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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 **PLAINTIFFS' RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT** *Hon. George H. Foster, Jr.*

Plaintiffs respond to defendant's Motion for Summary Judgment as follows.

I. THE BOARD'S BAN ON SPA FISH TREATMENTS VIOLATES DUE PROCESS AND EQUAL PROTECTION.

Defendant does little more than invoke the rational basis standard as if that is the end of the judicial inquiry, when in fact it is the starting point. Not only does defendant fail to confront the federal court decisions striking down excessive and discriminatory economic regulations, but

she also ignores the rich tradition in Arizona state constitutional law that affords substantial protection to the right to earn a living.

As set forth in our opening brief, the Board of Cosmetology's ban on Spa Fish treatments violates plaintiffs' federal and state constitutional rights in two distinct ways. First, by completely banning a legitimate livelihood rather than subjecting it to rational and proportionate regulation, it needlessly destroys economic activities and therefore violates due process guarantees. See, e.g., *Edwards v. St. Bd. of Barber Examiners*, 72 Ariz. 108, 114, 231 P.2d 450, 453 (1951) (holding that "individual liberties can be sacrificed only upon a clear showing of a benefit to the public commensurate with the loss of individual rights"); *Buehman v. Bechtel*, 57 Ariz. 363, 114 P.2d 227 (1941); *Cornwell v. Hamilton*, 80 F. Supp.2d 1101 (S.D. Cal. 1999). Second, by banning Spa Fish treatments while simultaneously allowing and regulating more dangerous cosmetology practices, the Board violates plaintiffs' equal protection rights. See, e.g., *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985); *Merrifield v. Lockyer*, 547 F.3d 978 (9th Cir. 2008); *Santos v. City of Houston*, 852 F. Supp. 601 (S.D. Tex. 1994); *Brown v. Barry*, 710 F. Supp. 352 (D.D.C. 1989).

What little defendant offers by way of justification does not suffice. As expected, defendant (Br. at 4) urges that the Board possesses "special knowledge and expertise" to which the Court should defer. In some instances that unquestionably would be the case. Here, however, the Board freely acknowledges that it has no expertise over what it derisively refers to

as a form of "entertainment" (*id.* at 5 & n.1). No member of the Board has training in fish diseases (SOF 24). The Board received no public health or safety complaints spurring it to action (SOF 20). No member of the Board's staff has observed fish pedicures being performed (SOF 26). The Board did not conduct any inspections of Spa Fish while it was in operation (SOF 27).

The Board willfully clung to its ignorance even as Cindy Vong pleaded for her livelihood and asked the Board to allow her to demonstrate that fish pedicures could be provided at little or no risk to the public. The Board did not perform or retain any outside expert to conduct an analysis of Vong's proposed hygiene protocol for Spa Fish therapy (SOF 28). It did not conduct or commission an analysis of health and safety issues relating to fish pedicures before ordering Vong to shut down her business (SOF 29). It consistently has refused to consider any less-drastic alternatives to banning the practice (SOF 30).

Even when the United Kingdom Health Protection Agency issued a report (upon which defendant's own expert relies) finding that "the risk of infection as a result of a fish pedicure is likely to be very low" and can be reduced further through appropriate procedures (SOF 32), the Board refuses to retreat one inch into the land of enlightenment. Yet the Board allows licensed cosmetologists to expose customers to dangerous chemicals and procedures every day, reasonably concluding that the dangers can be made acceptable through appropriate regulation and sound practices (SOF 40-61). But despite uncontroverted evidence that the skin-nibbling

fish present minimal risks that can be reduced even further—and most tellingly of all, the absence of a single documented instance of harm from fish pedicures (SOF 39)—the Board adheres to its absolute prohibition with nary a justification.

Defendant cites *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 487-88 (1955) for the proposition, "It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it." Again true where applicable, but not here. The rule requiring disinfection or disposal of cosmetology implements clearly was not enacted to counteract a perceived menace from tiny foot-nibbling fish; or, for that matter, from any type of "entertainment," as defendant depicts the practice. It is the law of the case that "no rules exist that specifically address—or even contemplate—the practice of fish pedicures" (SOF 22).

Thus, the Board's onerous action emanates from applying a rule that regulates a set of cosmetology practices to an activity that was not even contemplated when the rule was crafted, thereby creating a dilemma of the Board's own making. The escape from the dilemma is as simple as solving a first-grader's workbook problem: which of the following items does not belong on this list—scissors, comb, tweezers, curling iron, fish? It is manifestly irrational to shut down a business by forcing its services into a category to which they do not belong, then using the regulatory mismatch to pronounce the activity unfit. And yet noncompliance with the Board's rule is its *sole* basis for prohibiting fish pedicures (SOF 29).

The Board is missing the forest for the trees. The rules are not an end in themselves. They are the means by which the Board is supposed to carry out its statutory mandate to protect public health and safety. Simply reciting the platitude of public health and safety does not give the Board a regulatory blank-check. The rule at issue must relate rationally to the asserted end. Defendant says that fish cannot be sanitized—but she does not and cannot assert that Spa Fish therapy cannot be made safe (nor even assert that it presents much of a threat to begin with). It violates plaintiffs' due process rights to prohibit an occupation by forcing it into a regulatory regime to which it does not belong, which was precisely the situation presented in *Cornwell v. Hamilton, supra*.

Finally, defendant argues (Br. at 6) that plaintiffs' actual Spa Fish procedures failed to comply "with the consensus of experts on necessary safeguards for the procedure." We agree emphatically with defendant that such a consensus exists, which of course renders a complete prohibition altogether unnecessary.

The question before the Court is not whether Cindy Vong was using optimal procedures for her Spa Fish business at the time the Board shut it down. The Board's decision was not predicated on Vong's specific practices or protocol, but rather entirely upon the Board's interpretation and application of "[o]ur statutes and rules" (SOF 29). Had the Board developed rules for fish pedicures, or ordered plaintiffs to provide their services in a particular way, we would not be here today. Plaintiffs would have harmonized their procedures with the applicable

rules and there would be one less lawsuit.

Rather, the question before the Court is whether the Board's action—which as the Court of Appeals concluded "acts as an effective prohibition of the practice statewide" (SOF 31)—is constitutional. Should the Court agree that the ban is unconstitutional, the Board may wish to regulate fish pedicures. Cindy Vong already has indicated her willingness "to submit to all lawful health and safety requirements that the Board of Cosmetology might impose on the Spa Fish business" (SOF 62). Hence, the disposition of the lawsuit rests entirely on the constitutionality of the statute and rule as they were applied to Cindy Vong. Under applicable federal and state constitutional precedents, the Board's action cannot stand.

II. THE BOARD DOES NOT HAVE JURISDICTION OVER FISH.

Defendant also argues that Cindy Vong should leave this Court empty-handed because she does not possess the right to own *garra rufa* fish in Arizona. This *post hoc* rationale takes the Board of Cosmetology far beyond not only its expertise but its jurisdiction. For as even defendant acknowledges (Def't's SOF 21), it is the Arizona Game and Fish Department, not the Board of Cosmetology, that regulates the use, possession, and transportation of wildlife.

Defendant's argument—that one agency can take an enforcement action based on the violation of another agency's rules—was squarely rejected in *State ex rel. Babbitt v. Green Acres Trust*, 127 Ariz. 160, 618 P.2d 1086 (1980) (*superseded by statute, State ex rel. Corbin v. Pickrell*, 136 Ariz. 589, 592, 667 P.2d 1304, 1307 (1983)). The Attorney General filed an

action against a company for violating Consumer Fraud Act because it allegedly violated the Securities Act, which was under the jurisdiction of the Arizona Corporation Commission. The Court held that "since the legislature has under separate legislation established a comprehensive and particularized method for the regulation of the sales of securities and has provided the methods for the enforcement of the securities laws, the attorney general cannot effectively allege Securities Act violations as a basis for an action under the Consumer Fraud Act." *Id.*, 127 Ariz. at 165, 618 P.2d at 1091. Likewise, the Board cannot justify its enforcement action against Cindy Vong on an alleged violation of rules enforced by another agency.

The Arizona Game and Fish Department has jurisdiction over wildlife, including wild fish, pursuant to a statutory mandate and comprehensive regulatory scheme (see Deposition of Kirk Young, Reply Exhibit at 11-12). The Board of Cosmetology does not have such jurisdiction (*id.* at 13). Moreover, it is not at all clear that Cindy Vong could not obtain a permit to possess *garra rufa* fish from the Department. Indeed, the Department's fisheries branch chief, Kirk Young, testified that he was unaware of a wildlife holding permit that was ever denied for wild fish (*id.* at 18). The Department has made no official determination on whether or not Vong would be entitled to receive a license (*id.* at 27). Given that Cindy Vong has been ordered not to operate Spa Fish and has shut down her business (SOF 15), the question of whether she must and can obtain a wildlife permit is both moot and premature.

It also simply is not before the Court. No party is present in the case with the requisite

standing to interpose additional barriers to Cindy Vong's pursuit of her livelihood. The only issue before the Court is whether the Board may categorically ban the practice of fish pedicures, even as it permits a plethora of demonstrably dangerous cosmetology practices and even when the practice of fish pedicures presents no greater risk than wading into a lake.

Conclusion

This is a case that lends itself to puns. Indeed, it could be said that this case is about a tiny carp being devoured by a regulatory piranha. One of counsel's friends aptly referred to the Board's actions as "callous."

But for Mrs. Vong, whose family escaped oppression in Vietnam to seek freedom and opportunity in our nation, this is no laughing matter. The law gives great deference to government regulation of business activities. It especially heeds regulatory concerns about public health and safety. But as the abundant case law set forth in our opening brief demonstrates, government's regulatory power when it comes to business enterprises is not *carte blanche*. It must indeed have a rational basis for its regulations—especially in Arizona, whose courts have taken that standard seriously.

Here, Mrs. Vong's Spa Fish business provided a popular service to numerous patrons. It provided a livelihood not only to Cindy Vong but to several others who lost their jobs because of the agency's action. It evoked not a single public health and safety complaint. Indeed, according to no less an authority than the Centers for Disease Control, the practice has not

yielded a single documented instance of harm anywhere in the world.

Acting from fear and ignorance, the Board closed down the business—not to give the Board a chance to learn more about fish pedicures in order to evaluate any possible risk and remediation, but because of a tortured application of its own rules. On the eve of dispositive motions, a definitive study---that both sides' experts rely upon—concluded that health and safety risks from fish pedicures are very low, and that they can be reduced even further through appropriate procedures. Yet the scales still are not removed from the Board's eyes.

In other contexts, the Board is quite solicitous of the prerogative of cosmetologists to ply their trade even in the face of health and safety risks to their customers and themselves. The Board considers those risks acceptable, yet deems the minuscule risk from fish pedicures to be intolerable. That position raises the question whether the Board's main interest is protecting public health and safety or preserving its own hegemony.

For Cindy Vong, whose livelihood depends upon the Board's good graces, the only recourse to protect her rights is law. Plaintiffs respectfully ask this Court to find that the applicable statute and rule, as applied to Spa Fish therapy, exceed defendant's constitutional boundaries.

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

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