

COPY

NOV 30 2009



MICHAEL K. JEANES, CLERK
J. GARCIA
DEPUTY CLERK

**Scharf-Norton Center for Constitutional Litigation at the
GOLDWATER INSTITUTE**
Clint Bolick (021684)
Gustavo E. Schneider (027213)
Carrie Ann Sitren (025760)
500 E. Coronado Rd., Phoenix, AZ 85004
(602) 462-5000
litigation@goldwaterinstitute.org
Attorneys for Plaintiffs

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

CINDY VONG and LA VIE LLC,

Plaintiffs,

vs.

SUE SANSOM, in her official capacity as
executive director of the Arizona State
Board of Cosmetology, and ARIZONA
BOARD OF COSMETOLOGY,

Defendants.

Case No.

CV2009-037208

COMPLAINT

INTRODUCTION

1. This is a civil rights lawsuit designed to vindicate the right of Plaintiffs Cindy Vong and La Vie LLC to pursue a legitimate business in the face of Defendants' arbitrary, oppressive, discriminatory, and unlawful actions that have prevented her from doing so. Until Defendants forced her to shut it down under threat of severe penalties, Ms. Vong operated a business called

Spa Fish, which provided a relaxing, enjoyable experience in which fish remove rough skin from the feet of her customers. The procedure was safe, sanitary, and extremely popular. Despite lacking jurisdiction to do so and any evidence of harm to the public, Defendants ordered the business closed. In the process, they violated Ms. Vong's economic liberty, one of her most precious rights as a citizen of the United States and the State of Arizona.

PARTIES, JURISDICTION, AND VENUE

2. Plaintiff Cindy Vong is a naturalized citizen of the United States and a resident of the State of Arizona. She is the owner of La Vie LLC.
3. Plaintiff La Vie LLC is an Arizona limited liability corporation. It operates LaVie Nails & Spa, a licensed nail salon; and until recently operated Spa Fish.
4. Defendant Sue Sansom is executive director of the Arizona State Board of Cosmetology, and is sued in her official capacity only.
5. Defendant Arizona Board of Cosmetology ("Board of Cosmetology") is empowered by the laws of the State of Arizona to license and regulate the cosmetology profession. See A.R.S. § 32-504.
6. Jurisdiction over this action, claims, and parties is provided by A.R.S. §§ 12-123, 12-1831, and 12-1801; and 42 U.S.C. § 1983.
7. Venue is proper pursuant to A.R.S. § 12-401.

FACTS COMMON TO ALL CLAIMS

8. Plaintiff Cindy Vong moved to the United States from Vietnam in 1983, and subsequently earned American citizenship.

9. Plaintiff Vong is owner of Plaintiff La Vie LLC, an Arizona limited liability corporation. She is a professional nail technician and aesthetician licensed by Defendant Board of Cosmetology.

10. Through La Vie LLC, Plaintiff Vong owns and operates LaVie Nails & Spa, a licensed nail salon in Gilbert, Arizona, which she has operated continuously for about three years.

11. Defendant Board of Cosmetology has the power to license and regulate LaVie Nails & Spa and its nail technicians, and thus has substantial control over Plaintiff Vong's livelihood.

12. In 2008, through La Vie LLC, Plaintiff Vong began operating an additional business, Spa Fish, in a separate part of the premises from the nail salon. The spa fish therapy provided a relaxing and reinvigorating experience in which small Garra Rufa fish, which are tiny carp that have no teeth and cannot injure, penetrate the skin of, or transmit diseases to humans, are used to remove dead skin from the feet.

13. The Garra Rufa fish are native to the Middle East, and have been used as a treatment for people with skin diseases such as psoriasis. Spa fish therapy is popular in European and Middle- and Far-Eastern countries and in other states in the United States.

14. Plaintiff Vong lawfully imported the fish from China and remodeled her salon for the new

business, both at considerable expense.

15. Plaintiff Vong developed an extensive set of Spa Fish Therapy Procedures for the protection of her customers. Among other things, customers used an individual tank for their treatment. Before the treatment, the customers' feet were inspected to ensure they had no open wounds, rashes, or other irritations; feet that passed inspection were then washed with antibacterial soap. Fish were placed in the tank just prior to the treatment and removed immediately afterward. After use, the tank was cleaned and sanitized, allowed to dry in open air, and refilled with clean water just prior to the next use. Customers had their feet washed again with antibacterial soap after treatment. Fish were kept in a community tank whose water was continuously recycled through both a filter system and an ultraviolet system to kill any bacteria.

16. In addition to those procedures, Plaintiff Vong developed and used a Spa Fish Therapy Notice that explained the procedure to customers, including the fact that the treatment is not a pedicure. Customers desiring a pedicure could have one done in a separate part of the salon following the Spa Fish treatment.

17. Plaintiff Vong's Spa Fish business was extremely popular and profitable. She charged \$30 for 20 minutes of therapy. She obtained new customers through word-of-mouth. No customer filed any type of health, safety, or business complaint relating to spa fish therapy.

18. During the period in which Plaintiff Vong operated Spa Fish, the salon employed six people.

19. In 2008, while Plaintiff Vong was planning to open Spa Fish, an inspector from Defendant Board of Cosmetology visited the salon for a routine inspection. At that time, Plaintiff Vong informed the official of her plans, and the official stated she would obtain and communicate the Board's position. Thereafter, in October 2008, Plaintiff Vong opened Spa Fish.

20. On or about October 29, 2008, an inspector for Defendant Board of Cosmetology visited the salon and informed Plaintiff Vong that the spa fish therapy was illegal because the procedure involved skin exfoliation subject to the Board's authority and that the fish were a tool that could not be sanitized as required by Board regulations.

21. On November 13, 2008, Plaintiff Vong wrote to Defendant Board of Cosmetology describing the procedure and proposing a pilot program in her salon to determine if there were any health risks associated with spa fish therapy. Defendant Board of Cosmetology never responded to the letter.

22. In an undated letter from Defendant Board of Cosmetology received by Plaintiff Vong on January 3, 2009, the Board informed Plaintiff Vong that it believed spa fish therapy was in violation of various Arizona statutes and that her conduct could constitute a class I misdemeanor. The letter advised Plaintiff Vong to "immediately refrain from offering or performing fish pedicures in your salon."

23. On February 3, 2009, Defendant Board of Cosmetology sent a letter to Plaintiff Vong

advising her to attend an informal interview regarding alleged violations of Arizona statutes and administrative rules.

24. Several of Plaintiff Vong's customers sent comments to Defendant Board of Cosmetology urging it not to shut down Spa Fish.

25. On September 21, 2009, Defendant Board of Cosmetology and Plaintiff Vong executed a Consent Agreement in which Plaintiff Vong agreed to immediately cease operating Spa Fish in her salon. The purpose of the Agreement was to create a final, appealable agency decision and preserve Plaintiff's legal and constitutional claims for direct challenge in this Court.

26. Plaintiff Vong has complied with the Consent Agreement and immediately ceased Spa Fish operations and, at considerable expense, removed all spa fish therapy equipment and fish from the salon.

27. As a result of discontinuing her business, Plaintiff Vong has suffered substantial loss of income, had to fire three employees, and has been prevented from pursuing a legitimate business.

28. Other states vary in their regulatory approach to spa fish treatments. Some states allow spa fish therapy and subject it to public health and safety regulation.

29. As conducted by Plaintiff Vong, spa fish therapy poses no health and safety risk to the public.

COUNT I—LACK OF JURISDICTION

30. Defendants possess no authority except for authority that is expressly delegated to them by Arizona statutes.

31. Plaintiff Vong's spa fish therapy does not constitute the practice of cosmetology, aesthetics, or nail technology as those terms are defined in A.R.S. § 32-501(2), (6), or (10). Accordingly, Defendants do not have jurisdiction over that business.

32. Ariz. Admin. Code R. 4-10-112 does not encompass the use of fish for removing rough skin on feet. Accordingly, Plaintiff Vong was not in violation of any law or regulation, and cannot be guilty of a misdemeanor offense for operating Spa Fish.

33. For all of the foregoing reasons, Defendants have no jurisdiction over Plaintiff Vong's Spa Fish business.

COUNT TWO—STATE CONSTITUTION VIOLATIONS

34. Ariz. Const. Art. II, § 13 provides, "No law shall be enacted granting to any citizen, class of citizens, or corporations other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations."

35. Ariz. Const. Art. II, § 4 provides, "No person shall be deprived of life, liberty, or property without due process of law."

36. Plaintiffs in the operation of Spa Fish have been subjected by Defendants to regulation that does not rationally pertain to that business.

37. The regulations as construed and applied by Defendants have the effect of prohibiting spa fish treatments in the State of Arizona and, specifically, preventing Plaintiff from operating her spa fish therapy business.

38. The regulations as construed and applied by Defendants far exceed whatever legitimate and rational public health and safety requirements necessary to protect the public in the context of spa fish therapies.

39. For all of the foregoing reasons, Defendants' actions violate Plaintiffs' constitutional rights under the Arizona Constitution.

COUNT THREE—FEDERAL CONSTITUTIONAL VIOLATIONS

40. At all times and in all of their actions encompassed by this complaint, Defendants acted under color of state law.

41. The 14th Amendment to the U.S. Constitution protects the privileges or immunities of citizens, the right to due process under law, and the right to equal protection of the law.

42. Defendants' actions have irrationally, arbitrarily, and excessively restricted the ability of Plaintiffs to operate a legitimate business.

43. Defendants have subjected Plaintiffs to a regulatory regime that does not rationally pertain to her chosen Spa Fish therapy business.

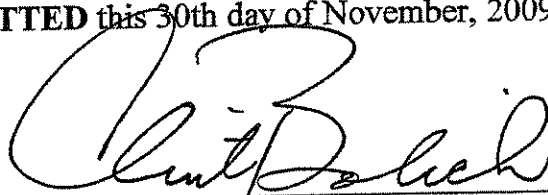
44. For all of the foregoing reasons, Defendants' actions violate Plaintiff's 14th Amendment rights.

REQUEST FOR RELIEF

To serve the interests of equity and justice, Plaintiffs request that this honorable Court award the following relief:

- A. Issue a declaratory judgment that Defendants do not possess jurisdiction over Plaintiffs' Spa Fish business;
- B. Issue a declaratory judgment that Defendants' actions violate Plaintiffs' state and federal constitutional rights;
- C. Issue a preliminary and permanent injunction forbidding Defendants from subjecting Plaintiffs' Spa Fish business to regulation and from preventing the operation of such business;
- D. Award costs and attorney fees to Plaintiffs pursuant to A.R.S. §§ 12-341, 12-341.01, and 12-348; the private attorney general doctrine; and 42 U.S.C. § 1988;
- E. Order such additional relief as may be just and proper.

RESPECTFULLY SUBMITTED this 30th day of November, 2009 by:



Clint Bolick (021684)

Gustavo E. Schneider (027213)

Carrie Ann Sitren (025760)

**Scharf-Norton Center for Constitutional Litigation
at the GOLDWATER INSTITUTE**

500 E. Coronado Rd., Phoenix, AZ 85004

(602) 462-5000

litigation@goldwaterinstitute.org

Attorneys for Plaintiffs