Ex. 29, Audit Report dated September 20, 2011 by RBM, LLC.

⁵⁹ The Shreveport CPA firm of Robertson, Bailes, & McClelland, LLP changed its name to RBM, LLC.

⁶⁰ See Ex. 30. Tax Credit Certification Letter dated November 9, 2011. (In 2011, the tax credit percentage on base investment was 30%.)

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investment" expenditures made during the 12-month period prior to the date of initial certification. This is consistent with the Program statute, as well as the Development Office's treatment of <u>all motion picture productions</u>, even today.

The Program statute provides:

The initial certification shall be effective for a period twelve months prior to and twelve months after the date of initial certification, unless the production has commenced, in which case the initial certification shall be valid until the production is completed.⁶¹

The Program permits production companies to do the necessary preliminary "leg work" to plan and make contracts for the production, make arrangements with suppliers, obtain necessary equipment and incur expenses, even before applying for initial certification.

The Development Office has always allowed other production companies to do just that. For example, the producer of the 2006 and 2007 Jazz Fests did not receive initial certifications until April of each of those years, but had already expended substantial production costs prior to the initial certification dates. As expressly stated in the Development Office's initial certification letters for those productions, a producer is entitled to "count" expenditures made during the twelve-month period prior to the initial certification of the production. The LLA offers no justification for reversing this beneficial, long-standing practice of Development Office, which continues in effect even today.

The Program Is Vital to the State's Economy

The Program has benefited the State's economy immensely. LED hired the BaxStarr Consulting Group ("BSCG") to conduct an economic and fiscal assessment of the State's entertainment incentives between 2008 and 2010. BSCG's staff compiled and analyzed data provided by the State and data collected from its own field research with business and economic development specialists throughout the state.

The key findings from BSCG's economic and fiscal impact analysis were:

- Every \$1 of tax credits issued generates the following estimated total economic output:
 - Film production \$5.71
 - Sound recording \$6.47
 - Digital media \$6.90
 - Live performance \$7.41

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⁶¹ La. R. S. 47:6007(C)(1)(a)(iii)(emphasis added).

⁶² The full report is available at http://www.louisianaentertainment.gov/images/louisiana_entertainment 2011 economic impact analysis.pdf.

- > The program generated an average of \$710 million per year in economic output for 2008 and 2009.
- ➤ The Program generated approximately \$1.08 billion statewide in economic output for 2010 alone, representing a 52 percent increase above the annual average for years 2008 and 2009.

The study demonstrated that live entertainment actually generates a larger positive economic impact than film production.

Festival Productions Have Major Economic Impacts

Further, the economic incentives provided to the Jazz Fest, Essence Fest, Voo Doo Fest and Kern Artists productions have supported festivals in providing approximately \$1 billion dollars in annual economic impact to the State of Louisiana. The University of New Orleans has estimated the annual economic impacts of Mardi Gras at over \$450 million, Jazz Fest at over \$300 million, Essence Fest at over \$150 million, and Voo Doo Fest at over \$50 million.

Related Party Transactions Were All At Fair Market Value

As the LLA knows, there is nothing untoward about related-party transactions as long as their terms are in line with terms of arms-length transactions between unrelated parties, i.e., at fair market value. MMD included a detailed related party transaction section in the audit of the Production dated January 20, 2009. This section of the audit (Note 7) contained 12 separate notes about related party transactions included in the cost report for this Production. The Development Office requested and received extensive documentation on all these transactions, as evidenced by numerous emails and delivery to the Development Office of cancelled checks and additional support (including leases of properties owned by related parties). The rental payments to related parties were substantiated as market value transactions by the fact that two leases were with unrelated parties and the rental rates for those leases were in line with the rental rates for leases of the related party properties. Notably, neither the Development Office nor the LLA has criticized <u>any</u> of the rental payments as being anything but arms length transactions between the parties at fair market value.

The Development Office has routinely approved the granting of tax credits for payments in related-party transactions, once it is satisfied that the transactions were at fair market value, as these were.

experience-gets-halloween-weekend-dates-at-city-park/

⁶³ For Jazz Fest, go to http://www.jazzandheritage.org/about-us/about-us/
For Voo Doo Fest, go to http://neworleanscitybusiness.com/blog/2009/03/30/voodoo-music-us/

For Essence Fest, go to $\frac{http://neworleanscitybusiness.com/blog/2010/09/29/essence-music-fest-will-return-to-no-through-2014/$

Production Services Agreements Showed What Services Were Rendered

The LLA alleges that "LED certified and issued tax credits for ineligible payments" in the amount of \$209,648 for producer fees "which were not substantiated by adequate documentation of services rendered." In fact, Kern Artists and LEAP executed written agreements which spelled out in detail the work that was to be performed by LEAP and its principals in order to earn the producer fees. 64

The LLA contends that some of the costs paid by Kern Artists were to "satisfy outstanding contractual agreements for parades in the Greater New Orleans area." These contractual agreements are very similar to contractual agreements between festival promoters and musical/entertainment talent that perform at such festivals. All such contractual agreements had to be in place to enable the Production to make the documentary. Without such contracts previously in place, the cameras would have had nothing to film.

\$90,900 of Expenditures Allegedly "Returned" To Kern Artists

The LLA alleges that three expenditures fall into this category:

The building rental deposit of \$60,000

Kern Artists paid \$120,000 to Henry Bath, Inc. for rental of a building. The payment was comprised of \$60,000 of rent and \$60,000 as a security deposit. After the termination of the agreement, the landlord returned the security deposit to Kern Artists.

During the course of the MMD audit of production costs, MMD asked for a copy of the lease invoice and Kern Artists' independent accountant supplied a copy of the lease invoice and the lease itself to MMD.⁶⁵ The lease invoice clearly stated that \$60,000 of the \$120,000 payment was for a security deposit.

When Kern Artists received the \$60,000 deposit back from Henry Bath, Inc., it classified this payment as "revenue" when it should have been classified as an offset to rent expense. This was an inadvertent misclassification that resulted in Kern Artists reflecting income (taxable as such) on its books instead of a "return" of a deposit.

The important fact is that Kern Artists gave the independent auditors the information that enabled them to determine whether or not the \$60,000 deposit was or was not eligible to be counted as part of the "base investment". This cannot constitute misrepresentation by Kern Artists, LEAP, or any of their principals.

⁶⁴ See Ex. 31, Producer Agreements and Production Services Agreement.

⁶⁵ See Ex. 32, Email dated June 19, 2009 attaching Henry Bath, Inc. invoice dated January 26, 2007 and other documents requested by MMD.

The \$5,900 Audit Fee

LEAP and MMD were quite clear with the Development Office in their correspondence with the Development Office about auditor's fees. The \$5,900 audit fee was included for tax credit certification with the final audit report dated January 20, 2009. The Development Office issued tax credits on the \$5,900 amount in the tax credit certification letter dated April 22, 2009.

The second tax credit certification letter the Development Office issued to the Production was dated July 29, 2009. This letter incorrectly states that the Development Office had received an "Auditor's Report dated July 21, 2009". The Development Office did receive a letter from MMD dated July 21, 2009 but that letter was not an audit report. MMD provided this letter merely to verify the total audit costs expended by the Production. MMD was not asked to break out audit costs that were already included in the January 20, 2009 audit report. As such, MMD's letter correctly stated the full amount of audit fees charged to and paid for by the Production. This cannot constitute misrepresentation by Kern Artists, LEAP, MMD, or any of their principals. The fact that the \$5,900 was included twice was mere inadvertence.

The "Story Rights" Issue

Kern Artists paid LEAP a \$25,000 fee for "story rights." LEAP developed the behind-the-scenes story of how the parades rolling in the Greater New Orleans area are put on the street and enjoyed by millions, locals and tourists alike. The LLA's Report incorrectly suggests that LEAP repaid this \$25,000 to Kern Artists. LEAP did not repay this fee. In fact, the \$75,000 check that the LLA refers to was a payment by LEAP to Kern Artists of a portion of the proceeds of the sale of the tax credits. The "memo" reference to "story rights" on this \$75,000 check was in error.

LEAP took on the task of selling the tax credits to third parties. Pursuant to LEAP's agreement with Kern Artists, LEAP accounted to Kern Artists for Kern Artists' share of the proceeds of the sale. A detailed recap of the payments and advances between the parties shows that the \$75,000 check represented a portion of the proceeds due Kern Artists from the sale of the tax credits. It was not a "repayment" of the funds Kern Artists originally paid LEAP for the story rights.

Development Office's Notice Dated February 10, 2012

The Development Office posted to its website on February 10, 2012 the attached document entitled "Notice: Revised Accounting Guidelines For Motion Picture Investor Tax Credit" (the "Notice"). By issuing the Notice, the Development Office has apparently conceded that its current audit guidelines required clarification.

1804214-1

⁶⁶ See Exhibit 33; "Notice: Revised Accounting Guidelines For Motion Picture Investor Tax Credit" published on the Development's Office website dated February 10, 2012.

This prospective-only Notice demonstrates that the Development Office has maintained its historical practice of not changing its policies retroactively. The Notice expressly states that it is "effective for initial certification letters issued on or after 1/1/12." By its own terms, the Notice does not apply to our Production, which was initially certified in December 2006.

This Notice represents a substantive change in the Development Office's prior policies that it was implementing for productions initially certified during 2005-2007, as evidenced by the facts cited herein. In addition, the Notice supports Kern Artists' position that when the Development Office changes its longstanding policies, it does not (and must not) enforce policy changes retroactively. This Notice makes it clear that the Development Office understands that when it changes its policy, the policy change is to be implemented only with respect to productions that have not already been initially certified as state-certified productions. The Development Office did not adopt or implement such a policy at any time while our Production was applying for initial certification, spending money, submitting audited cost reports, and receiving certification of tax credits.

Our Production Representatives Acted in Good Faith to Comply

The professionals representing our Production acted at all times in complete good faith in their dealings with the Development Office. They relied on actual knowledge of what types of expenditures the Development Office had previously allowed to qualify for tax credits. That knowledge came from records the Development Office itself supplied, before our Production was initially certified. Our representatives and the Production's accountants and auditors provided extensive documentation to the Development Office that made it crystal clear what types of expenditures were being submitted.

It is wrong for the LLA to suggest that our Production's tax credits should be retroactively clawed back years later (and after the credits have been sold and used by taxpayers), based on an unwritten policy that never existed.

It is reckless for the LLA to suggest that the Production "may have" violated the Program statute, and it is defamatory for the LLA to publicly suggest the Production or any of its representatives "may have" violated criminal laws. There exists not a shred of evidence to suggest wrongful or intentional conduct on the part of Kern Artists or its principals.

These unfounded allegations and the unsupportable legal conclusion that Kern Artists may have committed criminal violations should have been removed from the LLA's Report because there is no probable cause, and certainly not proof beyond reasonable doubt, that Kern Artists or its representatives committed any criminal violation. Further, presenting these allegations and legal conclusions in a report which will be released to the public defames and may cause damage to Kern Artists' reputation.

1804214-1 A.35

The LLA offers no proof of a violation of LSA R.S. 14:67(A). Specific intent to permanently deprive a victim of his property is an essential element of the crime of theft.⁶⁷ Intent is a question of fact and may be inferred from the circumstances of the transaction and the actions of the defendant.⁶⁸ The facts and circumstances revealed in the investigation by the LLA do not support an inference that Kern Artists intended to denrive the State of Louisiana of tax revenues. The facts show that Kern Artists acted in good faith in this matter. Kern Artists relied on experienced professionals for advice that the Production was eligible for tax credits and that similar productions had received tax credits. Kern Artists also had all expenditures audited by independent auditors who had years of experience with film credits. Further, during the application process, LEAP was in continuous contact with the Development Office, including negotiations with the Development Office about what expenditures would be allowed for certification. The General Counsel of the Development Office reviewed and approved the expenditures. During these discussions and negotiations, LEAP was never told by the Development Office that there was a "but for" or "normal business expense" rule with regard to productions and fully disclosed the nature of its expenditures on the production to the Development Office. Further, no written rules setting forth the LLA's so-called "but for" rule or "normal business expense" rule were ever promulgated by the Development Office. Furthermore, Kern Artists had no prior experience with applying for tax credits and thus relied heavily on professional advice as well as guidance provided by the independent auditors and the Development Office.

There is also no evidence that Kern Artists or its representatives violated LSA R.S. 14:133(A) relative to filing false public records. This offense requires proof that the defendant filed a public record with knowledge of its falsity. The facts do not warrant any inference that Kern Artists filed any record with knowledge of its falsity.

Kern Artists also objects to the implication at page 8, paragraph 2 that the Development Office was "misled" by Kern Artists. The Development Office was given full and complete information about the production by LEAP, dialogued continuously with LEAP about the Production, provided guidance to LEAP, and approved the expenditures as evidenced in the tax credit certification letter.

Conclusion

We respectfully suggest that the LLA's Report is inaccurate, incomplete and misleading for the reasons we have stated, especially the following indisputable facts:

1. The broad language of the Program statute authorized credits to be based on expenditures "directly used" in a production. The Development Office was entitled to construe this language liberally to encourage economic development. The expenditures in question were used in the Production. Without them, no film could have been made. If in hindsight the LLA

⁶⁷ State v. Albert, 697 S.2d 1355, 1996-1991.

⁶⁸ State v. Crosby, 515 S.2d 570.

⁶⁹ State v. Dowl, 39 So.3d S. 754.

- disagrees with the manner in which LED and the Development Office have administered the Program, such policy differences should not be criminalized.
- 2. The Development Office's consistent regulatory policy during the relevant period (2006-2007) was to allow all producers of live entertainment events to earn credits on 100% of their expenditures.
- 3. Because the Development Office had never published any written regulations for the Program when it initially certified our Production, production companies such as ours had to rely on the Development Office's guidance and public information about how it was actually administering the Program.
- 4. The Development Office never adopted any "but for" or "normal business expense" rule during the relevant period. It was not until 2012 that the Development Office announced such a policy, stating that this policy would be applied only prospectively.
- 5. As the Development Office itself has publicly acknowledged, it would be unfair to apply policy changes retroactively because an initial certification letter constitutes a binding contract between a production company and the State and production companies are entitled to rely on these contracts.
- 6. The constitution and laws of the State require that all similarly-situated taxpayers be treated equally.
- 7. Chris Stelly and other LED personnel received and reviewed reams of detailed information about our Production. There is absolutely no doubt that they knew what types of expenditures they were certifying. Our Production was forthright and open in its dealings with the Development Office.
- 8. There is no support for the LLA's conclusions regarding "return" of payment for story rights;
- 9. Because all "related-party" transactions were transactions at fair market value, the Development Office correctly concluded the expenditures qualified for credits.
- 10. The LLA's improper suggestion that tax credits should be clawed back by applying policy changes retroactively will surely damage the highly-successful Louisiana motion picture industry. If production companies cannot rely on policies as applied by the State, the resulting uncertainty will cause them to make their movies elsewhere.

Thank you for your assurance that this response will be attached to the LLA's Report if and when it is ever made public. We appreciate the opportunity to bring to light the crucial facts we believe should have been included in the LLA's Report.

Sincerely,

Robert S. Rooth

Counsel to Blaine Kern Artists, Inc.

Mandy Mendoza Gagliardi

Counsel to Blaine Kern Artists, Inc.

LAW OFFICES

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MEMORANDUM

TO:

(VIA EMAIL)

Daryl Purpera, Legislative Auditor (dpurpera@lla.la.gov)

Allen Brown, Assistant Legislative Auditor for Local Government Audit

Services (abrown@lla.la.gov)

Kimberley Jones, Senior Auditor (kjones@lla.la.gov)

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FROM:

Robert L. Wollfarth

Baker, Donelson, Bearman, Caldwell & Berkowitz, PC

DATE:

February 24, 2012

RE:

Reply Memorandum to Legislative Auditor's Compliance Audit Report

This reply memorandum is submitted on behalf of Louisiana Entertainment and Production, LLC ("LEAP") in response to the Louisiana Legislative Auditor's (the "LLA") compliance audit report that LEAP received on February 23, 2012, which is attached as Exhibit A (the "Report"). On the basis of the applicable law and the incontrovertible facts described in this reply memorandum, LEAP categorically denies any and all allegations contained in the Report as they are without merit.

The Report falsely alleges that LEAP and Blaine Kern Artists, Inc. ("BKA") misrepresented to the State that the production expenditures incurred in 2006 and 2007 to produce the documentary *Blaine Kern's Mardi Gras: Building of the Greatest Free Show on Earth* (the "Production") were qualified to earn tax credits under the State's Motion Picture Investor Tax Credit Program codified at Louisiana Revised Statutes 47:6007 (the "Program"). The LLA bases its allegations on the supposed existence of a so-called "but for" rule applied by the Office of Entertainment Industry Development (the "OEID")² for determining qualifying expenditures under the Program.

^{&#}x27; LEAP received an initial draft of the Report on January 23, 2012. The only material difference between the January 23 and the February 23 reports is the addition of the last page to the February 23 report entitled "Additional Information Gathered in Response to LEAP's and BKA's Legal Counsels' Statements."

² Formerly, the Governor's Office of Film and Television Development, the OEID was, and is, the agency within the Louisiana Department of Economic Development charged under Louisiana Revised Statutes 47:6007 with administering the Program.

In short, what the LLA alleges is that because the expenditures LEAP and BKA submitted to the OEID did not satisfy this unknown and unwritten "but for" rule, their submissions amounted to misrepresentations. Based on this erroneous allegation, the LLA labels most of the Production's qualifying expenditures as "BKA Normal Operations - Fulfilling Contractual Agreements" to indicate that these expenditures should not have qualified. For the same purpose, it also labels film qualifying producer fees as "Outflows" and other qualifying expenses as "Duplicated or Returned Expenditures."

The LLA alleges this even though it cannot cite to any written law applicable to the Production, whether a statute, regulation, ruling, guideline, memorandum, pronouncement or otherwise, that ever contained this so-called "but for" rule. Indeed, Malcolm Dienes, L.L.C. ("Malcolm Dienes"), the well-respected independent certified public accounting firm that audited these expenditures, informed the LLA that they had never heard of the "but for" rule.

The LLA alleges this even though it is aware of the existence of a voluminous public record held at the OEID's offices which conclusively establishes that for all productions initially certified between 2004 and 2008 the OEID's actual rule was to approve expenditures identical to the expenditures that LEAP and BKA had submitted. The LLA knows that the Production received its initial certification on December 11, 2006.

The LLA alleges this even though it knows that the Production's expenditures were audited twice by Malcolm Dienes before LEAP and BKA submitted them to the OEID which then approved the expenditures after having, in its own written words, a "full and adequate opportunity" to investigate the expenditures.

The LLA alleges this even though it knows that the first time the OEID adopted any rule change similar to the LLA's so called "but for" rule was on February 10, 2012 when the OEID issued a statement on its website entitled "revised accounting guidelines" that contained a guideline akin to the LLA's "but for" rule. And even this statement indicated that this so-called "clarification" would only be "effective for initial certification letters issued on or after 1/1/12".

The LLA alleges this even though it knows from public statements by OEID officials that the OEID's practice was never to apply a substantive rules change retroactively, but only prospectively to productions certified after the effective date of the rule change. As explained in more detail later in this memorandum, the LLA should know that this practice is actually required of government agencies by Louisiana's Administrative Procedure Act set forth in Louisiana Revised Statutes 49:950 et seq. ("LAPA").

How then, with only a prospective change in OEID policy to rely upon, can the LLA reasonably persist with its allegations against LEAP and BKA? How can it reasonably suggest that the Program, which is authorized by a tax statute, be applied retroactively to one taxpayer in a manner different from the manner in which the statute had been applied to all other taxpayers

³ To earn the Louisiana motion picture investor tax credit, a production was required to submit an application to the OEID on its prescribed form to be initially certified as a state-certified production eligible to earn the motion picture investor tax credit. See the Production's Initial Certification Letter attached as Exhibit B

at the time? How can the LLA further reasonably suggest that as a consequence of this retroactive application of current policy changes that LEAP and BKA made misrepresentations to the State by relying in good-faith on the only Program rules applied by the OEID at the time? The LLA can only do so if it turns a blind eye to the law and the facts.

As established hereafter, based on the facts and law, and using the public record available to the LLA and all concerned, we conclusively refute the false and defamatory allegations contained in the Report. We will also establish beyond a doubt that following a lengthy, transparent review of all of the Production's expenditures, the OEID awarded this Production tax credits that it had properly earned in accordance with the law and the OEID's policies at that time.

CONCLUSIONS:

- I. The LLA's allegations are based on mistaken assumptions about the facts and the rules that were applicable to the Production under the Program.
- A. The OEID's own public records confirm that during the time of the Production the OEID consistently and repeatedly interpreted the applicable statute to allow 100% of event expenditures to qualify, not just "but for" expenses.
 - B. There is no "but for" rule in the written law of the Program.
- C. Former government officials have confirmed that during the time of the Production the OEID consistently and repeatedly interpreted the applicable statute to allow 100% of event expenditures to qualify.
- D. LEAP and BKA did not misrepresent anything to the OEID by claiming those expenditures that the OEID had historically and consistently certified as qualifying under the applicable statute.
- E. Any unwritten rule that was inconsistent with the OEID's historic and consistent interpretation of "production expenditures" would have been invalid and unenforceable.
- II. Federal constitutional law required the OEID to apply the same rules under the Program to the Production that it applied to all similarly situated productions.
- III. Neither LEAP nor BKA made any misrepresentations to the OEID as all of their communications and correspondence were completely open and transparent during the extensive audit and OEID review of the Production's expenditures.
- IV. Any actions taken against LEAP or BKA based on the Report would violate their legal rights and impair the Program as a whole.

BACKGROUND:

The LLA conducted an audit of the OEID's issuance of Louisiana motion picture investor tax credits for the Production and issued the Report.

In the Report, the LLA draws the following erroneous conclusions, among others:

- 1. that although unwritten, the controlling rule within OEID was that qualifying production expenditures were only those that would not have been made "but for" the Production; and
- 2. that LEAP and/or BKA misrepresented the nature of the Production's expenditures because they represented that, consistent with the OEID's historic and consistent interpretation of the controlling statute, the expenditures submitted as qualifying were directly related to the Production.

The OEID's own public records prove that the OEID did *not* apply a "but for" rule with respect to this Production or ANY other productions between 2004 and 2008 to determine whether production expenditures were qualifying. Furthermore, as explained below, such an unwritten rule would have been legally invalid because it was not adopted in accordance with Louisiana's Administrative Procedure Act.

There was no misrepresentation on the part of LEAP or BKA. They fully disclosed the nature of their expenditures and represented, based on the public information available to them, that their expenditures were directly related to the Production which was consistent with the applicable statutory definition of "production expenditures" and the OEID's consistent interpretation of this definition with respect to similarly situated productions.

The OEID properly awarded the Production motion picture investor tax credits, consistent with the applicable law and documented practices of the OEID at that time.

In response to the Production's application and after discussions with LEAP, effective as of December 11, 2006, the OEID issued an "Initial Certification Letter" in which it certified the Production as a state-certified production and, thus, eligible to earn Louisiana motion picture investor tax credits under the Program. Under the statute then in effect, state-certified productions approved by the OEID on or after January 1, 2006 were eligible to earn motion picture investor tax credits at the rate of 25% of all expenditures incurred in the state directly in connection with the production, plus an additional 10% if the expenditures were for payroll of Louisiana residents.

This December 11, 2006 Initial Certification Letter is critical, as it establishes the legal and binding agreement between the Production and the State and serves as the basis for which the tax credits were granted. As established hereafter, the OEID's own publicly stated policy was to award tax credits on all expenses associated with festival and event productions initially certified before 2008.

As the LLA recognizes in the Report, the Production was a documentary about the history, design, building, and production of New Orleans' Carnival and Mardi Gras and would

focus on the 2007 carnival season. The Production was a joint effort by BKA, the company responsible for creating, designing and building the parade floats and organizing the parades, and LEAP, a company specializing in providing film-production services including financing services.

According to the Production's application for initial certification, the anticipated date range over which LEAP and BKA would produce the Production was March 31, 2006 through April 1, 2007. This date range was intended to encompass not only the rolling of the parades in the metropolitan New Orleans area during the 2007 carnival season, but also all of the preparatory steps necessary to get the floats ready for the parade season, all of which was to be the subject of the Production.⁴

At all relevant times described in this reply memorandum, the OEID was the governmental agency charged with administering the Program with the exclusive authority to review the expenditures of state-certified productions and determine whether they qualified for motion picture investor tax credits.' Since January 1, 2006, all state-certified productions are required to have their expenditures audited by an independent Louisiana certified public accountant before submitting them to the OEID for approval. The Production followed this requirement. In connection with the OEID's review, the Production provided to the OEID the same raw data, which included a general ledger of all Production expenses, that it submitted to the independent auditor.

At all relevant times, the OEID's procedure for approving qualifying expenditures and issuing the motion picture investor tax credits earned thereon was to issue what is called a "Tax Credit Certification Letter." In this letter the OEID not only certifies the amount of qualifying production expenditures and the motion picture investor tax credits earned on the expenditures, but also states that the motion picture investor tax credits earned are not subject to recapture unless the credits are issued as a result of material misrepresentation or fraud.

After a comprehensive audit by Malcolm M. Dienes and a detailed review by the OEID, the OEID issued the Tax Credit Certification Letters dated April 22, 2009 and July 29, 2009, respectively, attached as Exhibit D. With these letters the OEID certified \$3,420,863 of qualifying production expenditures and \$935,114 of Louisiana motion picture investor tax credits as having been earned by LEAP and BKA and stated that none of the credits were subject to any "Post-Certification Remedy." In each of these Tax Credit Certification Letters, there is also the following statement:

⁴ See the Production Synopsis attached to LEAP's application for initial certification attached as Exhibit C.

⁵ See subsection D(2) of Louisiana Revised Statutes 47:6007 in effect through July 1, 2009

⁶ The Initial Certification Letter that the OEID issued to LEAP defines "Post-Certification Remedy" in paragraph (b) as "recapture, disallowance, recovery, reduction, repayment, forfeiture, decertification, or any other remedy that would have the effect of reducing or otherwise limiting the use of the Louisiana Motion Picture Investor Tax Credits."

"In connection with our review and examination of these materials, we have had a full and adequate opportunity to investigate the transactions, the investments and expenditures covered by the Current Audit Report."

Each letter was signed by Stephen Moret as Secretary of the LED and Christopher Stelly as the OEID's Director of Film and TV.

Now, almost three years after the OEID gave its final certification of the Production's expenditures, and over five years after the OEID executed the Initial Certification Letter, the LLA posits that the OEID issued tax credits for "ineligible expenditures" because LEAP and/or BKA misrepresented to the OEID that the Production's expenditures were qualifying because, in fact, the expenditures did not qualify under some unwritten "rules" not previously used by the OEID. However, the facts overwhelmingly demonstrate that there was no opportunity for misrepresentation on the part of LEAP or BKA. The Production's expenditures were qualified under the applicable law and, thus, were eligible for the tax credits that were certified by the OEID.

REASONING:

I. THE LLA'S ALLEGATIONS ARE BASED ON MISTAKEN ASSUMPTIONS ABOUT THE FACTS AND THE RULES THAT WERE APPLICABLE TO THE PRODUCTION UNDER THE PROGRAM.

During the time of the Production, the OEID had the exclusive authority to interpret and administer Louisiana Revised Statutes 47:6007 and to make the rules for determining which production expenditures were qualifying. And its own public records show that with respect to all productions that it approved as state-certified productions before 2008 it was interpreting Louisiana Revised Statutes 47:6007 to allow 100% of production-related expenditures to qualify for motion picture investor tax credits, irrespective of whether those expenses were also "normal operating expenses." For those productions certified in 2008 and after, the percentage was adjusted downward but still up to 50% for some expenses. Prior to February 10, 2012, there was no evidence that the OEID used a "but for" rule to determine whether a production expenditure qualifies. If the OEID had used such a rule, it would have been invalid and unenforceable because it was not adopted in accordance with Louisiana's Administrative Procedure Act. Therefore, LEAP and BKA did not misrepresent anything to the OEID when they submitted the Production expenditures that the OEID ultimately certified as qualifying.

A. The OEID's public records confirm that during the time of the Production the OEID consistently interpreted the statute to allow 100% of event expenditures to qualify, not just "but for" expenses.

The following passage, which appears on page 4 of the Report, contradicts years of actual practice by the OEID in the context of numerous projects:

"According to Mr. Christopher Stelly, LED Office of Entertainment Industry Development Director, LED determines whether expenditures qualify for tax credits by using a "but for" rule to verify that expenses were not incurred through standard business operations. Although not in writing by LED, this rule, as stated

by Mr. Stelly requires qualifying expenditures to be expenditures that would not have occurred "but for" the production."

This is a false statement and conflicts with years of actual practice by the OEID and the OEID's own public pronouncements on these festival and event productions. Time after time, the OEID failed to apply – and said nothing about – any supposed "but for" rule when it approved motion picture investor tax credits for productions, including performances and events that existed apart from a particular film.

The following documentation, which is part of the OEID's public records, clearly shows that before 2008 the OEID applied the same statutory interpretation to all state-certified productions: that is, with minimal exceptions, 100% of the Louisiana production-related expenses, not just "but for" expenses, constituted "production expenditures" as defined under Louisiana Revised Statutes 47:6007 and, thus, qualified to earn motion picture investor tax credits.⁷

- Documentation related to the December 8, 2004 Jimmy Buffet Concert
 - Certified on November 22, 2004 as part of a slate of state-certified productions certified by the OEID as eligible to earn motion picture investor tax credits under the Program (state certification number 0060-2004).*
 - Attached as Exhibit E-1 is a spread sheet that AEG Louisiana Production, L.L.C. ("AEG") submitted to the OEID with its production report dated February 1, 2005 that shows all of the expenses incurred in connection with the concert, a total of \$368,416.16. The spread sheet shows not only television broadcast expenses but also event production expenses such as venue rent, stagehands, catering, box office, clean-up, security venue, usher/ticket taker staff, electrical, venue production personnel, insurance and overhead.
 - O Attached as Exhibit E-2 is the Tax Credit Certification Letter dated July 11, 2005 issued by the OEID to AEG that references the December 8, 2004 Jimmy Buffet Concert by its state-certified production number 0600-2004. Apparently, it is a Tax Credit Certification Letter for two of the productions included in AEG's slate of certified productions, the December 8, 2004 Jimmy Buffet Concert and the 2005 Jazz and Heritage Festival. It references two production reports, one dated February 1, 2005

⁷ Representatives of LEAP and BKA learned at the LLA Meeting that the LLA had not reviewed these public records before issuing its January 23 draft report. Interestingly, the volumes of public records available for the LLA to review since the LLA Meeting does not seem to have contributed any changes in the Report.

⁸ According to the application for initial certification, this production was part of a slate of concerts/live performances that were to be produced by AEG in 2004 and 2005 for which it was seeking an aggregate certification. Then and now, the OEID allows production companies to obtain an aggregate certification for a slate of projects if they are to be produced within 12 months of the certification date and satisfy other requirements.

applicable to the December 8, 2004 Jimmy Buffet Concert and one dated June 9, 2005 applicable to the 2005 Jazz and Heritage Festival (described below). In Section 3 of this Tax Credit Certification Letter, the OEID certifies \$36,841.61 of motion picture investor tax credits. According to section 2 of the letter, the credits were to be earned at the rate of 10% of investment in the production.

This means the OEID determined that \$368,416.10 or 100% of the expenses incurred to produce the December 8, 2004 Jimmy Buffet Concert were qualified.

If a "but for" rule existed, the OEID presumably would not have approved credits based on the costs of the ticket-takers and ushers, venue rent, janitorial or security.

- Documentation related to the 2005 New Orleans Jazz and Heritage Festival
 - Certified on November 22, 2004 as part of a slate a state-certified productions certified by the OEID as eligible to earn motion picture investor tax credits (state certification number 0060-2004).
 - O Attached as Exhibit F-1 is a document entitled New Orleans Jazz and Heritage Festival 2005 Budget that AEG submitted to the OEID with its Production Report dated June 9, 2005 that shows all of the expenses incurred in connection with the 2006 Jazz and Heritage Festival, a total of \$11,825,088.00. The budget shows the following event production expenses:
 - fair production
 - crafts
 - fair music production
 - sponsorship expenses
 - hr/legal
 - staff
 - Festival Productions, Inc. producer fee and direct expenses
 - insurance
 - pre-production, advertising, sponsorship fulfillment
 - mentorship/internship program

- insurance
- finance/ticket/concessions operation
- educational programs
- staff
- commissions
- o In Section 4 of the same Tax Credit Certification Letter described above and attached as Exhibit E-2, the OEID certifies \$1,182,508.80 of motion picture investor tax credits. According to section 2 of the letter, the credits were to be earned at the rate of 10% of investment in the production.

This means the OEID determined that \$11,825,088.00 or 100% of the expenses incurred to produce the 2005 Jazz and Heritage Festival were qualified.

Once again, this result is wholly incompatible with the existence of a "but for" rule.

- Documentation related to the 2006 New Orleans Jazz and Heritage Festival
 - O Certified on April 13, 2006 as part of a slate a state-certified productions certified by the OEID as eligible to earn motion picture investor tax credits (state certification number 0258-2006).
 - O Attached as Exhibit G-1 is a Cost Report of Production Expenditures that the accounting firm Robertson, Bailes & McClelland LLP submitted to the OEID on AEG's behalf that shows all of the expenses incurred in connection with the 2006 Jazz and Heritage Festival, a total of \$10,361,609.00. The cost report shows the same event production expenses as those submitted in connection with the 2005 festival including the following additional expenses:
 - Festival Productions, Inc. producer fee and direct expenses
 - pre-production promotion
 - advertising
 - sponsorship fulfillment

⁹ According to the application for initial certification, this production was part of a slate of concerts/live performances that were to be produced by AEG in 2006 for which it was seeking an aggregate certification.

- Louisiana tourism sponsorship expenses
- film production
- administration
- finance
- American expense grant expenses
- O Attached as Exhibit G-2 is a Tax Credit Certification Letter dated September 22, 2006 issued by the OEID to AEG that references 2006 New Orleans Jazz and Heritage Festival by its state-certified production number 0258-2006. In Section 3 of this Tax Credit Certification Letter, the OEID certifies \$2,590,402.25 of motion picture investor tax credits. According to section 2 of the letter, the credits were to be earned at the rate of 25% of investment in the production.

This means the OEID determined that \$10,361,609.00 or 100% of the expenses incurred to produce the 2006 Jazz and Heritage Festival were qualified.

- Documentation related to the 2006 Voodoo Music Experience
 - Certified on December 11, 2006 by the OEID as eligible to earn motion picture investor tax credits (state certification number 0275-2006). Note, this project received its "pre-certification" agreement on the same date as the Production.
 - O Attached as Exhibit H-1 is a Profit & Loss Detail that the accounting firm Malcolm M. Dienes, L.L.C. (the same firm that audited the Production) submitted to the OEID that shows all of the variable production costs incurred in connection with the 2006 Voodoo Music Experience, a total of \$2,823,345.42. The Profit & Loss Detail shows the following categories of event production expenses that were included as qualifying Louisiana expenses:
 - project, site and stage management
 - equipment upkeep
 - site rental
 - catering management
 - commissions tent
 - hotel

- office expense
- transportation
- art production
- audio production
- banners
- barricades and risers
- car rental
- clean-up
- contract labor
- credentials
- electricity
- entertainment
- equipment
- equipment rental
- film and video
- first aid
- hospitality
- other labor
- lighting
- meals event labor
- media
- permits and tax
- photography
- police/security

- shipping
- production
- professional fees
- site preparation
- stage production
- storage
- supplies
- talent
- telephone- info line
- ticket sales handling
- travel airfare
- video
- Attached as Exhibit H-2 is a Tax Credit Certification Letter dated October 25, 2007 issued by the OEID that references the 2006 Voodoo Music Experience by its state-certified production number 0275-2006. In Section 3 of this Tax Credit Certification Letter, the OEID certifies \$706,748.73 of motion picture investor tax credits. According to section 2 of the letter, the credits were to be earned at the rate of 25% of investment in the production.

This means the OEID determined that \$2,826,994.90 or over 100% of the variable costs incurred to produce the 2006 Voodoo Music Experience were qualified.

- Documentation related to the 2007 New Orleans Jazz and Heritage Festival
 - Certified on April 27, 2007 by the OEID as a state-certified production eligible to earn motion picture investor tax credits (state certification number 0311-2007).
 - Attached as Exhibit I-1 is a Cost Report of Production Expenditures that the accounting firm Robertson, Bailes & McClelland LLP submitted to the OEID on AEG's behalf that shows all of the expenses incurred in connection with the 2007 Jazz and Heritage Festival, a total of \$12,066,954.00. The budget shows the same event production expenses as those submitted in connection with the 2005 and 2006 festivals.

O Attached as Exhibit I-2 is a Tax Credit Certification Letter dated December 14, 2007 issued by the OEID to AEG that references the 2007 Jazz and Heritage Festival by its state-certified production number 0311-2007. In Sections 3 and 5 of this Tax Credit Certification Letter, the OEID certifies \$2,744,076.25 of motion picture investor tax credits. According to section 2 of the letter, the credits were to be earned at the rate of 25% of investment in the production.

This means the OEID determined that \$10,976,305.00 or 100% of the expenses incurred to produce the 2007 Jazz and Heritage Festival were qualified except for the following expenses:10

- \$333,940 for pre-production promotion, advertising and sponsorship fulfillment
- \$137,882 for finance, tickets and concession operations
- \$159,668 for crafts
- \$36,372 for educational programs
- \$22,917 for mentorship/internship programs

In the OEID's public records, there are several more productions and many more examples over the years evidencing a consistent pattern of the OEID allowing expenditures that were not "but for" expenditures to qualify for the motion picture investor tax credit.

The foregoing public records show that before 2008, the OEID was not applying a "but for" rule to determine whether production expenditures qualified for the motion picture investor tax credit. If the OEID had been applying a "but for" rule, it would have rejected many of the expenses listed above because many of those expenses were obviously essential for producing these events and would have been incurred whether or not the events were filmed.

The statements contained in the Report regarding a "but for" rule are wrong and do not correctly reflect the documented actions of the OEID at the time the Production was approved and qualified.

B. There is no "but for" rule in the written law of the Program.

Louisiana Revised Statutes 47:6007 is the only statutory authority for the Program. It has never contained a "but for" rule and does not currently contain a "but for" rule. As in effect until July 9, 2009, Louisiana Revised Statutes 47:6007 defined "production expenditures" as "preproduction, production, and postproduction expenditures directly incurred in this state that are directly used in a state-certified production."

¹⁰ See explanation of reductions in documentation that Robertson, Bailes & McClelland LLP submitted to the OEID and which is attached as Exhibit J.

The current published rules of the Program, which were not promulgated until January 1, 2010, do not contain a "but for" rule. In fact, prior to January 1, 2010, when the OEID certified the Production's expenditures, there were no published rules related to the Program.

The Auditing Instructions that are attached to the Production's Initial Certification Letter as Exhibit B -- and which are attached to every Initial Certification Letter -- do not contain a "but for" rule. In fact, several reputable accounting firms that have conducted hundreds of audits under the Program, including Malcolm Dienes, the auditor of the Production, have all stated that in all their dealings with the OEID and, in particular, Mr. Stelly, they have never heard of a "but for" rule applied with respect to the Program.

In fact during the period the Production was produced, there were no guidelines at all published on the OEID's website other than perhaps what was already in the statute.

For productions certified prior to 2008, the OEID had consistently interpreted the statute to allow 100% of production-related expenditures to qualify for motion picture investor tax credits, irrespective of whether those expenses were also "normal operating expenses." The OEID did not change its interpretation of the statute until 2008 (applicable only to productions initially certified in 2008 and later) when it reduced, but did not eliminate, expenditures that were not considered "but for" expenses. The OEID adopted this new substantive change in its rules by means of an internal memorandum dated April 18, 2008 from Mr. Stelly to Sherri McConnell, the then Director of the OEID and Mr. Stelly's boss." By reducing, but not eliminating, allowable expenditures that could not be considered "but for" expenditures, the OEID had still not adopted a "but for" rule with this 2008 memorandum.

Not until February 10, 2012 did the OEID attempt to adopt a "but for" rule by publishing the following statement on its website:

"10 February 2012

By Louisiana Entertainment

Important Guideline Clarification Statement - please note the following clarification statement provided in our audit guidelines:

Cost Report of Direct Production Expenditures –Events:

Clarification of Direct Production Expenditures: effective for initial certification letters issued on or after 1/1/12: Only costs incurred directly for film production (i.e. unique to the filming) are eligible to earn tax credits. Costs that are indirectly related to the film production, such as costs associated with events (music festivals, concerts, documentary and reality television activities, etc.) that would occur irrespective of filming are not eligible expenditures. Such ineligible costs

¹¹ This memorandum was not provided to the Production (and would not have applied retroactively anyway). It was only recently discovered by LEAP during a public records search conducted on January 26, 2012. See Memorandum dated April 18, 2008 attached hereto as Exhibit K.

may include artist compensation for festival or concert appearances, and costs associated with the usual activities of the subject of a reality show or documentary."¹²

Although, the statement is entitled "Clarification Statement," it is not a mere clarification of existing audit guidelines because, as explained above in this Section B, such guidelines did not exist. Clearly, this so called "clarification" was an obvious attempt by the OEID to change its interpretation/application of the statute yet again, but this time in response to the LLA's suggested policy changes in the Report. It constitutes a new, substantive change in how the OEID has interpreted the definition of "production expenditures" under Louisiana Revised Statutes 47:6007 since 2008.

Since this substantive change was not adopted in accordance with LAPA before the Production was initially certified, it cannot be applied retroactively to the Production. As explained in more detail in Section E below, the Louisiana Legislature enacted LAPA to establish certain formal procedures to be followed by state agencies proposing the adoption of new substantive rules.¹³ The most important of these procedures includes giving public notice of the proposed substantive rules and providing those affected by the proposed substantive rules with the opportunity to respond.

It is a simple and undeniable truth that during the time that the Production's expenditures were audited by Malcolm Dienes and reviewed by the OEID, neither Mr. Stelly nor anyone else with the State ever mentioned to anyone involved with the Production that there was a "but for" rule. The first time any of LEAP's representatives, BKA's representatives, Malcolm Dienes or this author heard of a "but for" rule was when they read it in the Report. The OEID's February 10, 2012 pronouncement shows that there was good reason for this. Until February 10, 2012, the OEID did not have a "but for" rule.

C. Former government officials have confirmed that during the time of the Production the OEID interpreted the statute to allow 100% of event expenditures to qualify.

On February 1, 2012, Michael Arata, a managing member of LEAP, spoke with Sherri McConnell and asked her whether, during her tenure as Director of the OEID (2007-2010), she was aware of a "but for" rule. Ms. McConnell's responses to Mr. Arata are somewhat consistent with the LLA's findings stated on the last page of the Report, although it appears the Report leaves out many significant details.

The LLA does not describe with any detail what Ms. McConnell explained the actual rule to be at the time the Production was initially certified. She provided Mr. Arata with the following details:

¹² http://www.louisianaentertainment.gov/film/content.cfm?new=2005&id=64

¹³ Women's and Children's Hosp. v. State Dept. of Health and Hosps., 2008-C-946 (La. 1/21/09); 2 So.3d 397, 401.

- When she started with the OEID in 2007, she was made aware that the OEID was issuing tax credits to the Jazz Festival and other festivals for 100% of their "normal operating costs."
- She explained that everyone in the office knew that these expenses were the "cost of putting on the Jazz Fest" and entailed 100% of every expense associated with that event. Ms. McConnell cited as examples police, concessions and others. She confirmed that there was no "but for" rule excluding these costs at that time.
- After she started, and was made aware of the OEID's practice of awarding tax credits on 100% of the event expenses, she had discussions with her staff (including Mr. Stelly) and she tried to change the way the credits were awarded in 2008.

The Report also does not mention what Ms. McConnell probably told the LLA about the OEID's view of initial certification letters. Then and now, the OEID views an initial certification letter as a contract with the production under which the OEID is bound to apply to the production the rules in effect on the date of the initial certification. Additionally, the OEID will only apply a substantive change in those rules to productions that are initially certified after the change.

In a December 8, 2007 Times-Picayune article Ms. McConnell was asked whether the 2008 policy changes described above in Section B that reduced allowable production expenditures below 100% would impact the Jazz Festival and other productions that had been certified before 2008. Ms. McConnell responded: "We don't think it would be fair -- when they had planned and budgeted based on their 'precerts' -- to change. . .If we had an agreement, we're going to stand with our agreement." The Production was one of those pre-2008 productions, having received its initial certification on December 11, 2006. According to the OEID's operating procedures as described by Ms. McConnell, then Director of the OEID, the Production cannot be impacted by subsequent policy changes. The OEID's February 10, 2012 statement published on its website shows that the same operating procedures are in place today.

Whether or not Ms. McConnell remembered speaking with Mr. Stelly about the documentary and making the determination that costs to build or recreate floats for parade purposes should not qualify is of no moment. The fact is the OEID did ultimately approve the expenditures that LEAP and BKA submitted by issuing the Tax Credit Certification Letters attached as Exhibit D. More importantly, the OEID did so with full knowledge of the nature of the expenditures. The Report alludes to Ms. McConnell's internal discussions with Mr. Stelly regarding the nature of the expenditures. In Section III below, this memorandum describes Mr. Stelly's discussions with LEAP and BKA and the detailed general ledgers that LEAP and BKA provided to him. The simple truth is that at the time the Production received its initial certification the law of the Program was that the expenditures submitted by LEAP and BKA were qualifying expenditures. Therefore, the OEID was required to abide by its December 11, 2006 contract with the Production and approve these expenditures.

¹⁴ Early on in the Program, Initial Certification Letters were referred to as "Precertification Letters."

For the reasons given above, the OEID could not have applied a "but for" test to the Production. The Tax Credit Certification Letters prove that, in fact, the OEID did not apply such a test to the Production.

Indeed, the LLA does not and cannot establish that the so called "but for" test was applied to the Production. It cannot offer any official certification document or correspondence between the OEID and the Production or the Production's independent auditor that such a "rule" was applicable to this Production at that time. The LLA does not rely upon the actual laws of the State of Louisiana, or the public records evidencing the OEID's actual practice. Nor do they offer direct testimony that the unwritten "but for" rule existed and was used in this Production. Instead, they claim (without producing them) to have "located" emails between Ms. McConnell and a Times-Picayune writer as their best evidence of the existence of this "rule".

Is this truly the LLA's position that laws of the State of Louisiana are overcome by secretive unwritten and unknown "rules" and private emails from Agency officials to the media?

It is not without irony that the very article Ms. McConnell was discussing with the Times Picayune reporter in December 2007 contains comments from Ms. McConnell that undermine the LLA's "findings", namely:

- * "McConnell said that even though the film office's policy has changed, the department will not seek to rescind or recapture tax credits granted to festivals in the past."
- * "The department will also honor its "precertifications" -- letters sent before the policy change that indicate the department's intention to grant a certain number of credits."
- * "We don't think it would be fair -- when they had planned and budgeted based on their 'precerts' -- to change," McConnell said. "If we had an agreement, we're going to stand with our agreement."

These comments establish that the OEID knew it was granting tax credits on "but for" expenses and that they had made a policy decision to abide by the Pre-Certification Agreements, regardless of whether or not they thought that the expenses "should" qualify or not. It seems beyond the scope of the LLA's authority to now second guess those OEID decisions and retroactively penalize this Production, which relied in good-faith on those decisions and the OEID's pre-certification agreement.

On February 2, 2012, Mr. Arata spoke with Richard House, former General Counsel for the Louisiana Department of Economic Development. He asked Mr. House whether, during his tenure as General Counsel (2004- August 2007), he was aware of a "but for" rule in the OEID. Mr. House responded to Mr. Arata with the following:

- There was no "but for" rule when he was there.
- Everyone knew at that time that 100% of the expenses associated with the festivals and other event productions were being claimed for tax credits.

 The LED specifically accepted those expenditures as production expenditures because the festivals and other events were qualified as film and television productions.

It is critical to note that Mr. House was provided a copy of the LLA's statements attributed to him and, to quote Mr. House, "In order for the paragraph in the attachment pertaining to me to more accurately reflect both my conversation with the Auditors as well as the facts, it should be stricken in its entirety" and he suggested a new statement with substantive changes from what the LLA had reported.

Mr. House's statements as reported by the LLA appear to be inconsistent with the well-documented operating procedures of the OEID and seem to imply that tax statutes may be applied differently to similarly-situated taxpayers in violation of the U.S. Constitution. Under the Equal Protection Clause of the U.S. Constitution discussed in Section II below, a governmental agency cannot apply the tax laws as it sees fit at any point. The law must be applied in the same manner to all similarly-situated taxpayers. Again, the LLA relies upon a clearly unlawful position to support its allegations and "findings".

Public confidence in the State depends entirely upon the consistency and predictability of the State's administration of the law and to suggest that a "case by case" analysis of substantive policy is appropriate is not only wrong, but damaging to the State and the Program.

As Ms. McConnell explained in the December 8, 2007 Times-Picayune article, it would matter if tax credits were issued in the past for similar expenses, and it was a policy decision by the OEID to allow these expenditures for projects with pre-certification agreements in place before the change in 2008. This project was awarded a pre-certification agreement in 2006, well before the change. We know Mr. House provided the LLA with more information that they have reported. We can only assume the LLA's findings do not precisely match all that they actually learned from Mr. House.

As Ms. McConnell explained in the December 8, 2007 Times-Picayune article, it would matter if tax credits were issued in the past for similar expenses. It is hard to believe a lawyer of Mr. House's stature would have uttered these statements. We can only assume the LLA's findings do not precisely match what they actually learned from Mr. House.

Once again, there was no "but for" rule applied by the OEID to *any* productions, even after it modified its practices in 2008 to prospectively limit qualifying expenditures.¹⁵

¹⁵ Representatives of LEAP and BKA learned at the LLA Meeting that the LLA had not spoken with either of these former government officials who were working with the OEID at the time the Production was reviewed and approved by the OEID.

D. LEAP and BKA did not misrepresent anything to the OEID by claiming those expenditures that the OEID had historically and consistently certified as qualifying under the statute.

The Report suggests that BKA and/or LEAP misrepresented the "nature" of the expenditures associated with the Production. They do not and cannot say that LEAP and/or BKA misrepresented the actual expenditures in any way. This is because the LLA knows (but unfairly fails to report) that LEAP and BKA provided the OEID with hundreds of pages of raw financial data, specifically detailing not only the "nature" of the expenditures, but the actual detail of the expenditures. It is impossible for anyone reviewing this detail NOT to understand the precise nature of the expenditures.

According to Louisiana Revised Statute 47:6007 and other published authorities described below, during the time of the Production, the OEID and/or the Louisiana Department of Economic Development was the exclusive authority charged by the Louisiana Legislature with determining which productions and production expenditures were qualifying. The OEID's interpretation of the statute as reflected in the public record at the time the Production was initially certified was the law of the Program.

This Production, like all of the above-referenced productions (and many others), and all of the independent auditors associated with this and the other live event productions, properly classified the costs associated with ("used directly in") the productions as "production costs," irrespective of whether those costs were the costs of camera rental, float preparation, concession booths or ticket takers. And the OEID accepted the classification of these expenses as "production expenses", with full knowledge of the "nature" of all of these expenses. The OEID's own records evidence, time and again, that they knew what they were doing, and continued to allow tax credits on these expenditures.

The LLA cannot credibly suggest that it was the responsibility of LEAP and BKA to tell the OEID which of their expenditures were qualifying, in effect to approve their own expenditures, and to also apply some unwritten, unknown rule to the Production. This suggestion improperly second-guesses (and eliminates) the OEID's exclusive responsibility for administering the Program.

Given the OEID's legislative mandate and the lack of other available guidance, it is not reasonable or valid for the LLA to suggest that LEAP or BKA or their accountants were responsible for instructing the OEID as to which of the Production expenditures were qualifying. This Production, like the productions that came before it and like those that followed, could only provide all of the raw documentation to the OEID and rely upon the OEID for their determination of what would qualify and would not. And as established herein, this is exactly what happened in this case. This does not, and cannot, constitute misrepresentation.

¹⁶ Representatives of LEAP and BKA learned at the LLA Meeting that the LLA believes that it was not reasonable for the Production to rely on the OEID's interpretation of the statute because in their current opinion the OEID's interpretation was wrong.

As in effect on the date the Production was initially certified and until it was amended effective as of July 1, 2007, Subsection D of Louisiana Revised Statutes 47:6007 required the Department of Economic Development and the OEID to promulgate rules for determining what projects and expenses qualify:

"D. The secretary of the Department of Economic Development and the Governor's Office of Film and Television Development shall determine through the promulgation of rules what projects and expenses ... qualify according to this Section. Prior to adoption, these rules shall be approved by the House Committee on Ways and Means and the Senate Committee on Revenue and Fiscal Affairs."

As in effect on the date the Production was initially certified, Subsection D(3) of Louisiana Revised Statutes 47:6007 provided that it is not intended as a clear statement of the rules on what projects and expenditures qualify but only as "general guidelines," that the OEID must promulgate more specific rules to carry out the intent of the statute:

"(3) The secretary of the Department of Revenue, in consultation with the Department of Economic Development and the director of the Governor's Office of Film and Television Development, shall promulgate such rules and regulations as are necessary to carry out the intent and purposes of this Section in accordance with the general guidelines provided herein." ¹⁸

In Revenue Ruling No. 06-016 issued on October 12, 2006¹⁹ (almost exactly two months before the Production was certified as a state-certified production), the Louisiana Department of Revenue stated in response to question number 2 under the section of the ruling entitled "Frequently Asked Questions" that "Louisiana Revised Statutes 47:6007 gives the Film Office and the LED, jointly, the exclusive authority to determine whether a production qualifies as a state-certified production."

¹⁷ Even after its amendment in 2007, Subsection D of Louisiana Revised Statutes 47:6007 required, and still requires in its current version, the Department of Economic Development and the OEID to promulgate rules:

[&]quot;D. The secretary of the Department of Economic Development and the office shall determine through the promulgation of rules the minimum criteria that a project must meet in order to qualify according to this Section."

¹⁸ To date, the language of Subsection D(3) has not been amended and remains in the current version of the statute. Despite the Louisiana Legislature's clearly expressed intention that this statute does not provide a clear and precise set of rules for determining qualifying production expenditures, representatives of LEAP and BKA learned at the LLA Meeting that the LLA believes that the statute does provide a clear rule for determining qualifying production expenditures and that the Production should not have heeded the OEID's determinations consistently applied over several years.

¹⁹ See Revenue Ruling No. 06-016 (October 12, 2006) attached as Exhibit L.

In Paragraph I of Private Letter Ruling No. 07-001 issued on February 5, 2007,²⁰ the Louisiana Department of Revenue ruled that the OEID has the exclusive authority to determine whether funds are properly expended with respect to a state-certified production:

"The Film Office has the exclusive authority under La. Rev. Stat. 47:6007(D)(2)(d) to determine whether funds were properly expended with respect to a state-certified production prior to issuing a Tax Credit Certificate. Additionally, LDR is aware of the Production Certification Letter whereby, among other things, LED and the Film Office may review and examine the findings of the certified public accountant prior to issuing a Tax Credit Certificate."

As in effect on the date the Production was initially certified, Subsection D(2)(d)(i) of Louisiana Revised Statutes 47:6007 provided that the OEID "shall review the production expenses" and not merely accept the submissions of the Program applicant or its independent auditor. Effective July 9, 2009, the same provision of Subsection D(2)(d)(i) was further refined by the Louisiana Legislature to read as follows:

"The office and the secretary shall review the audit, the production expense details, and may require additional information needed to make a determination."

As in effect on the date the Production was initially certified, Subsection D(4) of Louisiana Revised Statutes 47:6007 establishes that the OEID is not bound to rely on the audit report submitted by the independent auditor and may have it owns audit conducted if it is not satisfied with the independent auditor's report:

"(4) Any taxpayer applying for the credit shall be required to reimburse the Governor's Office of Film and Television Development and the Department of Economic Development for any audits required in relation to granting the credit."²¹

Certainly, the Production's independent auditor, Malcolm Dienes, was not the final authority on which of the Production's expenditures were qualifying." Not until January 1, 2006 were productions even required to have their expenditures audited by an accountant. The Program had already existed and had been utilized by productions for three and a half years by that time." The accountants necessarily took the Program as they found it. By January 1, 2006,

²⁰ See Private Letter Ruling No. 07-001 (February 5, 2007) attached as Exhibit M.

²¹ This provision also remains in the current version of the statute.

²² Representatives of LEAP and BKA learned at the LLA Meeting that the LLA may believe that the independent auditor has the responsibility of informing the OEID as to which production expenditures qualify and that with respect to the Production, the independent auditor, Malcolm Dienes, got it wrong and, thus, the Production should not have relied on their audit as approved by the OEID.

²³ The Program was enacted into law on July 1, 2002.

the OEID had already established how it was interpreting "production expenditures" under the statute.

Where could Malcolm Dienes and other accountants look to determine the rules for determining which production expenditures should be included in qualifying productions costs? The Auditing Instructions attached to the Production's December 11, 2006 Initial Certification Letter (attached as Exhibit B) provided no guidance in this regard. These Auditing Instructions stated only that "Only expenditures which were incurred for the production can be recorded as production costs." What Malcolm Dienes did, which was all that they could do, was to follow the OEID's interpretation of the statute.

According to Louisiana case law, a reviewing court "should afford considerable weight to an administrative agency's construction and interpretation of its rules and regulations adopted under a statutory scheme that the agency is entrusted to administer, and its construction and interpretation should control unless they are found to be arbitrary, capricious, or manifestly contrary to its rules and regulations." If the evidence, as reasonably interpreted, supports the determination of an administrative agency, its orders are accorded great weight and will not be reversed or modified in the absence of a clear showing that the administrative action is arbitrary and capricious. The test for determining whether the action is arbitrary and capricious is whether the action taken is reasonable under the circumstances.²⁶

The public record unequivocally shows that prior to 2008, the OEID's construction of 47:6007 was that production expenditures included 100% of the preproduction and production costs. This construction was consistent with the statutory definition of "production expenditures" which until July 1, 2009 required only that production expenditures be "directly used in a state-certified production."

Certainly, all of the Production expenditures that LEAP and BKA submitted to the OEID were directly used in the filming of the 2007 carnival season just as all of the production expenditures of Jazz Festival and the other productions cited above were directly used in the filming of their productions. Since the OEID's construction regarding qualifying production expenditures was not arbitrary, capricious, or manifestly contrary to its rules and regulations, its decision to award the Production motion picture investor tax credits would be accorded "great

²⁴ Women's and Children's Hosp. v. State Dept. of Health and Hosps., 2007-1157 (La. App. 1 Cir. 2/8/08); 984 So.2d 760, 766 (citation omitted.)

²³ Women's and Children's Hosp., 984 So.2d at 766(citations omitted); see also Women's and Children's Hosp. v. State Dept. of Health and Hosps., 2008-946 (La. 1/21/09); 2 So.3d 397, 402-403 (citation omitted) ("The powerful effect courts give most agency interpretations of the agency's own regulations is based on the recognition that the agency is typically in a superior position to determine what it intended when it issued a rule, how and when it intended the rule to apply, and the interpretation of the rule that makes the most sense given the agency's purposes in issuing the rule.")

²⁶ Women's and Children's Hosp., 984 So.2d at 766 (citations omitted).

weight" by a court of law and allowed to stand. In other words, the court would defer to the OEID's construction since it was reasonable under the circumstances.²⁷

Where a statute is ambiguous . . . a long settled contemporaneous construction by those charged with administering the statute is given substantial and often decisive weight in its interpretation." As stated above, the Louisiana Revised Statutes 47:6007 itself states that it is only meant to provide "general guidelines," not a clear statement of rules, which the Legislature left to the OEID and/or the Louisiana Department of Economic Development to promulgate.

It is clear that the Louisiana Legislature intended that the OEID and/or the Louisiana Department of Economic Development was to be the exclusive authority charged with determining which productions and production expenditures were qualifying under the Program. Without any other written guidance, LEAP's and BKA's reliance on the OEID to approve or disapprove the audited Production expenditures that they submitted following full disclosure of all relevant financial data was well placed and the most they could do under the law.

The Production's reliance is exactly why, in December 2007, the OEID publically stated that it was going to allow tax credits on all festival and event productions with pre-certification agreements that pre-dated the new 2008 policy.

E. Any unwritten rule that was inconsistent with the OEID's historic and consistent interpretation of "production expenditures" would have been invalid and unenforceable.

Even if the OEID had adopted an unwritten "but for" rule and was using it to determine which expenditures qualified under the Program, such a rule would have been invalid because it was not adopted in accordance with LAPA.

Louisiana Revised Statutes 49:953 sets forth extensive procedures to be followed for the adoption of rules. This statute requires an agency to publish notice of its intent to adopt, amend, or repeal any rule in the Louisiana Register.²⁹ The agency must provide interested persons with copies of the intended rule, and it must offer them a reasonable opportunity to respond.³⁰ The LAPA defines a rule as a "statement, guide, or requirement for conduct or action, exclusive of those regulating only the internal management of the agency . . . which has general applicability

²⁷ See Forbes v. Crockerham, Nos. 2008-0762 & 2008-0770 (La. 1/21/09); 5 So.3d 839; Matter of Recovery I, Inc., 93-0441 (La. App. 1 Cir. 4/8/94); 635 So.2d 690; Calcasieu League for Envtl. Action Now v. Thompson, 931978; 661 So.2d 143.

²⁸ Traigle v. PPG Indus., Inc., 332 So.2d 777, 782 (La. 1976) (citations omitted); See also Sales Tax Dist. No. 1 of Lafourche Parish v. Express Boat Co., Inc., 500 So.2d 364, 370 (La. 1987); Jurisich v. Jenkins, 99-0076 (La. 11/17/99); 749 So.2d 597, 602 (citations omitted); Bd. of Trs. of State Emps. Grp. Benefits Program v. St. Landry Parish Bd., 2002-0393 (La. App. 1 Cir. 2/14/03); 844 So.2d 90, 100 (citations omitted).

²⁹ Louisiana Revised Statutes 49:953.

³⁰ *Id*.

and the effect of implementing or interpreting substantive law or policy, or which prescribes the procedure or practice requirements of the agency. . . . "31

LAPA provides that no rule is valid unless it was adopted in substantial compliance with the law's provisions.³² A rule is effective upon its publication in the Louisiana Register, unless provided for otherwise.³³ Furthermore, no rule shall be effective or enforceable unless: (1) it was properly filed with the State Register, (2) a report on the rule was submitted to the legislature in accordance with Louisiana Revised Statutes 49:968, and (3) the approved economic and fiscal impact statements required by Louisiana Revised Statutes 49:953(A) were filed with the Department of the State Register and published in the Louisiana Register.³⁴

OEID's alleged "but for" rule fits the definition of a "rule" provided in Louisiana Revised Statutes 49:951(6). Assuming its existence, it would be a "statement, guide, or requirement for conduct or action," and it does not regulate "only the internal management of the [OEID]." Moreover, such a "but for" rule "prescribes the procedure or practice requirements of the [OEID]" for determining which expenditures are directly used in a film production such that they are film production expenditures eligible to earn motion picture investor tax credits.

An agency like the OEID that, as a practical matter, has enacted a new substantive rule such as the "but for" rule cannot evade the notice and comment requirements of LAPA by avoiding written statements or other "official" interpretations. Since the "but for" rule would have represented a significant departure from its consistent practice and would have substantially affected the film-production industry, the "but for" rule would have been a new substantive rule. The OEID would have been obliged, under LAPA, to submit the change for notice and comment. That, of course, never happened.

Indeed, after Mr. Arata informed Mr. House of the OEID's 2008 internal memorandum discussing the 2008 50% guidelines, Mr. House (the OEID's former counsel) asked, "Was it published?"

Because the OEID did not abide by LAPA's rule-making procedures, tax credit applicants had no means of determining whether the OEID rules should be followed or not; yet the OEID required that they be followed. The OEID's pre-2008 directives to tax credit applicants, the 2008 internal memorandum and the most recent February 12, 2012 web pronouncement reflect the OEID's pattern of informally adopting rules in violation of LAPA and then requiring taxpayers to claim expenditures in accordance with these informal rules.

³¹ Louisiana Revised Statutes 49:951(6).

³² Louisiana Revised Statutes 49:954.

³³ Id.

³⁴ *Id*.

Now as we see in the Report, when the LLA, an agency charged with looking out for the public's interest, eventually finds that the OEID's secret rules are not ideal, it proposes penalties for the tax credit applicant. This kind of thing can be described only as Kafkaesque.

The fact that the Department of Economic Development and the OEID did not ever formally promulgate rules to govern "production expenditures" as the Program statute required should not cause LEAP and BKA to be penalized. They used all reasonable means available to them (including being told by OEID that the expenses would qualify if they were "film related") for deciphering the correct interpretation of the statute as applied by the OEID at the time.

Since this *unwritten* "but for" rule was not adopted in substantial compliance with the guidelines set forth in LAPA, the rule, even if it did exist at the time of the Production, would not be valid or enforceable.³⁵

II. FEDERAL CONSTITUTIONAL LAW REQUIRED THE OEID TO APPLY ITS RULES EQUALLY TO THE PRODUCTION AND ALL OTHER STATE-CERTIFIED PRODUCTIONS UNDER THE PROGRAM.

The United States Constitution required the OEID to apply the same rules to the Production that it had consistently applied to all other eligible productions under the Program.

The Equal Protection Clause of the U.S. Constitution provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." Under the Equal Protection Clause, taxpayers shall not be subject to discriminatory state taxation. This means that if two taxpayers are similarly situated, a tax statute must be applied in the same manner to both. Louisiana Revised Statutes 47:6007, which embodies the Program, is a state tax statute.

For the OEID to have made a distinction between the Production and other eligible productions for the purpose of denying the Production motion picture investor tax credits under the Program would have been arbitrary and capricious and, thus, discriminatory taxation in violation of the Equal Protection Clause.

This Production, consistent with some of the earlier productions involved the documentary filming of an annual event. By way of example, the 2006 Voodoo Festival application (which was awarded tax credits on 100% of its expenses) categorized its project as a documentary that would follow the local and national musicians' performances at the annual Voodoo festival. The 2006 Voodoo Festival was awarded a pre-certification agreement on the same date as the Production - December 11, 2006, and was in all material respects, identical to the Production. Does the LLA suggest that the OEID could arbitrarily allow tax credits for the

³⁵ See Multi-Care, Inc. v. State Dep't of Health and Hosps., 2000-2001 (La. App. 1 Cir. 11/9/01); 804 So.2d 673, 676 (affirming judgment of trial court which found that a sanction imposed by an agency was invalid because it was based on "unpromulgated rules and regulations"); Bower v. Schumpert Med. Ctr, 618 So.2d 600, 604 (La. App. 2 Cir. 1993) (finding that the Patient Compensation Fund's (PCF's) rule prohibiting payment to medical malpractice victim's relatives for nursing care and custodial care was invalid, because notice requirements were not complied with and the rule was never promulgated in the Louisiana Register).

³⁶ United States Constitution, Amendment XIV, Sec. 1.

Voodoo Festival's "lumber" or "paint" cost, but not the cost of "lumber" or "paint" for this Production? Again, the LLA turns a blind eye to the law in order to support its "findings".

There is no colorable legal or factual argument to differentiate this Production from any of the earlier projects qualified by the OEID and indeed, this Production is sufficiently similar to those to require an equal application of the Program rules governing qualifying expenditures.

Based on the foregoing, if the OEID applied the statute to allow 100% or nearly 100% of the production expenditures from the projects cited herein to qualify for motion picture investor tax credits, then the OEID was required to allow the Production's expenditures to qualify to the same extent. And, as required by OEID's own policy, this is exactly what the OEID properly did in granting this Production's tax credits in 2009.

III. NEITHER LEAP NOR BKA MADE ANY MISREPRESENTATION REGARDING THE PRODUCTION'S EXPENDITURES; THEY WERE OPEN AND TRANSPARENT TO THE AUDITOR AND THE OEID.

The Report suggests that LEAP and/or BKA misrepresented the nature of the Production expenditures that they submitted to the OEID as qualifying because they represented to the OEID that these expenditures were directly related to the Production and that the Production was not part of BKA's "standard business operations." The following will show that there could not have been any misrepresentation on the part of LEAP or BKA. They fully disclosed the nature of their expenditures to the independent auditor and the OEID. Furthermore, their representations to the OEID that their expenditures were directly related to the Production and that the Production was not part of BKA's "standard business operations" were truthful and based on the only public information available to them - the statutory definition of "production expenditures" and the public record of the OEID's consistent application of this definition to similarly situated productions.

Given the comprehensive nature of the audit process to which the Production's expenditures were subject in connection with the independent audit conducted by Malcolm Dienes and then the OEID's penetrating review, it is contradictory and inconsistent with the facts to suggest that LEAP or BKA misrepresented anything. Such a suggestion also ignores the substantial legal authorities cited above which provide that the OEID and/or the Louisiana Department of Economic Development is ultimately responsible for determining which expenditures submitted as part of a tax credit application qualify.

LEAP hired Malcolm Dienes, a leading accounting firm with respect to auditing expenditures under the Program to conduct an independent audit of the Production's expenditures. Malcolm Dienes had performed audits for productions since the audit requirement was first enacted into law. To date the firm has audited over 100 qualified productions. Malcolm Dienes conducted the audit of the Production with exhausting attention to detail.

³⁷ See attached as Exhibit N, Letters from Mr. Arata to Mr. Stelly dated March 2, 2009 transmitting letters from Mr. Kern and Mr. Calhoun also dated March 2, 2009.

Due to the fact that the Production had expenses from two separate calendar years, 2006 and 2007, LEAP requested, not just one, but two audit reports from Malcolm Dienes.

On July 25, 2007, the Production submitted to the OEID Malcolm Dienes' first Audit Report dated July 12, 2007 which is attached hereto as Exhibit O. Included with the July 12 Audit Report was a Production Costs Report prepared by James P. Friedman, CPA, an independent accountant hired by BKA to compile and organize all of the Production's expenses.³⁸ The Production Costs Report shows each category of goods and services and the total amount spent in each category to prepare the floats for filming. The Production Costs Report showed total production expenditures equal to \$1,887,840.60. Malcolm Dienes' Audit Report included only \$1,861,041.28° of these expenses as qualifying Louisiana expenses. The Production provided Malcolm Dienes with all backup documentation required to prove that the expenses claimed were actually paid.

After reviewing the Production's July 25, 2007 submission, which clearly and unambiguously identified all of the 2006 costs associated with the production, on August 3, 2007, Mr. Stelly requested the "full bible" run for the Production. Malcolm Dienes sent Mr. Stelly the "bible run" that same day. 40

The Production's general ledger (or "the bible" as the OEID calls it) includes detail on each and every expense associated with the Production. These expenses are broken down into categories, including story, producer, director, production office, travel and living, meals and entertainment, artists, construction, drivers, electrical, fabrication, maintenance, miscellaneous labor, project manager, prop shop, travel pay, lumber, electrical, foam, misc. material, paint, material other, sub contractors, equipment rental, truck rental, per diem, travel charges, parade toll dumpsters, police escorts, tractor expenses, payroll taxes, cloth fringe goldleaf, primer, nails staples bolts, shop expense, auto and truck, bank charges, employee expense, health insurance, workmens comp, property insurance, insurance other, auto insurance, general liability, janitorial dumpsters, maintenance, office expenses, accounting fees, other professional, legal expense, rent, salaries, taxes licenses permits, salaries officers, security expense, telephone, tolls, travel expense, utilities, editing, and legal and accounting.

Within these categories are the detailed expenses for each item, with a reference to each parade the cost was associated with. For example, in the PAINT category, there are expenses for paint for the Alla parade, Rex parade, Hercules parade, Bacchus parade, and so on; and within the SUBCONTRACTOR category are expenses for float designer Henri Schindler for the Rex parade, other expenses for the Bacchus parade, and expenses for Endymion, Orpheus and other parades.

The general ledger also contains categories for the filming of the documentary, including the categories for PRODUCER, DIRECTOR, PRODUCTION OFFICE, EDITING and others.

³⁸ See the Productions Costs Report attached as Exhibit P.

³⁹ Malcolm Dienes correctly excluded \$26,799.40 of costs that were incurred outside of Louisiana.

⁴⁰ See Emails attached as Exhibit Q.

Within each of these categories is the detail of each payment of the Production for the expenses associated with the filming of the documentary.

Having seen the full bible, Mr. Stelly was fully informed about the kind of expenses that were being claimed with respect to the Production. By email on August 7, 2007, he made the following statement:

"I'm looking through the cost report for "Building the Greatest Free Show on Earth" and can find no costs attributed to the actual filming/production of this project. It all looks like this is related to the building of floats. Is this the first submission only?"

This email clearly and unequivocally establishes that (1) OEID knew of the nature of the production expenses that were submitted and (2) what was entailed in the Production.

The Production responded that same day, notifying Mr. Stelly that there would be two separate submissions: one for 2006 expenses and a second for 2007 expenses, which would include the filming costs. The Production also offered to submit unaudited filming expenditures to establish that additional significant production expenses had already been incurred.

In these emails, Mr. Stelly never indicated that the expenditures included in the first submission would not qualify. In fact, Mr. Stelly specifically stated that he would "feel a lot safer issuing these credits [based on the 2006 costs that he had just reviewed] once the production costs [the cumulative 2006 and 2007 costs] have been turned in." [emphasis added]

In another effort to be fully transparent, on August 8, 2007, the Production wrote to Mr. Stelly:

"Chris,

I had a very informative conference with the Kern accountant regarding the cost report and believe that it would be worthwhile for you and Sherri [McConnell] to speak with him prior to your meeting on Monday. He gave me a much better appreciation of the costs contained in the Production Cost[s] Report and a much fuller appreciation of what DID NOT go in the Cost[s] Report (which is equally important), and why.

Certainly worthwhile in your determination to hear this information and present same to counsel so they get a full idea of the costs involved in the project and directly related to the production."42

LEAP and BKA representatives did meet with Mr. Stelly and fully disclosed to the OEID the methodology that LEAP and BKA were using to determine which Production expenditures were to be submitted to the OEID as qualifying expenditures. They explained to Mr. Stelly that

⁴¹ See Emails attached as Exhibit R.

⁴² See Email from Mr. Arata to Mr. Stelly dated August 8, 2007 attached as Exhibit S.

only the costs necessary to get the parade floats ready to roll in the 2007 carnival season and to film them parading were included in qualifying costs. These costs would include, for example, the cost of decorating the floats that at the end of the previous carnival season had been white washed. On the other hand, the cost of float chassis and other capital expenditures which had a value beyond the 2007 carnival season were not included in qualifying costs.

LEAP and BKA representatives left the meeting with a clear understanding that the OEID agreed with the methodology of including these transient costs. Mr. Stelly took notes during the meeting with LEAP on a copy of the Production Costs Report that LEAP had submitted with the July 12, 2007 Audit Report. This Production Costs Report with Mr. Stelly's hand-written notes that LEAP obtained from the OEID's public records is attached as Exhibit P. The notes evidence Mr. Stelly's awareness of the methodology to be applied by LEAP and BKA to determine which Production expenditures should be submitted to the OEID as qualified. Marked with an asterisk on Mr. Stelly's notes is the following statement: "Nothing in #'s that has residual values after Mardi Gras." Also in Mr. Stelly's notes were the following statements: "costs are only those that are utilized to put the image on the floats" and "not including chassis."

The Production's independent auditor will also verify that the Production also explained the methodology to them prior to commencement of their audit of the Production expenditures and they did agree with the methodology and did not believe it was a violation of the Program rules as administered by the OEID at the time.

Following this meeting, and after conferring with OEID's counsel, on August 21, 2007, Mr. Stelly requested verification from the Production that the OEID "will NOT move forward with the first submission as we will not approve *only* the construction submitted." [emphasis added]

This is another critical point. In this email, Mr. Stelly states that (1) the OEID, including counsel for the OEID, was aware that the 2007 submission consisted of "only" float construction costs, and that (2) the OEID would not issue any tax credits for these pre-production float preparation costs unless the filming costs were also included in the second submission.

This email, coupled with the earlier August 9, 2007 email from Mr. Stelly, wherein he stated that he would "feel a lot safer issuing these credits once the production costs have been turned in," demonstrates that the OEID and the Production both agreed that the qualifying expenditures would include pre-production float preparation costs and the filming costs as long as *all* costs were directly related to the production, which was the only legal requirement, and the only "guideline" the OEID was employing at that time. There was no mention of any "but for" rule, and no indication such a "rule" was being applied to this Production.

On August 21, 2007, the Production agreed that the OEID would not issue a tax credit certification letter based on the first submission, and a new cumulative audit report would be submitted by LEAP that would include all production costs in one report.

⁴³ See Email from Mr. Arata to Mr. Stelly dated August 21, 2007 attached as Exhibit T.

On February 21, 2008,⁴⁴ LEAP submitted a new Production Cost Report to Malcolm Dienes and requested that Malcolm Dienes prepare a new audit report to replace the July 12, 2007 Audit Report. This production report mirrored in all material respects the Production Costs Report submitted to Malcolm Dienes in 2007 for the first submission, including a clear, detailed explanation of all costs included in the Production Cost Report.

Prior to submitting this Production Report to Malcolm Dienes, LEAP and BKA had done extensive work with BKA's independent and in-house accountants to ensure that the only costs submitted to the OEID were verified expenses, incurred in Louisiana, and used directly in the Production.

On February 22, 2008, the Production informed Mr. Stelly that the new Production Cost Report had been sent to Malcolm Dienes for final audit. Again, note that this new Production Cost Report contained the same categories and detail of expenditures that were included on the first Production Costs Report submitted to the OEID in 2007.

Malcolm Dienes worked with BKA's accountants in order to verify that all of the expenses contained in the Production Cost Report were valid expenses and that there were no non-Louisiana expenses included in the Report.

On February 4, 2009,⁴⁶ after a comprehensive independent audit, where over 80% of the expenditures were sampled, Malcolm Dienes informed the Production that the audit was complete.

On February 6, 2009, ⁴⁷ LEAP submitted to the OEID Malcolm Dienes' new Audit Report dated January 21, 2009 along with the full bible run associated with the Production Cost Report. This second Audit Report showed \$3,391,271 of qualifying expenditures.

After reviewing the detail contained in the full bible run, and the OEID's directives to the Production in August 2007, it is clear that LEAP provided OEID with exactly what OEID and LEAP and BKA had agreed to in 2007: all production-related costs contained in one Production Cost Report, with all expenses clearly detailed.

On February 26, 2009, Mr. Stelly emailed LEAP with certain questions about the production expenditures, particularly that, in looking over the bible runs, he could not "differentiate the costs to build the floats (standard business operations) versus the production costs." He thus knew, of course, that the submission included float-preparation costs. In

⁴⁴ See Emails dated February 21, 2008 from Mr. Arata to Ms. Kuchler attached as Exhibit U.

⁴⁵ See Email dated February 22, 2008 from Mr. Arata to Ms. Kuchler attached as Exhibit V.

⁴⁶ See Email from Ms. Kuchler to Mr. Arata dated February 4, 2009 attached as Exhibit W.

⁴⁷ See attached as Exhibit X Mr. Arata's transmittal letter dated February 6, 2009 with attached audit report dated January 21, 2009. The full bible run is not included in this attachment due to its large size but can be provided upon request and is available in the OEID's public records.

⁴⁸ See Email from Mr. Stelly to Mr. Arata dated February 26, 2009 attached as Exhibit Y. Representatives of LEAP

other words, Mr. Stelly knew the "nature" of these expenses. There was no misrepresentation of these expenses. As OEID and its lawyers had agreed during his meeting with LEAP and BKA representatives in August, 2007, the transient costs incurred in preproduction to get the floats ready for filming in the parades were part of the qualifying production expenditures.

On March 2, 2009, following a conversation between the Production and Mr. Stelly, Mr. Arata sent Mr. Stelly letters from Barry Kern, President of BKA, and Patrick Calhoun, a managing member of LEAP, in which they re-stated the Production's August 2007 agreement with OEID, that "the production was not part of Kern's standard business operations" and that only costs directly associated with the production were included in the submission. Nothing in the letters even remotely suggested that the Production had suddenly deleted the expenditures for the "paint," "drivers," etc. – all as shown in the full bible run. Indeed, as the LLA acknowledges, such a change would have reduced the gross expenditures dramatically. Mr. Stelly would have noticed, and it strains credulity to suggest otherwise.

In his transmittal letter, Mr. Arata verified that all costs submitted "qualify for tax credits pursuant to Louisiana Revised Statutes 47:6007", which at the time defined "production expenditures" as any "preproduction, production, and postproduction expenditures directly incurred in Louisiana and that are directly used in a state-certified production." Mr. Arata's statement accurately stated Louisiana law, and reflected the OEID's own consistent and public definition of "production expenditures."

As explained above, until January 1, 2010, Louisiana Revised Statutes 47:6007 was the only publicly available guidance on what expenditures qualified under the Program other than the OEID's actions in certifying other productions. "Standard business operations" never appeared in any public documents prior to February, 2009 and was never discussed with the Production prior to that time. The term "standard business operations" as used by Mr. Stelly in his emails to LEAP was not a term of art. It was not in the statute. It was not in any written regulations. It was not in the Audit Instructions attached to the Production's Initial Certification Letter. Certainly, all of the transient costs incurred to prepare the floats for the 2007 carnival season, the costs of parading and the costs of filming these events were preproduction and production expenditures directly used in the state-certified production Blaine Kern's Mardi Gras: Building of the Greatest Free Show on Earth. In fact, without these preproduction and production expenditures, there would have been no film.

Since the Production expenditures submitted by LEAP and BKA satisfied the statutory definition of "production expenditures" as approved by the OEID for other productions, it was accurate, and not a misrepresentation, for LEAP and BKA to state that the expenditures submitted were directly related to the Production and that the Production was not part of BKA's "standard business operations."

and BKA learned at the LLA Meeting that the LLA may believe that what Mr. Stelly is stating in this email is that the costs submitted do not qualify because they are standard business operating costs; yet, with full and accurate information regarding the true nature of these costs, Mr. Stelly ultimately approved these costs as qualifying.

⁴⁹ See attached as Exhibit N, Letters from Mr. Arata to Mr. Stelly dated March 2, 2009 transmitting letters from Mr. Kern and Mr. Calhoun also dated March 2, 2009.

It is important to state that all of the Jazz Festival, Voodoo Festival, Essence Festival and other event productions also classify all of their project costs as "production expenses," since their costs, like the Productions costs, are directly used in the production, irrespective of whether they are "standard business expenses" or not. And the OEID knowingly accepted these costs as "production costs", since the costs were "directly used in the production", the only legal requirement.

On March 23, 2009,⁵⁰ the Production emailed Mr. Stelly with responses (including supporting documentation) to all of his issues raised by Mr. Stelly in his February 26, 2009 email attached as Exhibit Y. This email states that "We have responded to your item No. 1 in prior emails and believe that issue is resolved to your satisfaction".

There were no other emails or conversations between Mr. Stelly and the Production following this email regarding the "nature" of the expenses before OEID issued the April 22, 2009 Tax Credit Certification Letter. The full bible run did not change. Mr. Stelly never replied to this email.

The Production did not alter, amend, reclassify, revise, add to or subtract from the raw financial information submitted to the OEID on February 6, 2009. The only additional information provided to the OEID were the letters provided by Messrs. Arata, Calhoun and Kern on March 2, 2009, and those correctly noted that the Production was not part of Kern's standard business operations, and that the costs (detailed in the "bible run") were directly related to the Production.

It is important to note that after receiving the OEID's February 26, 2009 email, the Production requested a meeting with the OEID to discuss the issues raised in the email. Instead, Mr. Stelly called Mr. Arata directly and requested the March 2, 2009 letters to establish that all of the costs were "film related." ⁵¹

As established above, it would not be possible for the Production to mislead the OEID, since the Production provided the OEID with the same raw financial data that the auditor reviewed. And a review of that data clearly shows that it cannot be anything other than exactly what it is – cost associated with the decorating, adorning, driving and filming the floats that were to be part of the documentary. Mr. Stelly's correspondence and notes show that he reviewed the data and understood what it meant.

The Production did not try to convince anyone of anything. It merely offered its good-faith belief that the expenses were qualified under the law and the custom and practice of the OEID at that time. And, as the OEID had consistently done for numerous projects before and after, conducted its own review and concluded on its own that the Production's expenses were qualified for tax credits. And, as the OEID had consistently done year, after year, after year, for numerous projects before and after, it conducted its own review of the information and concluded on its own that the Production's expenses were qualified for tax credits.

⁵⁰ See Emails attached as Exhibit Z.

⁵¹ See the February 27, 2009 email from Mr. Arata to Mr. Calhoun and Mr. Kern attached as Exhibit AA.

On April 2, 2009 and April 15, 2009, Mr. Stelly made additional inquiries about the real property leases. By April 17, 2009, LEAP had provided Mr. Stelly with copies of all the written leases and a description of the nature of the lease obligations.²²

On April 21, 2009, after an extensive independent audit and OEID review, Stephanie Le Grange, the OEID's in-house legal counsel, wrote to LEAP and BKA:

"Thank you to all for your diligent response to my questions. The documents sent did indeed resolve all my outstanding questions and I will approve your certification forthwith."53

The emails attached as Exhibit DD show that even after this statement by OEID's counsel, Mr. Stelly spent another week or so verifying that the audit fees paid to Malcolm Dienes were only for work performed in connection with the Production's expenditures, and not BKA's other business operations. As evidenced by these emails, LEAP provided Mr. Stelly with all requested information regarding the audit fees, and these were ultimately approved and certified by the OEID in a separate Tax Credit Certification Letter dated June 29, 2009 (attached as Exhibit D).

Malcolm Dienes also verified that the audit fees were paid only for audit services related to the Production expenditures and were not audit services provided to BKA in connection with its other business operations - meaning that all the expenditures submitted in the audit reports as qualifying were, in fact, directly related to the Production as required by the statute. BKA had hired its own independent accountant, James P. Friedman, CPA, to audit its standard business operating costs.

There was never any attempt or intent to mislead the OEID about the nature of the expenses submitted by the Production to the OEID for consideration. Indeed, the Production repeatedly and transparently provided the OEID with all of the raw financial data OEID requested about the Production, which clearly and unequivocally identified the expenses for exactly what they were. The Production is entitled to rely upon the full faith of OEID's statement in each of the Tax Credit Certification Letters issued to the Production which reads as follows:

"In connection with our review and examination of these materials, we have had a full and adequate opportunity to investigate the transactions, the investments and expenditures covered by the Current Audit Report." [emphasis added]

The LLA cannot now suggest that the OEID was unaware or somehow misled about the "nature" of the expenditures, when in fact, the OEID had the raw data in their possession starting in 2007 and again in 2009, and affirmed in writing to the Production in 2009 that the OEID had conducted a "review and examination" of these very expenditures.

⁵² See emails attached as Exhibit BB.

⁵³ See email from Ms. LeGrange to Mr. Arata dated April 21, 2009 attached as Exhibit CC.

The Production's Producer Fees Fall Well Within the State's Guidelines

The LLA alleges that \$209,648 for producer fees was not substantiated by adequate documentation and was not reasonable for the Production because its review of cost records for other motion pictures indicated that producer fees usually account for between 3% and 12% of the total production cost. The \$209,648 of producer fees is well within this range. That amount is only approximately 6% of the total qualifying Production expenditures of \$3,420,863 as certified by the OEID in the Tax Credit Certification Letters dated April 22, 2009 and June 29, 2009. The agreements and invoices that adequately documented these services which were provided to the OEID are attached hereto as Exhibit EE. Note, there was also a Production Services Agreement between LEAP and BKA pursuant to which LEAP provided all of the production services in connection with the Production. The Production Services Agreement and a related Letter of Intent are attached as Exhibit FF. These agreements substantiate the armslength nature of the fees that were paid for these services.

LEAP Did Not Reimburse BKA the \$25,000 Story Rights Fee

LEAP did not reimburse BKA the \$25,000 payment for story rights. According to the attached Letter of Intent, LEAP and BKA were to split proceeds from the sale of the motion picture investor tax credits 50/50. BKA and LEAP can verify that a \$75,000 payment that LEAP made to BKA was not repayment of "story rights fees" as alleged by the LLA but was in fact a partial payment of BKA's share of the tax credit sale proceeds.

Neither LEAP nor BKA Misrepresented the Nature of the \$60,000 Rental Payment

According to the email attached as Exhibit GG, BKA fully disclosed to Malcolm Dienes the nature of the \$60,000 building rental payment. Attached to this email is a document entitled "Sales Invoice" from Henry Bath Inc. to Kern Studios LLC which clearly shows a \$120,000 payment for the rental of the Amelia Cotton Building broken out into a \$60,000 rental fee and a \$60,000 security deposit. Although according to the Auditing Instructions attached to the Production's Initial Certification Letter Malcolm Dienes was required to deduct the \$60,000 security deposit from qualifying Production costs, Malcolm Dienes did not deduct this amount and included it in its audit report as a qualifying cost. LEAP and BKA did not become aware of this error until reading the Report. This error does not constitute a misrepresentation on the part of LEAP or BKA.

Inclusion of \$5900 Auditing Fee was Inadvertent Mistake, not a Misrepresentation

The audit fees of \$5900 were inadvertently included in qualifying expenditures twice. In this case, there was no intent on the part of LEAP or BKA to misrepresent the amount of the audit fees. In fact, the email correspondence involving Mr. Stelly, LEAP and Malcolm Dienes attached as Exhibit DD shows that Malcolm Dienes informed Mr. Stelly of the correct total amount of audit fees, \$42,398.10. In this final stage of the audit, as requested by Mr. Stelly, Malcolm Dienes was submitting additional backup documentation regarding all of the audit fees, including the \$5900 fee. Everyone, including Mr. Stelly, simply forgot that the \$5900, which was the initial flat fee paid to Malcolm Dienes early on in the audit, had already been submitted.

In an effort to verify all audit costs, the \$5900 was inadvertently submitted by the Production, and inadvertently accepted by Mr. Stelly, for inclusion in qualifying costs a second time.

This \$65,900 (\$60,000 + \$5900) discrepancy is not material given the \$3,420,863 of total qualifying production expenditures.

The OEID Allows Expenditures 12 Months Prior to the Date of Initial Certification

The LLA points out that LEAP claimed production expenses for the documentary as early as April 1, 2006, several months before BKA and LEAP agreed that LEAP would produce the documentary. It infers that these must have been BKA's normal business operating expenses. According to Louisiana Revised Statutes 47:6007 then in effect, production expenditures include preproduction expenditures. It is typical in the film industry for affiliates, eventual partners of the production company, and even unrelated third parties to incur preproduction expenses, sometimes before financing for a project is obtained or a project is green lit. The OEID has always allowed the production company to incorporate these preproduction expenditures into qualifying spend as long as they were not incurred more than 12 months prior to the date of initial certification.⁴⁴

Finally, nowhere in the statute or in the public record of the OEID's application of the statute prior to 2008 is there evidence of any rule that production costs which are subject to an existing contractual arrangement do not qualify under the Program.

IV. ANY ACTIONS TAKEN AGAINST LEAP OR BKA BASED ON THE LLA'S REPORT WOULD VIOLATE THEIR CONSTITUTIONAL AND OTHER RIGHTS AND PROVE DESTRUCTIVE TO THE PROGRAM AS A WHOLE.

In addition to violating their constitutional rights to have the law applied consistently and their rights to receive notice of substantive rule changes, any actions taken against LEAP or BKA in response to the Report would also violate their rights contained in the certification of the Production issued by the Louisiana Department of Economic Development.

According to paragraph (b) of the Initial Certification Letter dated December 11, 2006 executed by Michael J. Olivier, then Secretary of the Louisiana Department of Economic Development, Alex Schott, then Director of the OEID (formerly called the Governor's Office of Film and Television Development), LEAP and BKA, without material misrepresentations or fraud, there can be no recapture of the motion picture investor tax credits issued in connection with the Production:

⁵⁴ See Incentive FAOs on the OEID's website which as of February 8, 2012 stated the following:

[&]quot;Oops! I started spending money in Louisiana before I received initial certification. Can I still claim what I've spent?

Yes. Expenditures are creditable for at least one year prior and one year after initial certification."

"(b) the issuance by the DED and the GOFTD of a Tax Credit Certificate with respect to an amount of Louisiana Motion Picture Investor Tax Credits state[d] thereon shall mean that none of such Louisiana Motion Picture Investor Tax Credits are subject to recapture, disallowance, recover, reduction, repayment, forfeiture, decertification, or any other remedy that would have the effect of reducing or otherwise limiting the use of the Louisiana Motion Picture Investor Tax Credits (each of "Post-Certification Remedy") and that the DED and the GOFTD have waived their respective rights to conduct any further or additional review, examination or audit of the investments or expenditures (or the categorizations thereof) or other matters addressed in the Auditor's Report in which such Louisiana Motion Picture Investor Tax Credits were claimed;"55

New Orleans Jazz and Heritage Festival, Essence Festival, Voodoo Festival and other live performance productions create a tremendous amount of revenue each year for the State of Louisiana. Beyond the economic boost to the State, they have become part of the State's culture. With this Report, the LLA is manufacturing a strong disincentive to their operations in the State. What it suggests is that any production that has received motion picture investor tax credits by following the policies as administered by the OEID is now subject to having their credits recaptured. In that case, the certifications issued by the Louisiana Department of Economic Development aren't worth the paper they are written on.

The LLA may suggest that new and different rules might better serve the Program. But substantive changes to the program must be applied prospectively and equally to all similarly situated productions, not retroactively to only one production. And they must be promulgated in accordance with Louisiana's Administrative Procedure Act.⁵⁶

⁵⁵ See the Louisiana Department of Revenue's response to question 9 in Revenue Ruling 06-106 (October 12, 2006) attached as Exhibit L.

⁵⁶ Representatives of LEAP and BKA learned at the LLA meeting that the LLA may have based its conclusions largely on its own opinion that the kinds of production expenditures previously certified by the OEID in connection with the Production, New Orleans Jazz and Heritage Festival, Voodoo Music Experiences and others should not have been allowed - a policy decision that should be left to the Louisiana Legislature and/or the OEID.