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IN THE THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY

SALT LAKE CITY DEPARTMENT, STATE OF UTAH

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ZEN HEALING ARTS, L.L.C., d/b/a BEACHES BODYWORKS, JEFF STUCKI, MIDDONAY ROMAN, AND LEISA METCALF, Plaintiffs, vs. UTAH STATE DEPARTMENT OF COMMERCE, UTAH DIVISION OF OCCUPATIONAL LICENSING, and JOHN DOES I-X, Defendants.	:	MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT Civil No: 120900860 Judge Dever

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COME NOW the Plaintiffs and cite the following Points and Authorities in support of Plaintiff's Motion for Partial Summary Judgment:

STATEMENT OF FACTS

1. Plaintiff Zen Healing Arts, d/b/a Beaches Bodyworks, is a Utah Limited Liability Co. Its principal place of business is in Salt Lake County, State of Utah. Said Plaintiff operates a relaxation studio and is licensed by Salt Lake County. Stucki Decl. ¶ 1-2.

2. Treatments administered by Plaintiff include various spiritual healing arts that date back many centuries. This involves touching the skin to create energy, and to direct energy to various parts of the body. Stucki Decl. ¶ 3.

3. Treatment does not involve therapeutic massage, and every customer is required to sign a consent form acknowledging that they understand that they are not receiving a massage. Stucki Decl. ¶ 4.

4. Treatments may include the art of Reiki, which may include touching as a relaxation and healing technique. Massage techniques of "systematic manipulation" are not included. Stucki Decl. ¶ 5.

5. The Utah Division of Occupational and Professional Licensing is a Division of the Department of Commerce, and is charged, under Utah Code Ann. § 58-1-106(1)(a) with adopting rules

to administer the provisions of the Utah code within its jurisdiction.

6. Utah Code Ann. § 58-47b-102 defines the regulated profession of "Massage Therapy", one of several professions supervised by Defendants:

> (3) "Homeostasis" means maintaining, stabilizing, or returning to equilibrium the muscular system.
>
> (6) "Practice of massage therapy" means:
>
> (a) the examination, assessment, and evaluation of the soft tissue structures of the body for the purpose of devising a treatment plan to promote homeostasis;
>
> (b) the systematic manual or mechanical manipulation of the soft tissue of the body for the [therapeutic] purpose of:
>
> (i) promoting the <u>therapeutic</u> health and well-being of a client;
>
> (ii) enhancing the circulation of the blood and lymph;
>
> (iii) relaxing and lengthening muscles;
>
> (iv) relieving pain;
>
> (v) restoring metabolic balance; and
>
> (vi) achieving homeostasis; [and]
>
> (vii) [recreational] or other purposes;
>
> (c) the use of the hands or a mechanical or electrical apparatus in connection with this Subsection (6);
>
> (d) the use of rehabilitative procedures involving soft tissue of the body;

(e) range of motion of movements without spinal adjustment as set forth in Section 58-72-102;

(f) oil rubs, heat lamp, salt glows, hot and cold packs, or tub, shower, steam, and cabinet baths;

(g) manual traction and stretching exercise;

(h) correction of muscular distortion by treatment of the soft tissues of the body;

(i) counseling, education, and other advisory services to reduce the incidence and severity of physical disability, movement dysfunction, and pain;

(j) similar or related activities and modality techniques; and

(k) the practice described in this Subsection (6) on an animal to the extent permitted by:

(i) Subsection 58-28-307(12)

(ii) the provisions of this chapter; and

(iii) division rule.

(7) "Soft tissue" means the muscles and related connective tissue. (Emphasis added).

7. Pursuant to Utah Code Ann. § 58-47b-501, it is unlawful to practice, engage in or attempt to practice "massage therapy without holding a current license as a massage therapist or a massage apprentice under this chapter." Pursuant to Utah Code Ann. § 58-47b-503, "any individual who commits an act of unlawful conduct under Section 58-47b-501 is guilty of a class A misdemeanor."

8. A violation of the Massage Therapy Practice Act may also

bring an administrative sanction, pursuant to Utah Code Ann. § 58-1-501, which states:

> (1) "Unlawful conduct" means conduct, by any person, that is defined as unlawful under this title and includes:
>
> > (a) practicing or engaging in, representing oneself to be practicing or engaging in, or attempting to practice or engage in any occupation or profession requiring licensure under this title if the person is:
> >
> > > (i) not licensed to do so or not exempted from licensure under this title; or
> >
> > (c) knowingly employing any other person to practice or engage in or attempt to practice or engage in any occupation or profession licensed under this title if the employee is not licensed to do so under this title;
>
> Utah Code Ann. § 58-1-502:
>
> (1) Unless otherwise specified in this title, a person who violates the unlawful conduct provisions defined in this title is guilty of a class A misdemeanor.
>
> (2)(a) If upon inspection or investigation, the division concludes that a person has violated Subsection 58-1-501(1)(a) or (c) or any rule or order issued with respect to those subsections and that disciplinary action is appropriate, the director or the director's designee from within the division shall promptly:
>
> > (i) issue a citation to the person according to this section and any pertinent rules:
> >
> > (ii) attempt to negotiate a stipulated settlement; or
> >
> > (iii) notify the person to appear before an adjudicative proceeding conducted under Title 63G, Chapter 4, Administrative Procedures Act.
>
> (b)(i) The division may assess a fine under this Subsection (2) against a person who violates Subsection 58-1-501(1)(a) or

(c) or any rule or order issued with respect to those subsections as evidenced by:

(A) a uncontested citation;

(B) a stipulated settlement; or

(C) a finding of violation in an adjudicative proceeding.
(j) The director of the director's designee shall assess fines according to the following:

(i) for the first offense handled pursuant to Subsection (2)(a), a fine of up to $1,000;

(ii) for a second offense handled pursuant to Subsection (2)(a), a fine up to $2,000; and

(iii) for any subsequent offense handled pursuant to Subsection (2)(a), a fine of up to $2,000 for each day of continued offense.

9. In May, 2011, Utah Code Ann. § 58-47b-102 was amended to include subparagraph, (6)(b)(vii) above. At the same time, the legislature removed the word "therapeutic" from the definition. A copy of the relevant portions of HB 243, showing those changes, is attached hereto as "Exhibit A".

10. On or about December 1, 2011, Defendants published a Notice on their website of a proposed additional definition, to be included as a part of Rule R156-47b, known as the "Massage Therapy Practice Act Rule". That Rule, in Part R156-47b-102 contains definitions which are to assist in administering the provision of the Massage Therapy Act. The addition to the Rule states:

(8) "Manipulation", as used in Subsection 58-47b-102(6)(b),

means contact with movement, involving touching the clothed or unclothed body.

The Rule greatly expands what may be considered "massage".

11. The Notice stated that the new rule MAY go into effect on or about January 24, 2012. (Emphasis in original). A hearing was to be held on January 9, 2012; and written comments would be accepted until January 17, 2012, the date of the regular Massage Board meeting. A copy of the Notice and the text of the Rule is attached as "Exhibit B"

12. Plaintiff Stucki appeared before the Board on that occasion, and made an oral presentation in opposition to the rule. Later that day, he and a number of others filed written comments on or before the due date, opposing the change. Attached hereto as "Exhibit C" is Plaintiff Stucki's written comments.

13. The Division did not respond to the written comments. The Rule went into effect on January 26, 2012, without additional discussion.

14. The Utah Legislature, in the 2012 General Session, largely reversed the law changes of 2011, restoring the word "therapeutic" to the massage therapy definition, and removing the term "recreational" under purposes. Attached hereto as "Exhibit D", is the Enrolled version of HB 114, showing those changes. Additions in 2012 are underlined in the definition above. Terms

added in 2011 and deleted in 2012 are in brackets.

15. The 2012 legislative bill, HB 114, originally contained the same language as the Rule, adopted at around the same time. At a committee hearing on February 6, 2012, (only 10 days after the Rule went into effect) the expanded definition of massage therapy at issue here was dropped from the bill. The sponsor of the bill indicated that the definition had caused concerns from chiropractic physicians. A copy of the Committee Minutes, showing the change is attached hereto as "Exhibit E".

16. Sally Stewart, a "Bureau Manager" over Massage Therapy for Defendant D.O.P.L. previously filed an affidavit with this Court, dated April 23, 2012, as to the circumstances of the adoption of the Rule, and stated as follows:

> Clarification also provided a written reference concerning potential abuses of the profession and public so as not to allow unqualified, unlicensed individuals to take advantage either physically or financially. The Division and the Board felt that the promulgation of the rule was necessary for the protection of the public and the profession. Stewart Aff. ¶ 9.

17. The decision of the Board was at least partially in reaction to unfavorable court rulings in which attempts to use the Massage Therapy Practice Act as a weapon against escort agencies, had failed. Attached hereto, as "Exhibit F", is a copy of a District Court ruling in the Fourth District Court, in Orem City v. Wood, Case No. 101200072, in which the Court ruled that an escort

who offered a "massage" as part of an escort appointment, along with "a sexy dance [or] the modeling of provocative lingerie". After listing the goals of a professional massage, from the Act, the Court stated:

> Arguably, the evidence may eventually show that Defendant's massage in this case *resulted* in some or all of these benefits. However, it is undisputed that Defendant never held herself out as a "massage therapist" or as an expert in massage. Moreover, it is not alleged that Defendant ever represented to her client that her massage techniques would result in any of these benefits or that the massage was being f=given of any of these therapeutic purposes. Therefore, there is no – and apparently will never be any – evidence that Defendant engaged in the massage "for the purpose of" achieving these results.

Other courts followed this decision, resulting in other dismissals either by the Court or by the prosecuting attorney.

18. Agents of Defendant have testified in various administrative and court proceedings over the last several months that the new definition was "the position of the Division", even before the Rule was adopted, and without notice of that "position" to those who might be affected by it.

19. Ms Stewart testified in an administrative proceeding involving Plaintiffs Roman and Metcalf:

> Manipulation is just that, <u>it is contact and movement</u>. If you are merely laying your hands upon your body, that is not manipulation of tissue. <u>If you take that hand and move it around, you are manipulating the soft tissues, whether you are doing so in a light fashion, a medium fashion or in a deep tissue type of practice.</u>" (Tr. 57) (Emphasis added). A copy

of the excerpt is attached as "Exhibit G.

20. Ms. Stewart was also deposed on December 12, 2012. She further started her view of the Rule at issue:

> The massage board reflects only with regard to the practice of massage therapy. They do not go beyond their effort in defining terms on in addressing matters that do not pertain to massage therapy as defined by the scope of practice.
>
> The massage therapy rule does not address, solely, touch with movement. It addresses manipulation of the soft tissues, defining manipulation as contact with movement on the clothed or unclothed body as it relates to massage therapy, not as it related to touching. Dep. 22-23.

21. Ms. Stewart was given a hypothetical situation by Plaintiff's counsel:

> Counsel: Among other people, I represent several license escort agencies. Escorts are licensed to provide companionship.
>
> My clients might, in connection with their business, for which they are paid, put their hands on you and stroke you a bit. "Gee, it's nice to see you. And they're – they're flirtatious. They might put their hand on your leg the same way. At what point is that a modality of massage?
>
> Ms Stewart: I cannot answer that question because it does not relate to the practice of massage.

In answer to further questions, she indicated she was not aware that escorts were being charged with Massage violations. "I'm not aware of that. I have no cause to be." She stated that her agency was not attempting to regulate escorts, just the practice of massage. Tr. 24-25.

22. According to Ms. Stewart, the rule was for purposes of clarification only. It was asked for by licensed professionals. She was involved in preparing the rule; but she does not determine who is required to be licensed. Dep. 27-8. She was involved in the 2011 legislative changes because:

> There were some areas where a person may have claimed not to have been doing therapeutic massage and that had not been previously included in the language within the scope of practice. That word was removed because the individuals chose to regulate, not just therapeutic massage, but also recreational or relaxation massage. They are the same techniques but serve different purposes and that was discussed with various individuals. Tr. 32.

> 23. Rubbing a person with lotion would generally be considered to be a cosmetic process. However, in the practice of massage therapy, you are dealing with potential harm to an individual through sanitation, safety in terms of too much pressure, too little pressure, effleurage as a very light touch technique can close of lymphatic system, can cause health effects. You have contagion, you may have unsanitary conditions possible. You have an number of potential threats to the public safety and welfare. Tr. 36-37.

24. At a Preliminary Hearing in State v. Cash, Third District Court, West Jordan Department, Case No. 111402066, held on January 31, 2012, Allison Robinson, an investigator for D.O.P.L, also testified:

> We have a definition that speaks to massage. There are a lot of different components to it. Mr. McCullough had touched on some of those components although it is the Divisions' position that not all of these components must be engaged in in order to be practicing massage therapy. However, the manipulation of soft tissue is mentioned and we view manipulation of soft tissue as any contact with movement. Tr.

38.

A copy of the testimony of Ms. Robinson is attached hereto as "Exhibit I".

25. Ms. Robinson, now Ms. Pettley, was also deposed on December 12, 2013. A copy of the relevant parts of her deposition is attached as "Exhibit J". She has no college education; but she took a 5 week POST class for "special function police officer". Dep. 5-6. She reads the statutes and ruled on her own, to decide what the law is, and how it should be enforced. Dep. 13. She knows generally the terms used in massage, through her own reading. She is "aware that there is a lymphatic system in the body" and that massage can enhance the circulation of it. Dep. 14. The statute refers to "achieving homeostasis". She thinks she would know if she saw this being achieved; but it is "subjective", so she has "discretion" as to whether to cite. Dep. 15.

26. Ms. Pettley was not an investigator when the statutory changes were made in 2011. She was an investigator in 2012, when those changes were largely reversed. She did not believe that those changes were significant in her investigations, and did not make any changes because of them. The addition of the term "recreational purposes", and then its removal did not affect her work, as the law retained the term "for other purposes". Dep. 16-17. Her citations

are "typically for contact with movement." She does not typically cite people for any of the other myriad "modalities" of massage, such as counseling, educating or advising. Dep. 17-18.

27. According to Ms. Pettley, if a licensed escort rubs a client on the arm, to show affection,

> that would depend on whether he hired her to rub him." I would say if the client hired the escort to provide rubbing for him, that would be a violation of the Massage Therapy Practice Act.
>
> . . .what I'm saying is if he hired her to rub him in whatever capacity and he paid her, that would be a violation of the Massage Therapy Practice Act. Dep. 18-19.

28. The term "manipulation", as in the contested rule, is her guideline. It does not matter that it is not applied in a therapeutic manner, or that it is not purported to have a health benefit. She cites people who touch other people for a fee, if there is movement with the touch. Dep. 19-20.

29. She states that "my plate is full with people that are touching each other." "The violation of the law is offensive to me, yes." She relies on her own reading of the statute and rule. Dep. 21.

30. If an unmarried man receives a massage from his girlfriend, and he takes her to dinner to show his appreciation, Ms. Pettley would cite her. Dep. 22.

31. The following question and answer were part of the

deposition:

> COUNSEL: But you really do have your plate full of people touching each other and it's - I mean it's so far you can't get around it, isn't it?
>
> WITNESS: It's a very - there is a very large population of people that are out there that are violating the Massage Therapy Practice Act, yes. Dep. 23.

32. She was an investigator before the Rule at issue was passed in January, 2012; and she did not change her enforcement because of the Rule. Prior to that, "it was always the standard that the definition of massage therapy included contact with movement. It was just clarified in writing." Dep. 25.

33. Defendants have named as an expert witness Ms. Sharon Muir, the Chair of the Board of Massage Therapy, as created by Utah Code Ann. § 58-47b-201. The duties of that Board include assisting the Division Director in governing the regulated profession, including suggesting Rules and setting requirements for licensure. See Utah Code Ann. § 58-1-202, 203. A member of the Board is to "assist the division in reviewing complaints concerning the unlawful or unprofessional conduct of a licensee. Utah Code Ann. § 58-47b-201(3)(a). (Emphasis added).

34. Ms. Muir has prepared a Report of her "expert opinions", including the opinion that "Reiki does not involve contact with movement involving touching the clothed or unclothed body." P. 2.

A copy of that opinion is attached as "Exhibit K".

35. She further stated that:

> As Chair of the Board of Massage Therapy, I am aware of concerns raised by numerous parties that unlicensed massages including massages of a sexual nature were being performed under the guise of Reiki and that there was a need for clarification of DOPL's Rule governing the practice of massage therapy to keep illegal sex businesses out of the massage profession.
>
> It is my opinion that the Board and DOPL acted within the scope of their authority to regulate the massage therapy profession by promulgating the amendment to Rule 156-47b-102. The amendment to the rule was necessary to establish clarification in the guide lines as to what constitutes the practice of massage therapy.
>
> It is my opinion that this type of conduct and behavior is detrimental and seriously undermines the integrity of the massage therapy profession and the Reiki petitioners. P. 2.

36. In answers to Interrogatories, Defendants state the following, regarding the reasons for the enactment of the Rule:

> Concerns were expressed by the Utah League of Cities and Towns, the State Board of Health, and Murray City about Reiki businesses and how they were being used as fronts fro prostitution at a Massage Therapy Board Meeting held on Se4ptember 20, 2011 which prompted a discussion for the rule amendment. Additionally, members of the public in attendance at the September 20, 2011 meeting expressed concerns about the misrepresentation of the practice of Reiki by individuals as fronts for sexually oriented businesses and prostitution. (Ans. #6).

37. In answers to Interrogatories, Defendants state the following, regarding the abuses of the profession" referred to in Ms. Stewart's previously filed affidavit:

> The actual or potential abuses referred to [in] Ms. Stewart's Affidavit of April 23, 2012 include physical harm, financial harm, being used as a vehicle for prostitution or sexual abuse and as a vehicle for human trafficking. (Ans. #12).

38. In answers to Interrogatories, Defendants state the following, regarding the abuses of the profession" referred to in Ms. Stewart's previously filed affidavit:

> The potential harm to the client of the recipient of a massage by someone who isn't licensed as a massage therapist are that they are deprived of the right to a legitimate massage and may be exposed to harm by an unlicensed person who does not do the massage in the right way. The client may also be exposed to illegal prostitution under the guise of massage therapy. In addition, unlicensed massage therapists may be subject to human trafficking. (Ans. #15).

38. When asked in Interrogatories specifically what danger there was in allowing unlicensed "touch plus movement", Defendants merely referred back to the Answers above. (Ans. #17).

39. In Answers to Interrogatories regarding the function of "touch plus movement", Defendants stated:

> The massage practitioner is a professional who is engaged in the business of giving appropriate, nurturing, and ethical touch. The massage or body work profession is unique in that human touch is the primary vehicle whereby services are preformed. Whether it is relaxation, wellness massage, sports massage, Therapeutic Touch, or the specifically applied soft tissue manipulation of clinical massage, it is the beneficial human response to skillfully applied touch that is the basis for the success of the massage profession. Touch is an essential element for healthy growth and development. From a very early age, positive touch affects human physical and emotional health through our lives.
>
> Multiple studies show that the positive touch of massage

> reduces stress, lowers blood levels of cortisol and norepinepherine, while increasing levels of serotonin and dopamine. Low levels of serotonin and dopamine are evident in people who suffer from depression, whereas significantly higher levels are associated with elevated moods.
>
> In the therapeutic setting, the practitioner is the giver, and the client is the recipient of touch. The massage professional's business is to provide caring, compassionate touch to the client. Massage therapists practice it every day and are comfortable administering touch as therapy. (Ans. #26).

40. In Answers to Interrogatories regarding whether there was a limit on the licensing of the human touch, Defendants stated:

> It is Division and Board's position that "contact with movement involving touching the clothed or unclothed body" or another person relates to the scope of practice of massage therapy as set forth in the Massage Therapy Act 58-47b-106 and does not involve incidental contact referenced such as shaking someone's hand or patting someone on the back." (Ans. #27).

41. The practice of Esthetics is related to the practice of massage and may overlap. According to Ms. Stewart in her deposition:

> A master esthetician also has the expanded expertise and additional training to do more complicated processes and to do lymphatic massage if so trained.
>
> A master esthetician is doing skin treatment.
>
> Placing lotion on the skin is a skin treatment. And, therefore would fall under a cosmetic treatment of the skin, which is part of the definition of the scope of practice for a master esthetician. Dep. 8-11.

42. Ms. Stewart also testified at the previous evidentiary

hearing involving the individual Plaintiffs herein. It is her opinion that light or medium touching constitutes massage therapy, and is a form of mechanical manipulation of soft tissue. It is also her opinion that doing a body rub with lotion is massage therapy. Use of lotion can be used for either esthetics or massage therapy. (Tr. 52). Using light or medium touch to manipulate muscles and achieve relaxation is part of "the modality of effleurage" (Tr. 53). Soft tissue is defined as the muscles and related connective tissue by the statute. Id. Skin is connective tissue as well. (Tr. 54) If a person is using lotion and is manipulating the soft tissue, it's still massage therapy. (Tr.56)

> Whether they are using lotion, water, oil or any other substance, it is the act of a light touch massage therapy, the medium touch or whichever that is a violation of the practice of massage therapy, not that you are using the lotion per se, but that you are practicing massage therapy." (Tr. 56).
>
> Manipulation is just that, it is contact and movement. If you are merely laying your hands upon your body, that is not manipulation of tissue. If you take that hand and move it around, you are manipulating the soft tissues, whether you are doing so in a light fashion, a medium fashion or in a deep tissue type of practice." (Tr. 57) (Emphasis added).

Reiki may be hands on, but it does not involve manipulation of the tissues nor movement. (Tr. 58) It would not be possible for a person to apply lotion to someone's body without manipulating the soft tissue. (Tr. 60).

43. Plaintiffs have retained Whitney W. Lowe as an expert

witness. Mr. Lowe has filed his Report and his C.V. attached to his Declaration herein. Mr. Lowe has taught massage at several schools, both private and public, and has written three books on the subject. He has also contributed to other books and written several peer-reviewed articles. See Declaration of Whitney Lowe.

> The primary purpose of licensure for massage therapists is to protect public safety. In order to require licensing, there must be a demonstration of potential public harm that relates to the particular occupation being licensed, in this case, massage, and which can be mitigated by the licensing process. As a result, it is crucial to have a solid definition and parameters for what constitutes massage therapy. Each state that licenses massage makes choices about how to define the practice. To be defensible, these definitions should reflect the generally accepted definitions and understanding of what constitutes massage therapy in the profession. Report. P. 1.

44. Mr. Lowe states that there is potential physical and psychological harm from untrained massage:

> In most states, the majority of complaints against practitioners involve psychological components and inappropriate behavior by practitioners as opposed to harm induced by improper massage techniques.
>
> Because many municipalities have a large job in cracking down on illicit and inappropriate mass services, it is understandable that professional licencing organizations would seek greater clarifications and opportunities to more specifically delineate the role and practice of massage therapists. Yet, simply casting a wider net for the definition of massage in an effort to include more individuals within the regulatory umbrella is not necessarily acting within the interest of public safety. Report p. 2.

45. Mr. Lowe states the following regarding the regulatory

efforts of the Utah Division of Occupational and Professional Licensing to further "clarify the definition of massage therapy":

> The Utah DOL definition as a whole is consistent with other accepted definitions of massage in the profession. In particular it agrees with the definition provided by the National Center fo Complementary and Alternative Medicine, at the National Institute of Health, which states, "in general therapists press, rub, and otherwise manipulate the muscles and other soft tissues of the body. People use massage for a variety of health related purposes, including to relieve pain, rehabilitate sports injuries, reduce stress, increase relaxation, address anxiety and depression, and aid general well being."
>
> It appears that the effort to expand the definition of massage with this practice act rule is to cast a wider net of regulation over a larger number of individuals in the hopes that this effort could reduce the number of people who are operating illicit massage establishments, but not calling their specific practice "massage therapy." While I understand the intent of the board's actions, the conceptual and semantic repercussions of this action are problematic.
>
> There is no doubt that massage therapy includes "contact with movement, involving the touching of the clothed or unclothed body." Yet, what follows is an erroneous and implied assumption that any activity which involves said 'contact with movement' should be defined as massage. There are numerous healing arts practices such as Alexander Technique, Feldenkrais Method, Trager Method, Relexology, and Polarity Therapy, just to name a few, which involve contact with movement. However, these practices are not by definition massage therapy, and are routinely exempted from massage therapy methodologies as massage therapy. A defining difference being that these modalities are not massage oriented, which is direct intervention in soft-tissue (muscle, fascia, ligament, tendon)function.
>
> It is highly problematic and inconsistent for the board to simply state that any activity involving contact with movement is by nature massage therapy and consequently subject to regulation under the massage therapy practice act. In

addition to the aforementioned healing arts practices, numerous other practices such as yoga, martial arts, or even more traditional health care practices such as chiropractic or acupuncture could also fall under this definition. Report. P. 3-4.

46. Based on the foregoing. Mr. Lowe gives his expert opinion:

It is my expert opinion that this current proposed rule change in the definition of massage therapy extends beyond the scope of accepted definitions and understanding. Effective enforcement of licensing laws for public safety are predicated on rational and reasonable definitions of scope of practice for that licensing law. While I see the intent beyond the rule change, the wording of the change has served to cause greater confusion around the implementation of the Massage Practice Therapy Act.

The chief challenge remains to enforce the existing stature and rules around massage therapy based on the prior existing broader definition of massage, rather than regulating by application of only one of the defining characteristics included in the law.

47. On the Division's website is an application for a Massage Therapy license, including a curriculum list. A copy of that application is attached hereto as "Exhibit L". The applicant is expected to list the courses he or she has completed, including the following requirements:

Anatomy, Physiology and Kinesiology - 125 hours minimum

Massage Theory Including the Five Basic Swedish Massage Strokes - 285 hours minimum

Professional Standards, Ethics and Business Practices - 35 hours minimum.

Sanitation and Universal Precautions Including CPR and First Aid - 15 hours minimum.

Clinic - 100 hours minimum

Pathology - 40 hours minimum

Other Related Massage Subjects as Approved by the Division - no specific requirement

Total hours - 600 hours minimum.

48. The application also includes "a criminal background check and fingerprint search".

49. Attached hereto as "Exhibit M, is a course description of the Professional Massage Therapy Program at the Utah College of Massage Therapy. The cost of the program is $11,828.17, plus books and supplies at $920.99. The course, if taken full time, will take 32 weeks, or 52 weeks, in the evening.

ARGUMENT

1. Plaintiffs seek to nullify the Rule at issue, as being arbitrary, capricious, not based on substantial facts, and outside of the scope of the statute it claims to "clarify". According to Utah Code Ann. § 63G-3-601(b)(I), such an action may be brought directly in the District Court if:

> less than six months has passed since the date that the rule became effective and the person had submitted verbal or written comments on the rule during the public comment period. (Emphasis added).

No particular form of comment is necessary. Defendant acknowledges that Plaintiff Stucki filed written requests for a further hearing,

and also written and oral comments in opposition to the Rule, which were ignored. Other parties affiliated with Plaintiff Stucki also made comments during the comment period; Copies of some of those comments have been previously submitted to the Court.

2. According to Utah Code Ann. § 63G-3-602, the responding agency must file a responsive pleading, and must "file the administrative record of the rule, if any, with its responsive pleading." While the Division has filed a responsive pleading, they have not supplied the full "record", which should include a transcript of the hearing, and the meetings at which the rule change was discussed and adopted. A separate motion to compel the filing of the complete record is pending. The Rule may be declared invalid if the Rule violates constitutional or statutory law; if the agency does not have authority to adopt this Rule; if the Rule is not supported by substantial evidence, and is thus arbitrary and capricious; or if the agency did not follow proper rule-making procedure.

The Utah Supreme Court has made it clear that the statute governs what the law is, not an administrative rule, and the Rule cannot add to or subtract from the statute. See Ferro v. Utah Dept. Of Commerce, 828 P.2d 507, 512 (n.7)(Utah App. 1992):

> Given the established rule that agency regulations may not "abridge, enlarge, extend or modify the statute creating the

> right or imposing the duty, IML Frieght, Inc. Otteson, 538 P.2d 296, 297 (Utah 1975), it is the stature, not the rule, that governs. If an agency regulation is not in harmony with the statute, it is invalid. (Emphasis added).

See also Rocky Mountain Energy v. Tax Com'n, 852 P.2d 284, 287 (Utah 1993) and Dorsey v. Department of Workforce Services, 2012 UT App 364 (Utah App. 2012). The Rule at issue here is not in harmony with the statute, and it seeks to greatly increase the reach of the Division over those not regulated by the statute. Thus, it is invalid.

This Court has specific authority and direction to delve into the facts upon which the Rule is based. The burden appears to be on the State to prove that the Rule is not "arbitrary and capricious", and is supported by substantial evidence. The State must also show that the Rule does not exceed its authority, and does not modify the statute. Much of the facts upon which Defendants claim to rely as supporting the passage of the Rule are not material to the issues. The State claims that law enforcement officials expressed concerns about non-therapeutic establishments or practitioners who might be engaged in prostitution or "human trafficking". Those activities are unlawful in themselves. As Plaintiffs' expert has stated, it is not a valid use of the Massage Therapy Practice Act to turn the Division into a police agency which investigates and prosecutes activity which is not within the

statutory jurisdiction or authority of the Division. Abraham Lincoln is reputed to have said: "Calling a lamb's tale a leg does not make it one." Calling a wide range of non-therapeutic touching "massage", does not make it massage. It demeans the practice of massage therapy and the Division to stoop to such ridiculous manipulation of a valid regulatory law. Obviously, it is also instructive that the Utah Legislature considered a change in the law to add this definition to the Massage Therapy Act, and declined to proceed with that change.

3. Plaintiff seeks relief under Rule 65 U.R.C.P., which governs injunctive relief, and also the Declaratory Judgment Act, Utah Code Ann. § 78B-6-401, et seq. This allows a party to sue a government agency to determine its rights, without waiting for citations. Utah Code Ann. § 63G-3-603 (4)(e) states specifically that the Court may grant relief by "issuing a judicial stay or injunction to enjoin the agency from illegal action or action which would cause irreparable harm to the petitioner." Plaintiff Stucki has filed a declaration stating that he will be caused irreparable injury by this Rule. It is clear that a business has a property interest in its business license, and its business investment, which cannot be taken away without Due Process of law. See Anderson v. Utah County Board of County Commissioners, 589 P.2d 1214, 1216 (Utah

1979). Enforcement of this Rule against Plaintiff will result in irreparable harm to Plaintiff; and Plaintiff is therefore entitled to an injunction against the enforcement of the Rule.

4. The Rule is based on an overly broad reading of the Massage Therapy Practice Act, one which renders the statute itself as unconstitutionally overbroad as applied to Plaintiff, as it sweeps within its ambit much constitutionally protected conduct or speech. See Provo City v. Willden, 768 P.2d 455 (Utah 1989) and Bushco v. Utah State Tax Commission, 2009 UT 73, 225 P.3d 153 (Utah 2009). While a massage is not directly speech, all parties agree that the right of one person to touch another is most fundamental. See Fact No. 39 above. And many entertainers touch audience members as part of the entertainment. This is especially true for exotic dancers, for whom some touch is intrinsic to the performance. It is also rendered hopelessly vague in its attempts to prohibit all touching. The practice of massage therapy as defined by the Utah code includes a substantial list of activities. "Massage therapy " must be "systematic", and is part of an overall treatment akin to physical therapy. The use of this statute and this Rule to prevent ALL touching of one person by another in which there is any form of remuneration, without a professional license, is arbitrary, capricious, and violates the general rule that legislation and

regulations must have a "rational basis".

5. Petitioners here admit that they may put their hands on another person's skin, and move them. That is enough for Defendants to require licensing, and to use the criminal process to enforce their will. The Legislature obviously did not contemplate the sheer volume and variety of actions that are now required to be licensed, if done for a fee. See Facts No. 24-32 above. Given Ms. Pettley's personally aggressive stance concerning those who touch others, it is anyone's guess where the line may be. She agrees that enforcement of the Rule may be "subjective", and that she has some "discretion" as to how and when it is enforced. Fact No. 25. What kind of touching might bring the weight of the State down on the heads of the offender? Would this include something as innocuous as a waitress touching a customer she is waiting on in a restaurant? Some service staff believe that tipping increases with such signs of friendliness. What about a trainer in a gym, who does nothing more than guide someone as to how to exercise or use a piece of equipment? How many people must live in fear of the stray "touch with movement", if done in any kind of commercial setting?

The target of this action and this Motion is the arbitrary, capricious and overbroad interpretation of the Act by the Division, and its in-house investigators. That policy is most specifically

contained in the Rule at issue; but Ms. Pettley insists that the Division has pursued its current policies based on an "understanding", even before the Rule was adopted.

The Division has taken upon itself the authority to construe the Massage Therapy Practice Act in an extremely broad manner; and clearly their determinations have swallowed up the act as written. Such a policy gives an officer, either one of their own, or an officer in a political subdivision, an unlawful amount of discretion to decide when a crime has been committed. Such discretion was prohibited by the Supreme Court, in Houston v. Hill, 482 U.S. 451, 465 (1987):

> Laws that provide the police with unfettered discretion to arrest individuals for words or conduct that annoy or offend them . . . [are] not narrowly tailored to prohibit only disorderly conduct or fighting words.

A Defendant is entitled to a criminal statute which has clear standards and guidelines, so the Defendant will know when he or she has violated it. The Massage Practice Act contains criminal sanctions; and those criminal sanctions have been used against Plaintiff's employees. As the U. S. Supreme Court stated in Grayned v. City of Rockford, 408 U.S. 104, 108-109 (1972):

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of

> ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards fo those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute "abut[s] upon sensitive areas of basic First Amendment freedoms," it "operates to inhibit the exercise of [those] freedoms." Uncertain meanings inevitably lead citizens to "'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked. (Emphasis added).

The Tenth Circuit Court, citing Kolender v. Lawson, 461 U.S. 352, 357 (1983), held, in U.S. v. Apollo Energies, 611 F.3d 679, 687 (10th Cir. 2010):

> First, due process requires citizens be given fair notice of what conduct is criminal. A criminal statute cannot be so vague that "ordinary people" are uncertain of its meaning. See Kolender v. Lawson, 461 U.S. 352, 357 (1983). However, even when a statute is specific about what acts are criminal, our due process analysis is not complete. When, as here, predicate acts which result in criminal violations are commonly and ordinarily not criminal, we must ask the fair notice question yet again.

The Utah Supreme Court, in State v. Mooney, 2004 UT 49, 98 P. 3d 420 (Utah 2004), a case with First Amendment implications, also cited Kolender:

> Both the United States and Utah Constitutions protect citizens from deprivation of liberty or property absent due process of law. U.S. Const. Amends V & XIV, §1; Utah Const. art. I, §7. The Utah Controlled Substances Act imposes substantial criminal penalties on those found guilty of violating its

> provisions. Our constitutional guarantees of due process require that penal statutes define criminal offenses "with sufficient definiteness that ordinary people understand what conduct is prohibited." Kolender v. Lawson, 461 U.S. 352, 357 (1983);

Ms. Pettley is determined to arrest and prosecute several people who have committed what most observers would agree is an innocent act. The policy and the Rule allow police officers to decide for themselves, based on a "suspicion" when "contact plus movement" is a crime. It seems pretty clear that a determination is being made based on be a suspicion of prostitution or some other "inappropriate" activity. The Division is charged with regulating and policing its own practitioners; but the law has not given the Division general police powers. They have taken these powers upon themselves without proper legislative authority, apparently in an effort to fight "prostitution and human trafficking".

Ms. Pettley, has very limited training as a "special function" law enforcement officer. She has no particular education for her position; and she apparently does not even have much supervision. It is her intent to go out and find people who touch other people for a fee, and to cite them for a Class A Misdemeanor.[1] Certainly, the suppression of these vices is not part of the regulation of

[1] Note that engaging in sexual activity for hire is a Class B Misdemeanor. See Utah Code Ann. § 76-10-1302.

massage. Yet the division claims that the passage of this one sentence rule gives them that authority. The Rule must be stricken, and the division must be directed to do only what it is empowered to do.

The problem here is that the Rule is apparently designed, and clearly being enforced, in a manner aimed at adult entertainers. It is only these people, looked down upon by the authorities, who are the objects of criminal enforcement. The dividing line between "incidental touching" and that which will result in an arrest, is entirely in the minds of the law enforcement officers.

The burden surely must be on the government to produce SOME evidence that such draconian use of the law is both necessary and proper. The enforcement activities of the Division and its allies are not contemplated by the Statute; and the Division has no authority to add to the law, especially in light of the specific determination of the legislature not to enact this change.

7. With this Rule, the Division has strayed out of the regulation of a profession, and turned its main focus onto people who touch other people, without being part of the profession. The actions at issue here are actions capable of being performed by any person upon any person. It does not take any training whatsoever for one person to say to another: "let me just rub your back and

shoulders, and make you relax." If such activity is the unlicenced practice of a regulated profession, there is no validity whatsoever in the issuance of a license or in regulation of the profession. In fact, massage therapy is much more than that. Defendants, in their previous memorandum in support of their Motion to Dismiss, actually went so far as to state, in the heading to Point III of their Memorandum:

> Plaintiff's Contention That Massage Therapy is a Specifically-Defined Profession has no Basis in Statutory Construction or Legislative History. Def.'s Motion to Dismiss, p. 9.

That statement is so obviously false and nonsensical as to need no further rebuttal. If it is not a defined profession, what is it? Why is it regulated and licensed by the Division of Professional Licensing; and why does it take months of specific schooling and a proficiency test to obtains a license?

Defendant pointed out in its previous Memorandum that the legislature changed the definitions in its 2011 amendments to eliminate the requirement that massage therapy be therapeutic. So, the State seems to agree that, in its zeal to stop people from touching each other, an effort was made to destroy massage therapy as a profession. Such an admission is mind boggling. But the legislature did not contemplate the extremes to which the Division would go on its own. It did not abolish all parameters of

regulation. The Division, however, has done just that; and the Division's actions cannot be reconciled with the statute.

Much of the damage the legislature did to the profession in 2011 was reversed in 2012, and massage therapy is once again therapeutic. If the 2011 amendments removed the need for massage to be therapeutic, and the 2012 amendments restored that requirement, how can those changes be totally ignored by the Division? How can the Division claim that its enforcement has undergone no changes as the statute expanded and contracted? The changes clearly are contradictory, and appear to reflect confusion in what is to be accomplished. Apparently, the Rule at issue has been deemed by the Division to insulate it from legislative changes; and the Division has no authority to do so in this manner.

It cannot be emphasized too much that the Division seeks to criminally prosecute, those who engage in the touching of another person's skin for commercial purposes. The testimony of the Bureau Manager and her investigator is clear. It is their intent to actually license touching by one person of another, and to require 600 hours of training, at a cost of thousands of dollars. The scope of the power grab is simply breathtaking. It obviously is not reasonable for the Division to take upon itself this kind of authority.

"Exhibit F" is a District Court decision rendered before the legislative changes in 2011. Perhaps those amendments were intended, in part, to overturn that decision, or to preclude others like it; but those changes were repealed only one year later. At the very time when a new bill defining the practice of massage therapy was introduced in the legislature, the Division was attempting to amend the law by using its rule-making powers. Ms. Stewart denies involvement in the 2012 legislative activity, Dep. 39; but it is an unlikely coincidence that the exact same language defining "manipulation" was simultaneously introduced in the legislature and by the Division. Ms. Stewart and her cohorts were not dissuaded by the removal of the identical language from the 2012 Bill. So, the legislature declined to pass the new definition, apparently because of concerns by other professionals. Yet the Division claims that the definition can be "implied" within the existing law. That claim is preposterous. The Division does not appear to making a good faith effort to enforce the law as it exists, but instead to engage in a moral crusade against perceived evils which does not fall within their statutory authority.

8. Attached hereto, labeled "Exhibit N", and by reference made a part hereof is the decision of the U.S. District Court in Clayton v. Steinagel, U. S. Dist Court No. 2:11-cv-00379-DS, 2012 Westlaw

3242255. This case was brought in Federal Court against the Division of Professional Licensing seeking declaratory relief that the Division's licensing and regulation of practice of African hair braiding as cosmetology was "arbitrary, excessive, and anachronistic". The Plaintiff there claimed the denial of rights under:

> the Due Process, Privileges or Immunities, and Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution as well as the Inherent and Inalienable Rights, Due Process, and Uniform Operation Clauses of the Utah Constitution.

A similar Complaint was successful in the earlier Southern District of California in Cornwell v. Hamilton, 97-cv-138 (S.D. Calif. Aug. 18, 1999), a copy of which was previously submitted to this Court as an exhibit to Plaintiffs' Memorandum in Opposition to Motion to Dismiss. There, the Court found that the licensing scheme as applied to hair braiders was irrational, and thus unconstitutional. The Federal District Court in Utah stated the standard of proof in Clayton:

> Review of both Plaintiff's Due Process and Equal protection claims must be based on the rational relation test. The Court must decide whether there is any rational connection between Utah's regulatory scheme and public health and safety when applied to Jestina. In order to prove a substantive due process claim, a plaintiff must plead and prove that the government's action was clearly arbitrary and unreasonable, having no substantial relation to public health, safety, morals or general welfare." While the fit between this interest and the means employed need not be perfect, it must

> be reasonable. "There must be some congruity between the means employed and the stated end or the test would be a nullity." The Supreme Court has long recognized that "a state can require high standards of qualification" to pursue an occupation, "but any qualification must have a rational connection with the applicant's fitness or capacity" to engage in the chosen profession." Courts have also made it clear that may not "treat persons performing different skills as if their professions were one and the same, i.e., . . . attempt to squeeze two professions into a single, identical mold," because this results in standards of qualification that have no rational connection to a person's actual profession. P. 3.

The State countered:

> that the styling of hair, including hair braiding, requires knowledge of sanitation, sterilization, diseases of the skin and scalp as well as an understanding of business and business laws including state and local health requirements. Sanitation and sterilization requirements are necessary to protect the public and the licensed professionals from harm caused by the transmission of lice and diseases like HIV AIDS. P. 3-4.

The Court, in making its determination, looked at the training necessary for a cosmetology license in Utah. It found that "1400 to 1600 of the 2000 hours of the mandatory curriculum are irrelevant to African hairbraiding." It also found that "the State admits that it cannot guarantee that the subjects it claims are relevant to African hair braiding will be given more than minimal time in any cosmetology/barber school". The State did not know if any schools in Utah taught anything about African hair braiding; and admitted that the standard textbooks "total 1700 pages, but only 38 pages mention braids of any kind, much less African braids." The State

also admitted that its exam to obtain a cosmetology license does not include any mention of African hair braiding. And finally, the State admitted that "it never considered African hair braiding when creating its licensing scheme." P. 4-5. The Court found that the State's requirement of a cosmetology license was irrational, in imposing irrelevant and burdensome requirements on African hair braiders. P. 5-6.

Likewise, Plaintiffs claim that the application of a professional massage therapy licensing scheme to a simple process of touching the skin and moving the hands, is irrational and unconstitutional. The chief investigator for DOPL stated in her deposition that something as simple as a romantic partner who caresses her significant other, followed by that partner buying her dinner to show appreciation, runs afoul of the law. Can anyone claim with a straight face, that this kind of contact, if remuneration follows in any form, requires 32 weeks of course work and training, at a cost of over $12,000? The arbitrary and capricious nature of the regulations enacted by the Division could not be more obvious. In fact, if the Division were not so serious, the whole thing would be nothing but laughable. This Court is urged to tell the Division that their regulations are beyond silly, and that they are indeed "arbitrary, excessive, and anachronistic", and

also that they are irrelevant and unduly burdensome. The regulations deny both equal protection and substantive due process. They do not comport with the requirements of the statute, and are thus beyond the duty and authority of the Division to enact.

9. Rule 56 U.R.C.P. provides that, in a civil action, either party may move for Summary Judgment, either all or in part, at anytime after the initial pleadings have been filed. A party is entitled to Summary Judgment on one or more issues when the pleadings themselves, together with any affidavits, show that there are no material facts at issue, and that the moving party is entitled to judgment as a matter of law. There appears to be no controversy that Plaintiffs performed services and that they were not fully paid for those services. Defendant has asserted defenses which are insufficient as a matter of law, and Plaintiffs are entitled to Judgment.

CONCLUSION

The Rule at issue here not only unlawfully extends the Massage Therapy Practice Act, it involves Division personnel in general law enforcement, in an apparent effort to fight "prostitution and human trafficking" and involve the Division in an area where it has no jurisdiction, and no business. The Rule and its enforcement are entirely arbitrary and capricious, and allow the Division's "special

function" investigators unlawful discretion on who and how to cite those accused of "contact with movement." The Court's power extends to reviewing that record to determine if the rule is supported by substantial facts. The record does not show substantial facts which support the division abandoning its mission to regulate a profession, in favor of persecution of those with whom the Division does not agree.

DATED this _____ day of February, 2013.

W. ANDREW MCCULLOUGH, L.L.C.

_____
W. Andrew McCullough
Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that I mailed a true and correct copy of the foregoing Memorandum to Laurie Noda, Attorney for Defendants, PO Box 140872, Salt Lake City, UT 84114, postage prepaid, this ____ day of February, 2013.

_____