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**IN THE SUPERIOR COURT OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA**

CINDY VONG and LA VIE LLC,

Plaintiffs,

vs.

SUE SANSOM (now DONNA AUNE), in
her official capacity as director of the
Arizona State Board of Cosmetology,

Defendant.

Case No. CV2009-037208

**STATEMENT OF UNDISPUTED
FACTS**

Hon. George H. Foster, Jr.

Pursuant to Ariz. R. Civ. P. 56, plaintiffs present the following facts that are relevant and material to the disposition of this lawsuit in support of their Motion for Summary Judgment:

I. FACTUAL BACKGROUND

1. Plaintiff Cindy Vong is a naturalized U.S. citizen who emigrated from Viet Nam, and is a resident of Maricopa County (Decl. of Cindy Vong (Exh. 1), ¶ 1).
2. Vong owns LaVie LLC, which since 2006 has operated LaVie Nails & Spa in Gilbert,

a nail salon licensed by the Arizona Board of Cosmetology (“Board”) (Vong Decl. (Exh. 1), ¶ 2; Answer, ¶¶ 2-3, 10).

3. Vong is a professional nail technician and aesthetician licensed by the Board in both professions (Vong Decl. (Exh. 1), ¶ 3; Answer ¶ 9).

4. Defendant Donna Aune is Executive Director of the Board (Answer, ¶ 4).

5. The Board is empowered by the State of Arizona to regulate the cosmetology profession (Answer, ¶ 5).

6. In 2008, Vong began operating Spa Fish as a separate business in the salon. Spa Fish involved patrons placing their feet in a tank in which *Garra rufa* fish, which are small carp that have no teeth, remove dead skin from their feet. Spa Fish provided a relaxing and invigorating experience (Vong Decl. (Exh. 1), ¶ 4).

7. Vong imported the fish from China, purchased equipment, and remodeled the salon in order to provide the Spa Fish service, all at considerable expense (Vong Decl. (Exh. 1), ¶ 5).

8. Vong prepared a hygiene protocol (Exh. 2) to protect the health and safety of Spa Fish customers. First Vong inspected their feet and washed them with antibacterial soap. The fish were placed in a clean tank immediately before the treatment and removed immediately afterward. The tank was cleaned and sanitized, dried in open air, and refilled with clean water before the next use. After treatment, the customers’ feet again were washed with antibacterial soap. The fish were kept in a community tank whose water was continuously recycled through

a filter system and subjected to ultraviolet light to kill bacteria. All customers were informed of those procedures through a written notice. Any customer who desired a pedicure could have one afterward in a different part of the salon (Vong Decl. (Exh. 1), ¶ 6).

9. Vong charged \$30 for a 20-minute Spa Fish treatment. The business was popular and profitable (Vong Decl. (Exh. 1), ¶ 7).

10. At the time Vong operated Spa Fish, she salon employed six persons (Vong Decl. (Exh. 1), ¶ 8).

11. An inspector from the Board of Cosmetology visited the salon for a routine inspection in 2008, at which time Vong advised her about my plans to open the Spa Fish business. She promised to obtain the Board's response. Spa Fish opened in October 2008 (Vong Decl. (Exh. 1), ¶ 9).

12. On November 13, 2008, Vong wrote to the Board of Cosmetology describing the procedures for Spa Fish and proposing a pilot program to determine if any risks were presented to the public (Vong Decl. (Exh. 1), ¶ 10 & Exh. A; Answer ¶ 21).

13. The Board of Cosmetology did not respond to Vong's proposal. Instead, in an undated letter that Vong received on January 3, 2009, the Board instructed Vong to "immediately refrain from offering or performing fish pedicures in your salon" (Vong Decl. (Exh. 1), ¶ 11 & Exh. B; Answer ¶ 22).¹

¹ Plaintiffs use the term "Spa Fish" to describe Vong's business and "fish pedicures" to describe the practice generically.

14. Several of Vong's customers wrote to the Board of Cosmetology urging it not to close the Spa Fish salon, all to no avail (Vong Decl. (Exh. 1), ¶ 12; Exh. 3; Answer ¶ 24).

15. On September 21, 2009, Vong signed a consent order agreeing to close down the Spa Fish business. Vong immediately complied with the agreement, at considerable expense and with substantial lost income. Vong had to fire three employees because of the loss of business (Vong Decl. (Exh. 1), ¶ 13; Answer ¶¶ 25-26).

II. SPA FISH THERAPY

16. Fish pedicures typically use *Garra rufa* fish, also known as “doctor” fish, which are small carps that are members of the Cyprinid (minnow) family (Deposition of Kirk Young (Exh. 4), p. 9; Exh. 5).

17. *Garra rufa* are used for fish pedicures in 22 countries, including the United Kingdom, Canada, and the United States (Exh. 6). “This practice involves immersing the feet in a tank of water containing *Garra rufa* fish (a small toothless species of freshwater carp) that nibble off dead and thickened skin. The use of *Garra rufa* fish is long established in Turkey, India and the Far East where it has a history as a treatment for a variety of skin conditions and, more recently, as a cosmetic treatment for the removal of dead and hardened skin from the feet.” (United Kingdom Health Protection Agency, *Guidance on the Management of the Public Health Risks from Fish Pedicures* (“HPA Study”) (Exh. 7), p. 4).

18. “The practice has been banned in some countries on safety grounds. However,

there is little evidence in scientific literature of the potential public health risk to users” (HPA Study (Exh. 7), p. 4).

19. States in the U.S. vary in their regulatory approach to fish pedicures. Some allow it and subject it to public health and safety regulations (Answer, ¶ 28). States that have banned the practice have done so “mainly on the grounds that it contravenes regulations applicable to beauty procedures” (HPA Study (Exh. 7), p. 5).

20. The Board received no health or safety complaints concerning Spa Fish from members of the public (Answer, ¶ 17); Defendant’s Response to Plaintiffs’ Requests for Admissions (“Defendant’s Admissions”) (Exh. 8), no. 1).

21. The Board has identified and verified no instances in which fish pedicures have caused injury or harm to consumers (Defendant’s Admissions (Exh. 8), no. 4).

22. The Board concedes that “no rules exist that specifically address—or even contemplate—the practice of fish pedicures.” *Vong v. Aune*, mem. dec., No. 1 CA-CV 10-0587 (Ariz. App. Apr. 29, 2011) at 10 n.4.

23. The Board’s sole basis for ordering Vong to shut down Spa Fish was the inability to disinfect fish as “implements” used in connection with nail technology pursuant to R 4-10-112 (30(b)(6) Deposition of Donna Aune for the Board of Cosmetology (“Aune Dep.”), Exh. 9, p. 14).

24. No member of the Board has training in fish diseases (Aune Dep. (Exh. 9), p. 30).

25. It is lawful for people in Arizona to wade into lakes, where fish may nibble at their skin. The Arizona Department of Fish and Wildlife is unaware of any instances of fish communicating diseases to humans (Young Dep. (Exh. 4), pp. 25-26).

26. No member of the Board's staff has observed fish pedicures being performed in person (Aune Dep. (Exh. 9), p. 30).

27. The Board did not conduct any inspections of Spa Fish while it was in operation (Defendant's Admissions (Exh. 8), no. 5).

28. The Board did not perform or retain any outside expert to conduct an analysis of Vong's proposed hygiene protocol for Spa Fish therapy (Aune Dep. (Exh. 9), pp. 33-34; Defendant's Admissions (Exh. 8), no. 3).

29. The Board did not perform or commission an analysis of health and safety issues relating to fish pedicures prior to ordering Vong to shut down Spa Fish. Rather, the decision entailed an interpretation of "[o]ur statutes and rules" rather than an analysis of the services Vong was providing (Aune Dep. (Exh. 9), p. 36; Defendant's Admissions (Exh. 8), no. 2).

30. The Board did not consider any alternatives to banning fish pedicures (Aune Dep. (Exh. 9), p. 36).

31. The Board's position "acts as an effective prohibition of the practice statewide." *Vong v. Aune*, mem. dec. at 10.

32. In October, 2011, the United Kingdom Health Protection Agency issued the

first—and so far only—comprehensive scientific analysis of the health ramifications of fish pedicures (HPA Study (Exh. 7)). The study concluded that “the risk of infection as a result of a fish pedicure is likely to be very low, but cannot be completely excluded. In order to reduce this risk even further, premises providing fish pedicures should implement the measures outlined in the Recommendations” (HPA Study (Exh. 7), p. 13).² The study went on to set forth its recommendations, including guidelines for premises and facilities, client preparation and follow-up, and equipment and maintenance (*id.*, pp. 14-16).

33. Plaintiffs’ experts are Graham M. Jukes, chief executive of the Chartered Institute of Environmental Health, and Andrew Griffiths, Principal Policy Officer for the Institute (Plaintiffs’ Expert Report (Exh. 10)). Dr. Jukes contributed a foreword to the Health Protection Agency’s study (HPA Study (Exh. 7), p. 3).

34. Plaintiffs’ experts testify that “fish pedicures do not pose a significant or unacceptable risk to patrons wishing to use such services, as long as good hygiene management practices are routine and those who wish to use the service are effectively informed; provided with relevant information which helps them to make informed choices and; screened by management to ensure that those who might be put at greater risk as a result of their own personal health issues, are prevented from using the service” (Plaintiffs’ Expert Report (Exh. 10), p. 1).

² The study also noted (*id.*) that Chin Chin fish, which sometimes are used for fish pedicures, should not be used because they develop teeth.

35. Plaintiffs' experts observe, "Fish pedicures presents no additional hazard to public health when compared with food establishments, skin piercing, tattoo or massage establishments, sun bed parlours, barber shops and nail bars, all of which if looked at from a potential disease transmission or operative health and safety perspective offer potential dangers to health. In all of these examples adherence to good practice and effective licensing control together with customer information and informed choice is sufficient to mitigate risk" (Plaintiffs' Expert Report (Exh. 10), p. 1). The experts refer to this as "proportionality in regulation" (*id.*).

36. Defendant's expert, Dr. Joseph Giancola, stated in an e-mail to defendant 12 days before submitting his report that "I have no previous experience or in depth knowledge of fish pedicures" (Exh. 11).

37. Defendant's expert relied on the Health Protection Agency study and on a publication of the Centers for Disease Control and Prevention. He does not directly dispute any facts or opinions set forth in the Plaintiffs' Expert Report. Instead, he testifies that "risks cannot be completely eliminated" from fish pedicures (Defendants' Expert Report (Exh. 12)).

38. Plaintiffs' experts testified that Dr. Giancola's "opinion is not backed by any evidence of any occurrence of . . . disease transmission." They conclude that "the letter from Joseph Giancola MD does not take the issue further in terms of scientific or operational evidence to support the prevention of this type of business from operation" (Plaintiffs' Expert Rebuttal Report (Exh. 13), pp. 2-3).

39. The Centers for Disease Control publication upon which Dr. Giancola relied states, “CDC is not aware of any published reports on illnesses resulting from fish pedicures. Nail salon foot baths, however, have caused outbreaks of nontuberculous mycobacterial infections that left infected pedicure customers with boils and scars” (Exh. 14; HPA Study Exh. 7), p. 6).

III. COSMETOLOGY PRACTICES AND PRODUCTS THAT PRESENT DANGER TO THE PUBLIC

40. The Board licenses three professions—nail technology, aesthetics, and cosmetology—as well as instructors for those professions.³ It prescribes curriculum for each and submits applicants to testing (Aune Dep. (Exh. 9), p. 8).

41. Training for each of the three licensed professions includes detection of skin diseases and open wounds. Cosmetologists are instructed to stop performing services if diseases or open wounds are detected (Aune Dep. (Exh. 9), p. 9).

42. Sterilization, disinfection, and sanitizing all involve different levels of hygiene (Aune Dep. (Exh. 9), p. 10). Sterilizing means completely removing bacteria and germs. Disinfection means that some germs or bacteria may remain (*Id.*, p. 12).

43. The Board does not require that implements used by cosmetologists must be sterilized, only that they be disinfected (Aune Dep. (Exh. 9), p. 10). The Board “thinks a disinfection is enough to disinfect the tools for the service” (*Id.*, p. 12).

³ Henceforth, this Statement will use the term “cosmetologists” to describe practitioners in all of the three licensed professions.

44. Human hands often come into contact with customers' skin, through shampooing, hand massaging, manicuring, pedicuring, and other services (Aune Dep. (Exh. 9), p. 15).

45. The Board does not require cosmetologists to wear gloves when their hands come into contact with human skin. Rather, they are required to sanitize their hands with hot water and soap. Hand washing does not disinfect hands. The Board believes hand washing is adequate to protect public health and safety (Aune Dep. (Exh. 9), pp. 17-18, 37-38).

46. Chemicals commonly used by cosmetologists can present a danger to both consumers and practitioners. Products commonly used by cosmetologists that contain chemicals include shampoos, peroxide treatments, coloring, brow and eyelash tints, permanent waves, bleaching, and nail polish and polish remover (Aune Dep. (Exh. 9), pp. 21-22).

47. Chemical peels used by cosmetologists remove the top layer of skin from customers (Aune Dep. (Exh. 9), p. 22).

48. Chemicals used by cosmetologists can cause burning of the skin, including around the eyes and in other sensitive areas. "Any chemical can leave a burn." The Board has seen instances of burning of skin due to chemicals used by licensed professionals (Aune Dep. (Exh. 9), pp. 23-24).

49. The Board does not test products used by cosmetologists. Instead, cosmetologists may use any "professional manufactured product" (Aune Dep. (Exh. 9), p. 24).

50. Some products used by cosmetologists contain carcinogens (Aune Dep. (Exh. 9), p.

25).

51. The Board does not prohibit the use of products that contain carcinogens, or other chemicals that can be very dangerous to consumers. Rather, in most instances it instructs cosmetologists to follow manufacturers' instructions and other methods that allow the use of such products as safely as possible. But the Board acknowledges that even with such precautions, risks of harm remain (Aune Dep. (Exh. 9), pp. 26-35).

52. The Board believes its rules concerning the use of potentially harmful chemicals are adequate to protect public health and safety (Aune Dep. (Exh. 9), p. 27).

53. Cosmetologists commonly use implements such as scissors, curling irons, and razors that can cause injury to consumers. For instance, curling irons can burn customers (Aune Dep. (Exh. 9), pp. 27-28).

54. The Board does not prohibit the use of potentially harmful implements by cosmetologists; rather, it believes that its regulations are adequate to protect public health and safety (Aune Dep. (Exh. 9), p. 28).

55. The public health and safety risks involved in cosmetology are not hypothetical, as demonstrated by various professional reports and by a sampling of consumer complaints disclosed by defendant.

56. Some products used by cosmetologists contain formaldehyde and methacrylates, which can cause occupational asthma, eczema, and allergic reactions including skin rashes and

hives. Some solvents and chemicals used by cosmetologists are suspected reproductive toxins (Aune Dep. (Exh. 9), p. 25; Exh. 15).

57. A Cornell University study found that common products used in cosmetology, including shampoos, coloring agents, bleaches, hairsprays, permanent waves, nail products, and cosmetics present risks from inhalation, skin contact, and skin absorption. Many products contain carcinogens, and are linked to allergies, cancer, and reproductive effects (Exh. 16).

58. In the Netherlands, an outbreak of *Staphylococcus aureus*, which caused skin boils and abscesses, was traced to a beauty salon wax treatment in which, among other things, the infected technician touched a patron's waxed legs with her hands to check for hairs (Exh. 17).

59. Board Case No. 81234 contains findings of a second-degree burn sustained by a patron from the application of a permanent wave (Exh. 18).

60. Board Case No. 81531 contains findings of a chemical burn and scar on a patron as a result of application of a permanent wave (Exh. 19).

61. Board Case No. 81896 contains findings that hair tinting and a hair dryer caused burning, blisters, and patches of lost hair on a patron (Exh. 20).

62. Plaintiff Cindy Vong is willing to submit to all lawful health and safety requirements that the Board of Cosmetology might impose on the Spa Fish business. In particular, Vong is familiar with the recommendations of the United Kingdom Health Protection Agency study regarding fish pedicures (Exh. 7, pp. 14-16) and would have no difficulty complying with all of

them. Indeed, most of the recommendations were already part of Vong's Spa Fish protocol (Vong Decl. (Exh. 1), ¶ 14). Vong seeks no monetary damages. All she seeks is the opportunity to resume her business.

RESPECTFULLY SUBMITTED this 6th day of January, 2012 by:

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