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Velva L. Price
District Clerk
Travis County
D-1-GN-17-002768
Ruben Tamez

CAUSE NO. D-1-GN-17-002768

TEXAS LBC, INC.	§	**IN THE DISTRICT COURT**
	§	
v.	§	250TH
	§	**JUDICIAL DISTRICT**
GLENN HEGAR,	§	
In His Capacity	§	
As Comptroller of Public Accounts	§	**TRAVIS COUNTY, TEXAS**

PETITION FOR DECLARATORY JUDGMENT

Petitioner Texas LBC, Inc. complains of Glenn Hegar, in his capacity as Comptroller of Public Accounts, Defendant, and would show:

1. This suit is a subject to a Level 2 discovery plan per TRCP 190.3.

I. The Parties

2. Petitioner Texas LBC, Inc. ("TLBC") is a Domestic Nonprofit Corporation doing business in Texas. TLBC is a trade association representing a number of clubs in Texas including the following:

i) Sacolo, Ltd. d/b/a Perfect 10 Men's Club ("Sacolo");

ii) CB Restaurants, Inc. d/b/a Sugar's Men's Club ("CB");

iii) Tripolis Enterprizes Inc. d/b/a Palace;

iv) 35 Bar and Grill Inc. d/b/a San Antonio Men's Club;

v) D's Restaurants Inc. d/b/a Blush Show Club (formerly known as Wild Zebra);

vi) E & 1 Enterprises d/b/a Allstars; and

vii) KHG of San Antonio LLC d/b/a Tiffany's Cabaret.

3. Defendant Glenn Hegar is sued in his capacity as Comptroller of Public Accounts ("CPA" or "Defendant"). The CPA may be served with process by serving the Office of the Attorney General, 300 W. 15th Street, Austin, Texas 78701.

II. Jurisdiction

4. The Court has jurisdiction of this suit pursuant to and as provided by Tx. Govt. Code §2001.038.

5. The CPA cannot invoke sovereign immunity or challenge this Court's jurisdiction because declaratory judgment actions challenging the validity of an agency rule do not implicate the sovereign immunity doctrine because they are not "*considered suits against the State*". *Texas Entm't Ass'n*, 287 S.W.3d 852 at 865 (Tex. App. - Austin 2009), *rev'd on other grounds*, 347 S.W.3d 277 at 288 (Tex. 2011). Although in the *Texas Entm't Ass'n* case the Supreme Court overruled the Court of Appeal's conclusion that the subject sexually-oriented-business tax violates the First Amendment, the court did not discuss or challenge the Court of Appeal's determination that the CPA did not have immunity. *See Texas Entm't Ass'n,* 347 S.W.3d at 288. See *Texas Entm't Ass'n,* 347 S.W.3d at 2865. Texas Tax Code Ch. 112 only mandates that the "*person who is required to pay a tax or fee*" must make a protest payment before bringing a suit to challenge a tax. See Tex. Tax. Code § 112.051. To the extent that Chapter 112 generally applies to taxpayer associations, trade associations are not persons who are required to pay the disputed taxes and fees, and thus they are not required to make protest payments before bringing suit. *See id.*

6. The Travis County District Court has exclusive jurisdiction pursuant to Tex. Govn't Code §2001.038 which authorizes a party to bring an action for declaratory judgment in the District Court against a state agency to the extent of determining the validity or applicability of a rule "*if it is alleged that the rule or its threatened application interferes with or impairs or threatens to*

interfere with or impair, a legal right or privilege of the Petitioner." *Texas Dep't of State Health Services v. Balquinta*, 2014 Tex. App. LEXIS 3766 at *42.

7. It is not necessary that a petitioner challenging the validity of an agency role exhaust administrative remedies before challenging the validity of an agency rule in District Court. Tex. Gov't Code §2001.038(a) establishes that the Travis County District Court has jurisdiction to hear a challenge to the validity or applicability of an administrative rule when it is alleged that "*the rule or its threatened application interferes with or impairs, or threatens to interfere with or impair, a legal right or privilege of the Petitioner*." The Administrative Procedure Act authorizes Texas courts to "*render a declaratory judgment without regard to whether the* [Petitioner first] *requests the state agency to rule on the validity or applicability of the rule in question*." Tex. Gov't Code §2001.038(d).

8. In addition, Petitioner avers that the CPA has acted ultra vires in promulgating the CPA's Sexually Oriented Business (SOB) Rule which is the subject of this suit. A state official's actions are not subject to immunity if the official acted ultra vires or outside of his authority. *Hous. Belt & Terminal Ry. Co. v. City of Houston*, 487 S.W.3d 154, 158 (Tex. 2016) (holding that "*a government officer with some discretion to interpret and apply a law may nonetheless act 'without legal authority', and thus ultra vires, if he exceeds the bounds of his granted authority or if his acts conflict with the law itself.*"). A public officer generally lacks discretion or authority to misinterpret law. *Id* (quoting *In re Smith*, 333 S.W.3d 582, 585 (Tex. 2011) (orig. proceeding)). An agency has no authority to adopt a rule that is inconsistent with existing state law. *Gerts v. Oak Cliff Sav. & Loan Ass'n*, 432 S.W.2d 702,706 (Tex. 1968). *R. R. Comm'n of Texas v. ARCO Oil & Gas Co., a Div. of Atl. Richfield Co.*, 876 S.W.2d 473, 481 (Tex. App. 1994), writ denied.

III. "Bikini/Latex Clubs"

9. As stated, Petitioner represents the interest of a number of clubs in Texas which charge customers an entrance fee to watch female dancers performing at their clubs. The represented clubs, however, are "Bikini/Latex Clubs" (not SOBs)[1] in that the entertainers who entertain at Bikini/Latex Clubs wear: i) bikini bathing suit "bottoms" that cover the entertainer's buttocks and genitals; and ii) opaque latex cover-up that covers the dancers' breasts below the top of the areola (and the dancers' buttocks to the extent not completely covered up by the bikini bathing suit bottoms).

10. At all relevant times since about 2013, the Bikini/Latex Clubs have not been, and have not operated as, SOBs. The Bikini/Latex Clubs represented by Petitioner are not (or should not be) subject to the SOB Tax which is the subject of this suit.

IV. The Sexually Oriented Business Statute

11. In 2007, the Texas Legislature enacted the Sexually Oriented Business Fee Act (the "SOB Statute"). See Tex. Bus. & Com. Code § 102.051 et seq. Effective January 1, 2008, the State of Texas assesses the SOB Tax against SOBs in the amount calculated at $5 for each entry by each customer admitted to the SOB (the "SOB Tax"). *Id.* §102.052(a).

12. The SOB Statute defines an SOB as a nightclub, bar, restaurant, or similar commercial enterprise that:

> *(A) provides an audience of two or more individuals live* ***nude*** *entertainment or live* ***nude*** *performances; and*
>
> *(B) authorizes on-premises consumption of alcoholic beverages, regardless of whether the consumption of alcoholic beverages is under license or permit issued under the Alcoholic Beverage Code.*

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[1] In 2012, the City of San Antonio enacted a zoning ordinance that required club entertainers wear certain types of clothing in order to avoid classification as an SOB – see San Antonio City Code §§ 21-200 and 21-223 of Chapter 21, Article IX which set forth the definitions of nudity, semi-nudity, special anatomical areas, and specific sexual activities. In subsequent litigation, the City of San Antonio and the Bexar County District Court agreed that the Bikini/Latex Clubs are not SOBs according to the San Antonio SOB ordinance.

Tex. Bus. & Com. Code §102.051(2).

13. The SOB Statute defines "***Nude***" as:

> *(A)* ***entirely unclothed; or***
>
> *(B)* ***clothed in a manner that leaves uncovered or visible through less than fully opaque clothing any portion of the breasts*** *below the top of the areola of the breasts, if the person is female,* ***or any portion of the genitals or buttocks.***
>
> *Id.* §102.051(1).

V. The Constitutionality Challenges to the SOB Statute

14. In or about 2008, the TLBC – on behalf of a number of SOB clubs – sued the CPA challenging the federal and state constitutionality of the SOB Tax. The Travis County District Court and subsequently the Third Court of Appeals of Texas ruled that the SOB Tax violated the First Amendment to the U.S. Constitution.[2] In 2011, the Texas Supreme Court reversed the district court and the court of appeals, and ruled that the SOB Tax did not violate the First Amendment. The Supreme Court remanded the case to the trial court to determine the TLBC's state law claims.[3]

15. On remand, the district court concluded that the SOB Tax was an occupation tax and did not violate the Texas Constitution. The TLBC appealed the district court ruling to the Third Court of Appeals. In May 2014, the Third Court of Appeals affirmed the District Court.[4] On 11/21/14, the Texas Supreme Court denied the TLBC's petition for review.

[2] *Texas Entm't Ass'n v. Combs*, 287 S.W.3d 852 at 863-64 (Tex. App. – Austin 2009).

[3] *Combs v. Texas Entm't Ass'n, Inc.*, 347 S.W.3d 277 at 288 (Texas 2011).

[4] No. 03-12-00527-CV (Tex. App. May 9, 2014).

VI. The CPA's Unsuccessful Administrative Enforcement of the SOB Tax Against the Bikini/Latex Clubs

16. After the constitutionality litigation concluded, the CPA initiated SOB Tax assessment and enforcement proceedings against a number of SOBs and also against several Bikini/Latex Clubs. See e.g. SOAH Docket No. 304-16-5144.20 styled *Sacolo, Ltd. v. TCPA*.

17. The CPA's prosecution of the enforcement of the SOB Tax against Bikini/Latex Clubs has not been successful (or was not successful until the CPA promulgated the CPA's SOB Rule in January 2017, and as discussed herein). On 11/16/16, for example, SOAH Administrative Law Judge Simonds issued his Proposal for Decision ("PDF") in the CPA v. Sacolo case which, in relevant part, determined and held that Sacolo (which is, as stated a Bikini/Latex Club) did not operate as a SOB and dismissed the CPA's SOB Tax assessment against Sacolo:

> ...
>
> "*8. During the periods at issue, Petitioner's dancer's breasts were always covered by opaque latex below the top of the areola and their buttocks were fully covered.*
>
> ...
>
> *11. During the periods at issue, the Comptroller's Enforcement Division agreed that the opaque latex that was used to cover Petitioner's dancer's breasts was adequate.*
>
> ...
>
> *21. The greater weight of the evidence demonstrates that Petitioner did not operate the club at issue as an SOB during the period at issue...*"

18. On information and belief, SOAH has – as of January 2017 – rejected the CPA's SOB Tax assessments against at least seven Bikini/Latex Clubs because, according to the ALJs, the Bikini/Latex Clubs were not SOBs subject to the SOB Tax.

VII. The CPA's January 2017 SOB Rule

19. In January 2017 – and in obvious reaction to SOAH's rulings against enforcement of the SOB Tax against Bikini/Latex Clubs – the CPA promulgated an administrative rule (the "CPA's SOB Rule") that defines "clothing" as a **garment** that is used to cover the body, or a part of the body,

typically consisting of cloth or a cloth-like material. Paint, latex, wax, gel, foam, film, coatings, and other substances applied to the body in a liquid or semi-liquid state are not clothing. See 34 Tex. Admin. Code § 3.722(a)(1):

> *34 Tex. Admin. Code §3.722 Sexually Oriented Business Fee.*
>
> *(a) Definitions. The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise.*
>
> > *(1) Clothing – a* ***garment*** *used to cover the body, or a part of the body – typically consisting of cloth or a cloth-like material. Paint,* ***latex****, wax, gel, foam, film, coatings,* ***and other substances applied to the body in a liquid or semi-liquid state are not clothing****.*
>
> ...
>
> *(b) Clothing requirements. An entertainer or performer will be considered 'nude' for purposes of this section unless the entertainer or performer wears fully opaque clothing that covers all portions of the genitals and buttocks, and if the entertainer or performer is a female, the entertainer or performer* ***must also wear fully opaque clothing*** *that covers the portions of the breasts below the top of the areola of the breasts.*
>
> ...
>
> *(d) Imposition and Calculation of Fee.*
>
> ...
>
> > *(3) The comptroller will presume that a business is a sexually oriented business if the business holds itself out as a sexually oriented business. Evidence that the comptroller may consider includes signage, advertising, social media, publication of images, inspections, investigations, and the reputation of the business. To rebut the presumption, a business may prove by a preponderance of the evidence the instances in which the business did not operate as a sexually oriented business."*

20. Note that the CPA's SOB Rule does not provide that the definition of the term "clothing" should be applied retroactively. The CPA's SOB Rule also does not address, define, or alter the term "uncovered" set forth in the SOB Statute §102.051(1)(B)

VIII. The CPA's Contentions and Position

21. The CPA now contends the Bikini/Latex Club entertainers were/are providing nude entertainment because, according to the CPA, the opaque latex that covers the dancer's breasts are not clothing as that term is used in the statutory definition of nude. See e.g. SOAH Docket No. 304-17-0384.20 styled *TMBJ Investments Inc. v. TCPA*. In the *TMBJ investments* case, SOAH ALJ Simonds issued his PFD which, in relevant part, upheld the CPA's SOB assessment against TMBJ (a Bikini/Latex Club), based on the CPA's SOB Rule. The ALJ denied, however, the CPA's SOB assessments before 1/29/17 (the effective date of the CPA's SOB Rule) – i.e. the ALJ rejected the CPA's argument that the CPA's SOB Rule should be applied retroactively.

22. It was not, however, the policy, practice, or position of the CPA enforcement officers – prior to January 2017 – that Bikini/Latex Clubs were SOBs subject to the SOB Tax. It had been the policy, practice, and position of the CPA's Enforcement Division – prior to January 2017 – that entertainers utilizing latex cover-up of their breasts were not "nude" as defined by the SOB Statute. See CPA Enforcement Officer Paul Zavala's deposition testimony in the Sacolo/SOAH proceeding:

> "Q: So in San Antonio, lots of the clubs have entertainers whose breasts are covered with latex, correct?
>
> Zavala: *Yes.*
>
> Q: So when you went to these clubs, you saw most likely dancers who had painted-on latex on their breasts, right?
>
> Zavala: *Yes.*
>
> Q: So does that qualify as coverage if it covers the total area required?
>
> Zavala: *If it covers the complete areola, then yes.*
>
> ...
>
> Q: They can be covered with just latex.

Zavala: *Right.*

Q: At any point did anyone tell you that you should interpret the rule so that latex doesn't count as covering?

Zavala: *No.*"

23. On June 15, 2015, Mr. Zavala sent an email communication to his supervisor stating that Sacolo (d/b/a Perfect 10) was not currently an SOB: "... *TP# 17427356963 (Perfect 10) not currently a SOB*..."[5] See also SOAH's 11/16/16 PFD Finding of Fact No. 30 in the Sacolo proceeding:

> "*Staff did not provide any evidence to establish an agency policy that opaque latex is not sufficient covering for purposes of the SOBF statutes.*"

IX. Petitioner's Challenges to the Rule

24. Petitioner seeks declaratory judgment and determination pursuant to Texas Government Code §2001.038 that CPA Rule §3.722 is invalid to the extent that:

i) the CPA's SOB Rule does not comport with the substance and plain meaning of Tx. Busn. & Comm. Code §102.051, et seq;

ii) the CPA acted with ultra vires in promulgating and enforcing the CPA's SOB Rule; and/or

iii) the CPA SOB Rule cannot be and should not be applied retroactively.

X. Relevant Case Law

A. An Agency's Rules Must Comport with the Statute

25. The executive branch and its state agency cannot adopt or enforce rules that conflict with the laws of this state or the Constitution of the United States. An agency's rules must comport with the agency's authorizing statute. Tex. Tax Code § 111.002 (providing that Comptroller's

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[5] Zavala's 6/15/15 email identifies 11 clubs that Zavala had "canvassed" for SOB compliance. The names and identification of 10 of the 11 clubs canvassed, however, are redacted. On information and belief, CB is also included in the list and also determined to be a non-SOB.

rules must not conflict with state or federal law); *see also Pub. Util. Comm'n,*809 S.W.2d at 207; *Stanford,* 181 S.W.2d at 273 (stating that an agency's construction of a statute may be considered only if it is reasonable and not inconsistent with the statute).*TGS-NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 443 (Tex. 2011); an agency has no authority to adopt a rule that is inconsistent with existing state law.*Gerst v. Oak Cliff Sav. & Loan Ass'n,* 432 S.W.2d 702, 706 (Tex.1968). *R.R. Comm'n of Texas v. ARCO Oil & Gas Co., a Div. of Atl. Richfield Co.,* 876 S.W.2d 473, 481 (Tex. App. 1994), writ denied. *Office of Pub. Util. Counsel v. Public Util. Comm'n of Tex.*, 131 S.W.3d 314, 321 (Tex. App. – Austin 2004, pet. denied). Tx. Tax Code §111.002 (providing that Comptroller's rules must not conflict with state or federal law); see also *Pub. Util. Comm'n v. Gulf States Util.*, 809 S.W.2d 201, 207 (Tex. 1991); *Stanford v. Butler*, 681 S.W.2d 269, 273 (Tex. 1944) (stating than an agency's construction of a statute may be considered only if it is reasonable and not inconsistent with the statute). *TGS-NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 443 (Tex. 2011). A state administrative agency has only the authority expressly provided by statute or necessarily implied in order to carry out the express powers the legislature has given it. See *Public Util. Comm'n of Tex. v. City Pub. Serv. Bd.*, 53 S.W.3d 310, 315 (Tex. 2001); *Public Util. Comm'n of Tex. v. GTE-Sw., Inc.*, 901 S.W.2d 401, 407 (Tex. 1995). An agency may not exercise what is effectively a new power on the theory that such exercise is expedient for the agency's purposes. *GTE-Sw.*, 901 S.W.2d at 407. See *Physicians Assistants Bus. All. Of Tex., L.L.C. v. Texas Med. Bd.,* No. 03-12-00735-CV, 2015 WL681010, at *3 (Tex. App. – Austin Feb. 13, 2015, no pet.) (mem. op.) ("*A rule is void where it conflicts with the plain language of a statute*..."). See also *Texas State Board of Veterinary Examiners v. Jefferson*, No. 03-14-00774-CV (Tex. App. – Austin 2/26/16). An agency has no authority to adopt a rule that is inconsistent with existing state law. *Gerts v. Oak Cliff Sav. & Loan Ass'n*, 432 S.W.2d 702,706 (Tex.

1968). *R. R. Comm'n of Texas v. ARCO Oil & Gas Co., a Div. of Atl. Richfield Co.*, 876 S.W.2d 473, 481 (Tex. App. 1994), writ denied.

26. When there are aspects of the application of a regulation that are policy determinations, Courts will defer to the agency's policy determinations as to those aspects of the application of the regulation unless they are plainly erroneous, inconsistent with the language of the rule, inconsistent with statute, or a violation of the constitution. *BFI Waste Sys. of N. Am., Inc. v. Martinez Envtl. Group,*93 S.W.3d 570, 575–76 (Tex.App.-Austin 2002, pet. denied); *H.G. Sledge Inc. v. Prospective Inv. & Trading Co.,* 36 S.W.3d 597, 604 (Tex.App.-Austin 2000, pet. denied). *Brownsville Irr. Dist. v. Texas Comm'n on Envtl. Quality*, 264 S.W.3d 458, 463 (Tex. App. 2008).

B. Judicial Review of the Validity of an Agency's Rule

27. Tex. Gov't Code §2001.038 provides that a party may challenge the validity of an agency's rule on procedural and constitutional grounds, and specifically, on the question of whether the agency "*acted contrary to the statute*". *Gulf Coast Coalition of Cities v. PUC*, 161 S.W.3d 706, 712 (Tex. App. – Austin 2005, no pet.) (citing *State of Texas Office of Public Utility Counsel v. Public Util. Comm'n of Texas*, 131 S.W.3d 314, 321 (Tex. App. – Austin 2004, pet. denied). To establish the rule's facial invalidity, the petitioner "*must show that the rule: (a) contravenes specific statutory language; (b) runs counter to the general objectives of the statute; or (c) imposes burdens, conditions, or restrictions in excess of or inconsistent with the relevant statutory provisions.*" *Id.* See also *Texas Bd. of Chiropractic Examiners v. Tex. Med. Ass'n*, 375 S.W.3d 464, 474 (Tex. app. – Austin 2012, pet. filed).

28. In analyzing the validity of an agency's rule, the court looks first to the plain language of the statute to ascertain and give effect to legislative intent; the court looks no further

than the literal text if the language is unambiguous. Where the words of the statute in issue are not defined by the Legislature and have no technical or acquired meaning, the court must "*construe the words according to their plain and common meaning unless a contrary intent is apparent form the context.*" *Texas Bd. of Chiropractic Examiners v. Tex. Med. Ass'n*, 375 S.W.3d at 474 (citing *City of Rockwall v. Hughes*, 246 S.W.3d 621, 625-26 (Tex. 2008)).

29. In this case, the term "uncovered" has a plain and common meaning: "*not supplied with a covering*" (Merriam-Webster Dictionary). And, "covering" also has a plain and common meaning: "*something that covers or conceals*' (Meriam-Webster Dictionary). In this case, it is undisputed that the latex "covers" the breast and is fully opaque (*blocks the passage of light* per Merriam-Webster Dictionary) – the entertainer's actual skin is not visible through the latex. Petitioner acknowledges that the latex – while fully opaque – does not cover up the "contour" of the breast, but the SOB Statute requires only that the breast be covered by a fully opaque covering, not that the contour of the breasts also be invisible. The "contour "of the breasts would be visible, however, even if the entertainer wore a spandex bra or a bikini top bathing suit. The SOB Statute does <u>not</u> require that the covering be loose-fitting or non-skin tight.

30. If a statute is ambiguous, the court may give some deference to the agency in interpreting its enabling statute where the agency's interpretation is both reasonable and <u>does not contradict the plain language of the statute</u>, and comports with its enabling statute. *Texas Orthopaedic Ass'n v. Tex. State Bd. of Med. Exam'rs*, 254 S.W.3d 714, 719 (Tex. App. – Austin 2008, pet. denied). There is no deference to the agency, however, if the statute is unambiguous. *Texas Bd. of Chiropractic Examiners*, 375 S.W.3d at 475. In this context, "[t]*he determining factor in deciding whether an administrative agency has exceeded its rule-making authority is whether the rules are 'in harmony' with the general objectives of the legislation involved.*" *Harlingen*

Family Dentistry, P.C. v. Tex. HHS Comm'n, 452 S.W.3d 479, 486 (Tex. App. – Austin 2014, pet. filed) (citing *Railroad Comm'n of Tex. v. Lone Star Gas Co.*, 844 S.W.2d 679, 685 (Tex. 1992); *Gulf Coast Coal. Of Cities*, 161 S.W.3d at 711). **An administrative rule is in "harmony" with legislative objectives only if it does not impose additional burdens, conditions, or restrictions in excess of or inconsistent with relevant statutory provisions.** *Id.* (citing *Gulf Coast* 161 S.W.3d at 712). Texas jurisprudence prohibits an agency from exercising what is effectively a new power or a power contradictory to its enabling statute based on the claim that the power is expedient for administrative purposes. *Id.* at 482. An agency's rules must comport with the agency's authorizing statute; unless an agency rule is adopted pursuant to specific or implied statutory authority, it is void. *Id.*

31. In this case, the CPA's SOB Rule imposes "additional burdens, conditions, or restrictions in excess of or inconsistent" with the SOB Statute as originally written.[6] The CPA's SOB Rule requires Bikini/Latex Clubs to require their independent contractor entertainers to wear a "garment" consisting of cloth or a cloth-like material," instead of utilizing other means of covering the entertainer's breasts (e.g., latex that is fully opaque and therefore "covers" the breast).

32. The CPA's SOB Rule requires Bikini/Latex Clubs to require that their independent contractor entertainers cover not only the skin of their breasts but also the shape of their breast through the use of a "garment" that is presumably not as "skin tight" as latex. The CPA's SOB Rule also restricts Bikini/Latex Clubs from utilizing "sexual" signage, advertising, social media, or images in its advertising, social media, or any other aspect of their operations, or risk the CPA's determination that the Bikini/Latex Club is "*holding itself out as a sexually oriented business*"

[6] The CPA's SOB Rule requires, among other things, that Bikini/Latex Clubs to exercise specific and greater control over their independent contractors' "work" dress, which jeopardizes the independent contractor status and legal relationship between the clubs and the entertainers.

(and despite the fact that the SOB Statute provides a specific – and much narrower definition of a SOB). The CPA's SOB Rule also unlawfully expands the statutory definition of SOB to include businesses based on the unconstitutionally vague (and completely subjective) standard of the business's "reputation."

33. If a statute is ambiguous, the court may give some deference to the agency in interpreting its enabling statute where the agency's interpretation is both reasonable and <u>does not contradict the plain language of the statute</u>, and comports with its enabling statute. *Texas Orthopaedic Ass'n v. Tex. State Bd. of Med. Exam'rs*, 254 S.W.3d 714, 719 (Tex. App. – Austin 2008, pet. denied). There is no deference to the agency, however, if the statute is unambiguous. *Texas Bd. of Chiropractic Examiners*, 375 S.W.3d at 475. In this context, "[t]*he determining factor in deciding whether an administrative agency has exceeded its rule-making authority is whether the rules are 'in harmony' with the general objectives of the legislation involved.*" *Harlingen Family Dentistry, P.C. v. Tex. HHS Comm'n*, 452 S.W.3d 479, 486 (Tex. App. – Austin 2014, pet. filed) (citing *Railroad Comm'n of Tex. v. Lone Star Gas Co.*, 844 S.W.2d 679, 685 (Tex. 1992); *Gulf Coast Coal. Of Cities*, 161 S.W.3d at 711). An administrative rule may be "in harmony" with legislative objectives only if it does not impose additional burdens, conditions, or restrictions in excess of or inconsistent with relevant statutory provisions. *Id.* (citing *Gulf Coast* 161 S.W.3d at 712). Texas jurisprudence prohibits an agency from exercising what is effectively a new power or a power contradictory to its enabling statute based on the claim that the power is expedient for administrative purposes. *Id.* at 482. An agency's rules must comport with the agency's authorizing statute; unless an agency rule is adopted pursuant to specific or implied statutory authority, it is void. *Id.*

34. Texas jurisprudence is clear that "[E]*very word in a statute is presumed to have been used for a purpose; and a cardinal rule of statutory construction is that each sentence, clause and word is to be given effect if reasonable and possible.*" *Tex. Workers' Comp. Ins. Fund v. Del Indus., Inc.*, 35 S.W. 3d 591, 593 (Tex. 2000). Construction of a statute that would make a provision useless is not favored by law. *Conseco Fin. Servicing Corp. v. J&J Mobile Homes, Inc.*, 120 S.W.3d 878, 884 (Tex. App. – Forth Worth 203, pet. denied).

35. In this case, the Legislature's exclusion of any definition of "clothing" – and, in particular, the exclusion of the "garment" requirement that the CPA now seeks to add to the SOB Statute – must be presumed to have been intentional, deliberate and purposeful. Likewise, the Legislature's definition of a SOB – and the exclusion of the expanded SOB definition parameters that the CPA now seeks to add to the SOB Statute – must be presumed to have been intentional, deliberate, and purposeful when the Legislature drafted the SOB Statute originally.

C. Taxing Statutes Must Be Strictly Construed Against the Taxing Authority and in Favor of the Taxpayer

36. Taxing statutes must be strictly construed against the taxing authority and liberally construed in favor of the person or entity sought to be held taxable. See *Bullock v. Statistical Tabulating Corp.*, 549 S.W.2d 166, 169 (Tex. 1977). When the issue involved is the propriety of the imposition of a tax on the person or object of the tax, any doubts are to be resolved against the taxing entity and in favor of the taxpayer. See *Bullock v. Ramada Texas, inc.*, 586 S.W.2d 651, 653 (Tex. App. – Austin 1979, writ ref'd n.r.e.).

D. Agency Rules Should Not Be Applied Retroactively

37. The general rule in Texas jurisprudence is that a presumption exists that an act is intended to operate prospectively and not retroactively; if there is any doubt, the intention will be resolved against retrospective operation. See *ex parte Abell*, 613 S.W.2d 255, 258 (Tex. 1981).

Agency rules are subject to the same principles. See *Pantera Energy Co v. Railroad Commission of Texas*, 150 S.W.3d 466, 475 (Tex. App. – Austin 2004, no pet.). Retroactive laws have been upheld when no vested substantive right has been impaired but only the procedure or remedy has changed. See *Ex parte Abell*, 613 S.W.2d at 260. The CPA's SOB Rule's definition of the term "clothing" is not procedural – it is substantive and, in this case, it is dispositive.

XI. The CPA's SOB Rule Is Not Valid

38. The SOB Statute, as written, specifically defines "nude" as follows:

> "*(A) entirely unclothed*[7]*; or*
>
> *(B) clothed in a manner that leaves* ***uncovered*** *or visible through less than fully opaque clothing any portion of the breasts below the top of the areola of the breasts, if the person is female, or any portion of the genitals or buttocks.*"

39. The SOB Statute, as written, did not and does not define "clothing". The SOB statute, as written, addresses: i) "***uncovered***" persons; and ii) persons "covered" by clothing but that clothing is "***less than fully opaque***". The **SOB Statute, as written, did not and does not exclude latex as a material that can be used to cover the breasts**.

40. The SOB Statute, as written, is specifically directed at imposing the SOB tax on businesses that provide live nude entertainment from or performances by person whose breasts (below the top of the areola), genitals or buttocks are: i) ***uncovered***; or ii) **visible through less than "*fully opaque clothing*"**. In other words, the SOB Tax applies only where the entertainers breasts, buttocks, or genitals are:

i) "***uncovered***"; or

ii) visible through less than "*fully opaque clothing*".

[7] The Bikini/Latex Club entertainers wear bikini bottoms – in addition to the latex cover-up "tops" – and are, therefore, not "entirely unclothed".

41. The SOB Statute does not apply to Bikini/Latex Clubs because the Bikini/Latex Club entertainers' breasts, buttocks, and genitals are <u>not</u>:

i) "*uncovered*"; or

ii) visible through less than "*fully opaque clothing*".

42. The CPA's SOB Rule does not comport with the SOB Statute because the CPA's SOB Rule substantively and unlawfully changes the SOB Statute in that the SOB Rule:

i) eliminates the statutory exclusion of entertainers who are "covered" through material that is fully opaque;

ii) eliminates the use of any cover-up material that is otherwise fully opaque but is not a cloth "garment" which – if the Legislature had intended – would have been specifically excluded when the Legislature originally drafted the SOB Statute; and

iii) expands the statutory definition of a SOB to include businesses that utilize sexuality in their advertising or social media (which the business does not necessarily control) or which the CPA determinates has the "reputation" of operating as an SOB (which again the business cannot necessarily control).

XII. Declaratory Judgment Sought

43. Petitioner seeks declaratory judgment and determination pursuant to Texas Government Code §2001.038 that Rule §3.722 is invalid to the extent that:

i) the CPA's SOB Rule does not comport with the substance and plan meaning of Tx. Busn. & Comm. Code §102.051, et seq;

ii) the CPA acted ultra vires in promulgating and enforcing the CPA's SOB Rule; and/or

iii) the CPA's SOB Rule cannot be and should not be applied retroactively.

44. All conditions precedent to Petitioner's right to the relief sought have been met and have occurred.

WHEREFORE, premises considered, Petitioner prays that Defendant be cited to appear and answer herein. Petitioner prays that the Court grant declaratory judgment and mandamus on the determination that the CPA's SOB Rule §3.722 as set forth herein is invalid and unlawful. Petitioner prays costs of court. Petitioner prays for other and further relief to which it may show itself justly entitled.

Respectfully submitted,

LAW OFFICE OF BRIAN W. BISHOP
900 West Avenue
Austin, Texas 78701
Tel: (512) 327-5121
Fax: (512) 327-5122

By: /s/Brian W. Bishop
Brian W. Bishop
State Bar No. 02346300
brian@bbishoplaw.com
ATTORNEY FOR PETITIONER