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ARIZONA SUPERIOR COURT

COUNTY OF MARICOPA

LAUREN BOICE and ANGELS ON EARTH HOME BEAUTY, LLC, Plaintiffs, v. DONNA AUNE, in her official capacity as Executive Director of the Arizona State Board of Cosmetology, et al., Defendants.	No. CV2011-021811 **DEFENDANTS' MOTION TO DISMISS** (Oral argument requested) Assigned to Hon. Michael Harrod)

Defendant Donna Aune, in her official capacity as Executive Director of the Arizona State Board of Cosmetology, and Defendants Gary Begley, Karla Clodfelter, Sandra Hecksel, Cheryl Chelius, Joe Verdugo, Larry Bulechek, and Jessica Stall, all in their capacities as members of the Arizona Board of Cosmetology (hereinafter collectively "Defendants" or the "Board"), by and through counsel undersigned, and pursuant to Rule 12(b)(6) of the Arizona Rules of Civil Procedure, request that portions of Plaintiffs' Complaint be dismissed for failure to state a claim.

MEMORANDUM OF LAW

I. Legal Standard

Under Rule 8 of the Arizona Rules of Civil Procedure, Plaintiffs' Complaint must contain "a short and plain statement of the claim showing that [they are] entitled to relief." Ariz. R. Civ. P. 8(a)(2). If a pleading does not comply with Rule 8, an opposing party may move to dismiss the action for failure to state a claim upon which relief can be granted. Ariz. R. Civ. P. 12(b)(6). When adjudicating a Rule 12(b)(6) motion to dismiss, Arizona courts look only to the pleading itself and consider the well-pled factual allegations contained therein. *Cullen v. Auto-Owners Ins. Co.*, 218 Ariz. 417, 419, 189 P.3d 344, 346 (Ariz. 2008) (citations omitted). Courts must also assume the truth of the well-pled factual allegations and indulge all reasonable inferences therefrom. *Id.* (citations omitted). Because Arizona courts evaluate a complaint's well-pled facts, mere conclusory statements are insufficient to state a claim upon which relief can be granted. *Id*.

II. Plaintiffs Fail to State a Claim for Lack of Jurisdiction (Count I)

Plaintiffs' factual allegations, even if taken as true, do not establish that they are outside the jurisdiction of the Board. To the contrary, they establish instead that the Board does indeed have jurisdiction over Plaintiffs.

Plaintiffs allege that Plaintiff Boice schedules appointments for home beauty services such as haircuts, makeup application, nail therapy, facials, and massages. Compl. ¶ 16. These are cosmetology practices as defined by A.R.S. § 32-501(6). Plaintiffs further allege that they are paid directly by clients in exchange for cosmetology services. Compl. ¶ 19. Plaintiffs' business is thus "operated for the purpose of engaging in the practice of cosmetology," which falls within the meaning of "salon" as defined by A.R.S. § 32-501(11)(a).

Conclusory statements are not sufficient to state a claim upon which relief can be granted. *Cullen*, 218 Ariz. at 419, 189 P.3d at 346. Accordingly, Plaintiffs' conclusory

statements that they do not operate a salon or engage in cosmetology are of no legal weight and entitled to no deference by this Court. *See* Compl. ¶¶ 55-56. Thus the factual allegations contained within Plaintiffs' Complaint do not support Plaintiffs' claim that the Board lacks jurisdiction.

III. Plaintiffs Fail to State an Equal Protection Claim (Count III)

Plaintiffs seek to characterize the application of uniform cosmetology laws and regulations to Plaintiffs' allegedly dissimilar business as a violation of Equal Protection. Plaintiffs' counsel, the Scharf-Norton Center for Constitutional Litigation at the Goldwater Institute, brought similarly frivolous equal protection claims against the California Department of Consumer Affairs, which licenses cosmetology in California, challenging the application of cosmetology licensing to African hair styling. *See Cornwell v. Hamilton*, 80 F.Supp.2d 1101 (S.D. Cal. 1999). As the Ninth Circuit has since explained:

> In *Cornwell*, the district court observed that under the Equal Protection Clause " 'sometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike.' " *Id.* at 1103 & n. 2 (quoting *Jenness v. Fortson*, 403 U.S. 431, 442 (1971)). In *Jenness*, however, the Supreme Court used the phrase in response to an argument that a Georgia state election law that treated traditional political parties differently than newer parties for ballot qualification violated equal protection. *Jenness*, 403 U.S. at 441-42. The Court noted that it was rational for Georgia to treat the two types of political organizations differently based on the different challenges that each entity faces and Georgia's need properly to manage elections. *Id.* The Court cited *Williams v. Rhodes*, 393 U.S. 23 (1968), in which it struck down an Ohio ballot access law due to its *different* treatment of established and new political parties. In other words, in both *Jenness* and in *Williams*, the challenged laws imposed *different* requirements on two different groups, traditional and new political parties. However, in *Cornwell* the challenge was by an African hair stylist who challenged a *uniform* licensing scheme. While the reasoning of the district court in *Cornwell* may be consistent with our due process analysis, it cannot survive equal protection analysis.

Merrifield v. Lockyer, 547 F.3d 978, 984-85 (9th Cir. 2008) (emphasis in original). Plaintiffs' allegations stem from the fact that they have been treated *similarly* to other entities. Compl. at ¶ 72. Accordingly, they do not state a valid claim under Equal Protection.

IV. Plaintiffs Fail to State a First Amendment Claim (Count IV)

Plaintiffs attempt to turn the regulation of a cosmetology salon business—through which Plaintiffs schedule cosmetology appointments, dispatch cosmetologists, and collect payment for cosmetology practices—into a free speech claim. Plaintiffs fail to state a claim for which relief can be granted, however, because the Board's statutes regulate Plaintiffs' non-expressive conduct, not Plaintiffs' speech. This distinction is fatal to Plaintiffs' claims, as the Ninth Circuit explained decades ago:

> An illegal course of conduct is not protected by the first amendment merely because the conduct was in part carried out by language in contrast to direct action. If conduct contains both speech and non-speech elements, and if Congress has the authority to regulate the non-speech conduct, incidental restrictions on freedom of speech are not constitutionally invalid.

United States v. Gilbert, 813 F.2d 1523, 1529 (9th Cir. 1987) (citations omitted). Plaintiffs' expressive speech is wholly incidental to Plaintiffs' cosmetology venture, and it is Plaintiffs' non-speech conduct that is regulated here.

Plaintiffs allege that the Board's licensing regime constitutes a prior restraint on their speech. As the Ninth Circuit has made clear, "a party who has been granted a permit has not suffered any injury." *Hunt v. City of Los Angeles*, 638 F.3d 703, 718 (9th Cir. 2011). Plaintiffs have been issued a salon license by the Board, Compl. ¶ 35, and therefore lack standing to bring this claim as a matter of law.

Plaintiffs allege that the Board's regulations constitute a content-based restriction on their speech. Compl. ¶ 83. This allegation fails as a matter of law. Whether a regulation "is content neutral or content based is something that can be determined on the face of it; if the [regulation] describes speech by content then it is content based." *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 448 (2002). "A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); *Rosenbaum v. City & County of San Francisco*, 484 F.3d 1142, 1158 (9th Cir. 2007). Plaintiffs identify no Board regulation

that so much as references speech, instead basing their allegations on statutes that clearly restrict activity (the practice of cosmetology) rather than speech.

For all of these reasons, Plaintiffs' First Amendment claims must be dismissed.

V. Plaintiffs Seek Improper Relief

Plaintiffs request that this Court "Permanently enjoin Defendants and their agents and employees from enforcing A.R.S. §§ 32-574(A)(6) and 32-574(A)(9)." Compl. at 15. This is a request that the Court cannot grant. "An injunction shall not be granted . . . to prevent enforcement of a public statute by officers of the law for the public benefit." A.R.S. § 12-1802(4). Nor can a Court enjoin the enforcement of an otherwise constitutional statute because it has been applied in a manner that is arbitrary or unreasonable. *Francis v. Allen*, 54 Ariz. 377 (1939). Plaintiffs have not established (or even alleged) a facial challenge to any of Arizona's statutes, and are not entitled to this sort of broad relief even if successful in an as-applied challenge. Accordingly, Plaintiffs' request for an injunction must be dismissed.

Plaintiffs also seek relief on behalf of "other dispatch services" as well as for themselves. However, Plaintiffs have not brought a class action under Rule 23 of the Arizona Rules of Civil Procedure. Accordingly, Plaintiffs cannot be granted any relief, including declaratory relief, on behalf of "other dispatch services."

VII. Conclusion

WHEREFORE, the Defendants respectfully request that this Honorable Court:

- Dismiss Counts I, III, and IV of the Plaintiffs' Complaint;
- Strike Plaintiffs' request for injunctive relief;
- Strike any remaining references to "other dispatch services" in Plaintiffs' prayer for relief;
- Award costs and fees to the Defendants; and
- Award such other relief as this Court deems proper.

DATED this 9th day of March, 2012.

Thomas C. Horne
Attorney General

/s/ Evan Hiller
Michael Tryon
Evan Hiller
Bridget Fitzgibbons Harrington
Attorneys for the Defendant

ORIGINAL efiled with the Clerk of the Court and
COPY mailed this 9th day of March, 2012, to:

Clint Bolick
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Sharf-Norton Center for Constitutional Litigation
GOLDWATER INSTITUTE
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By /s/Amy Smyers

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Forms:
Summary Sheet (This summary sheet will not be filed with the court. This sheet is for your personal records only.)

Attached Documents:
Motion to Dismiss: Defendants' Motion to Dismiss