

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
Tallahassee Division**

EVA LOCKE, et al.,
Plaintiffs,

v.

Civil Action No.
4:09cv193-RH/WCS

JOYCE SHORE, et al.,
Defendants.

JOINT PRETRIAL STIPULATION

Pursuant to this Court's Order for Pretrial Conference dated October 28, 2009, the parties hereby submit this joint pretrial stipulation:

- A. FEDERAL JURISDICTION.** The Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 (federal question) and 1343 (civil rights).
- B. NATURE OF THE ACTION.** This case presents a constitutional challenge to a Florida law that regulates (a) various activities defined by the challenged statute as "interior design"; and (b) who may use the term "interior designer" and "words to that effect."
- C. GENERAL STATEMENT OF EACH PARTY'S CASE.**
- 1. Plaintiffs.** The Plaintiffs contend that Florida's interior design law is unconstitutional for the following reasons:
- a. The challenged law censors truthful commercial speech by prohibiting nonlicensees who lawfully perform residential interior design services in Florida from referring to themselves, accurately, as "interior designers," and from using other accurate terminology such as "interior design," "space planning," etc. to describe work they lawfully perform (Claim 1).
 - b. The law is overly broad, in that it purports to regulate a great deal of speech that is both protected by the First Amendment and does not remotely constitute the practice of interior design, as that term is commonly understood (Claim 2).

- c. The law is unduly vague because it fails to provide sufficient clarity as to (i) what activities and speech nonlicensees may engage in versus the activities and speech for which a license is required because it constitutes the practice of interior design; and (ii) what are the “words to that effect” besides “interior designer” that nonlicensees may not use to describe themselves and the work they do (Claim 2).
- d. The law violates equal protection by arbitrarily criminalizing various activities and expressions that some people engage in (i.e., persons not licensed as interior designers under the challenged law), while permitting other persons (i.e., those persons who are licensed as interior designers in Florida) to engage in those same activities and expression for no rational reason (Claim 3).
- e. The law violates the Plaintiffs’ right to earn a living under the Due Process Clause of the Fourteenth Amendment by forbidding them from engaging in a variety of entirely harmless activities and expression without a license and by imposing on them occupational licensing requirements that are not rationally related to any legitimate public purpose (Claim 4).
- f. The law violates the privileges or immunities of citizens of the United States, including the three individual Plaintiffs and the individual members of Plaintiff NFIB by unduly interfering with their ability to earn a living in the occupation of their choice. The Privileges or Immunities Clause was initially misinterpreted by the Supreme Court as only protecting a narrow and idiosyncratic set of rights—such as access to navigable waterways and the ability to invoke the protection of the federal government when on the high seas—in the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 78-80 (1873). But the recent grant of certiorari in *McDonald v. City of Chicago*, 130 S. Ct. 48, 78-80 (2009), in which the question presented specifically invokes the Privileges or Immunities Clause of the Fourteenth Amendment, indicates that the Court may be poised to revisit *Slaughter-House*—a case that virtually every knowledgeable commentator from across the ideological spectrum has acknowledged is not simply mistaken in its analysis of the Privileges or Immunities Clause, but grossly and demonstrably so (Claim 6).
- g. The law violates the dormant Commerce Clause because it imposes substantial burdens on interstate commerce that are excessive in comparison to any putative local benefit and because

any such local benefits could be achieved as well through less burdensome means (Claim 7).

2. Defendants.

- a. All of Plaintiffs' claims present pure questions of law for the court.
- b. The Title Act portion of the law does not violate the First Amendment. The speech it prohibits is not truthful commercial speech and is entitled to no First Amendment protection. Since Florida requires a license for the practice of interior design (with exceptions for residential space and others), using the term "interior designer" implies licensure and the unrestricted ability to practice interior design. Truthful commercial speech in this circumstance would require inclusion of the restriction. Cases striking pure title acts are inapposite.
- c. The law is not overly broad. It was intended to and does only regulate the practice of interior design. Plaintiffs' argument is based on an interpretation of the statute that ignores well established norms of statutory construction. It does not reach much of the conduct that Plaintiffs posit. The practice portion of the statute is a valid regulatory law and any restriction on speech merely the incidental effect of an otherwise valid regulatory law.
- d. The statute is not vague. With respect to the phrase "words to that effect," it references obvious permutations of the term interior design and other services contained in the statutory definition. People of reasonable intelligence in the professional community will know the difference when the statute is given its proper interpretation and scope. Similarly, with respect to the Practice Act, the scope of the Act is not as broad as Plaintiffs' interpretation. The words and phrases taken in context describe clearly the practice of interior design using a variety of words in order to prevent the possibility of avoidance of the regulation by artful naming of services.
- e. The law does not violate the Equal Protection Clause; there is a rational basis for its passage.
- f. The law does not violate Plaintiffs' substantive due process rights; there is a rational basis for its passage. The "right to earn a living" is not a fundamental right protected under the Due Process clause.

- g. The law does not violate the Privileges and Immunities Clause; there is no disability based on residency or alienage in the statute. Plaintiffs' anticipation of a Supreme Court case is inapposite.
- h. The law does not violate the Commerce Clause; there is no discrimination against interstate commerce. Everyone, everywhere is subject to the same licensure and disciplinary requirements. There is no substantial burden on interstate commerce – out of state designers can work on residential projects without licenses and on commercial projects under a licensed design professional pursuant to a certificate of authorization. Even under *Pike*, the court must defer to the legislative choice regarding the health, safety and welfare benefits of this law. Such benefits cannot be weighed against economic harm. As long as the purpose is not prohibited economic protectionism, a valid public purpose wins. This law does not impede interstate commerce any more than any other professional licensing law.

D. TRIAL EXHIBITS.

Trial Exhibit No.	Title/Description	Objection
1	Printouts from the Interior Design Associations Foundation, Inc.'s website	No objection to authenticity to show what the site says, but object to relevance and hearsay as to the actual content
2	"Prohibited Titles Used in the Design Industry," by David K. Minacci	
3	Table setting forth selected Interrogatories and Requests for Admission from the Plaintiffs and the Defendants' responses	
4	Law office map	Relevance, hearsay, authentication
5	Drawing for proposed layout prepared by a business consultant for a retail store	Relevance, hearsay, authentication
6	Floor plan for Black Dog Cafe in Tallahassee, Florida from the dissertation of Professor Lisa Kinch Waxman.	Relevance, hearsay, authentication
7	Article, "State of Fear," by Rob Kirkbride in <i>Monday Morning Quarterback</i> dated July 28, 2008	Relevance, hearsay, authentication

8	Floor plan for a meeting room from the website of The Blue Hotel in Doral, Florida	Relevance, hearsay, authentication
9	Excerpts from the deposition transcript Lisa Kinch Waxman taken on November 12, 2009	
10	Renderings prepared by Juan Montoya in connection with the building of the International Design Center in Naples, Florida obtained from the Defendants' enforcement files	Relevance, hearsay, authentication
11	Final Order in <i>Sheryl Lyn Braxton v. Dep't of Bus. And Prof. Reg.</i> , Case No. 8-1827F (Fl. Admin. Ct., Jan. 26, 2009) obtained from the Defendants' enforcement files	
12	BOAID enforcement file on Office Depot	
13	BOAID enforcement file on Staples The Office Superstore, L.L.C.	
14	BOAID enforcement file on OfficeMax Incorporated	
15	Press Releases from the Kelly Wearstler action obtained from Defendants' enforcement files	Relevance
16	Excerpts from the administrative proceeding against Juan Montoya by the Florida Board of Architecture and Design obtained from Defendants' enforcement files	Relevance
17	Excerpts from the websites of four businesses based outside of Florida, which have either offered or performed services prohibited by Florida's interior design law within Florida	No objection to authenticity to show what the site says, but object to relevance and hearsay as to the actual content
18	Drawings by wedding planner and caterer showing placement of dining tables, portable dance floor, and food stations.	Relevance, hearsay, authentication
19	Letter dated March 30, 2009 to Barbara Vanderkolk Gardner from David K. Minacci	Relevance
20	Drawings by office-furniture dealers and furniture manufacturers that show how their products might fit into a given space and what they would look like	Relevance, hearsay, authentication
21	Minacci-Johnson memo w/ handwritten note re: building codes	
22	BOAID "Final Order" dated 1/23/09	

23	Staples web printouts	No objection to authenticity to show what the site says, but object to relevance and hearsay as to the actual content
24	8/25/08 letter from Emory Johnson to Jim Burby	Relevance, hearsay, authentication
25	Waxman article re: "Voluntary Flammability Regulations"	Relevance, hearsay, authentication

(As noted in correspondence between counsel on January 6, 2010, Plaintiffs' counsel reserve the right to introduce printouts of the pages from Defendant Joyce Shore's website if necessary to rebut her testimony.)

The Defendants do not plan to offer any trial exhibits at this time.

E. WITNESSES.

Plaintiffs:

Will call: Chris Bates, Jere Bowden, John Doe, Brandy Gaar, Barbara Gardner, Emory Johnson, Pat Levenson, Eva Locke, Michael Miarecki, David Minacci, Paola Pearce.

May call: Charles Bolton, Gretchen Embrey, Sean Kellenbarger, David Pearce, Jerry Pierce, Joyce Shore, Lisa Kinch Waxman, Ph.D.

Defendants: The Defendants do not plan to call any witnesses at trial.

F. CONCISE STATEMENT OF ADMITTED FACTS.

1. The National Federation of Independent Business (NFIB) is the nation's leading small business association, with offices in Washington, D.C. and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents approximately 350,000 member-businesses nationwide, including 11,000 in Florida.
2. Some members of plaintiff NFIB—including NFIB members who do not consider themselves to be interior designers or their businesses to provide "interior design" services—have been the subject of enforcement actions under Florida's interior design law.

3. Only three states have laws that require a license to perform interior design services: Florida, Louisiana, and Nevada.
4. Florida began regulating the use of the term “interior designer” in 1988 and the practice of interior design in 1994. In 2002, the Board contracted with the Tallahassee law firm Smith, Thompson, Shaw & Manausa to provide investigative and prosecutorial services related to Chapters 455 and 481, Florida Statutes, including interior design laws and regulations. The services provided by Smith Thompson include receiving and reviewing complaints about the unlicensed or improper practice of interior design, issuing cease-and-desist letters on behalf of the Board, presenting cases to the Board’s probable cause panel, and prosecuting complaints at disciplinary hearings.
5. Most of the Board’s interior-design-related enforcement actions relate to people using the term “interior designer” (or other “words to that effect”) without being licensed to do so. Acting on behalf of the Board, Smith Thompson has sent letters to hundreds of individuals and businesses, both inside and outside the state, ordering them to stop using various terms including “interior designer,” “interior design,” and other “words to that effect.”
6. According to the Board’s interpretation of Florida law, a nonlicensee may not use the terms “interior design” or “interior designer” even if that person is lawfully performing residential interior design services under the statutory exemption set forth in Fla. Stat. section 481.229(6)(a). The same is true of the terms “space planning” and “space planning services”—the Board has interpreted Florida law to prohibit the use of those terms by nonlicensees even if the nonlicensee is lawfully performing space planning services for residential applications.
7. Obtaining an interior design license in Florida requires an applicant to complete a combined total of six years post-secondary education (at a Board-approved school) and “diversified interior design experience” under a state-registered interior designer. The applicant must then pass a national licensing exam administered by a private testing body called the National Council for Interior Design Qualification (NCIDQ), which maintains its own eligibility criteria to sit for the test.
8. Practicing interior design or using the term “interior designer” (or other prohibited “words to that effect”) without a license in Florida is a first degree misdemeanor punishable by up to one year in jail. Fla. Stat. § 481.223(2). The Board may also impose an administrative penalty, Fla. Stat. § 455.228.

9. The letter dated March 30, 2009, from Smith, Thompson, Shaw & Manausa to plaintiff Barbara Gardner is a representative example of letters sent by Smith Thompson to persons similarly situated and reflects the standard language used by Smith Thompson in correspondence of that kind at that time.
10. Wedding planners and caterers routinely consult with clients and others regarding the layout of furniture, preparation and serving tables, dance floors, decorations, and other items and they routinely make drawings showing the proposed placement of those items.
11. Retail business consultants and sellers of product displays routinely consult with clients, study their clients' businesses and produce drawings—ranging from simple sketches to detailed specifications—reflecting the proposed placement of such things as product display fixtures, shelving, and other display items.
12. David Minacci and former Smith Thompson consultant Emory Johnson disagreed whether the renderings prepared by Juan Montoya would be covered as regulated “drawings” under Florida’s interior design law. Mr. Minacci testified that the renderings would not be covered by the law, but Mr. Johnson testified that the renderings would be covered by the law.
13. Florida’s interior design law applies to the activities specified in Fla. Stat. § 481.203(8) whether they are undertaken for pay or for free.
14. Interior design students routinely perform studies relating to the interior elements of existing buildings and structures, and they routinely prepare drawings—ranging from sketches to space plans—relating to the interior elements of buildings or structures.
15. Neither the Defendants nor the State of Florida have any evidence that the unregulated practice of interior design presents any bona fide public welfare concerns.
16. Neither the Defendants nor the State of Florida have any evidence that licensing of interior designers has led to better job performance by interior designers, greater safety, fewer building code violations, or otherwise benefited the public in any demonstrable way.
17. Interior design drawings can be a “communication tool.”
18. The Defendants’ expert witness, Professor Lisa Kinch Waxman, of the interior design department of Florida State University, testified that it

would be “unreasonable” to apply Florida’s interior design law to drawings prepared by wedding planners and caterers reflecting the proposed layout of furniture and other items for a wedding reception.

G. CONCISE STATEMENT OF ISSUES OF LAW UPON WHICH THERE IS AGREEMENT.

1. The parties agree that the proper standard of review for the plaintiffs’ due process and equal protection claims is the rational basis test.
2. Plaintiffs hereby voluntarily dismiss Claim 5 of their Complaint asserting procedural due process/improper delegation under the Fourteenth Amendment.

H. CONCISE STATEMENT OF ISSUES OF FACT WHICH REMAIN TO BE LITIGATED.

The parties believe the specific facts of this case are undisputed, but some of the conclusions or inferences to be drawn from those facts are disputed.

I. CONCISE STATEMENT OF ISSUES OF LAW WHICH REMAIN FOR DETERMINATION BY THE COURT.

1. Whether the practice act is unconstitutionally overbroad.
2. Whether the practice act is unconstitutionally vague.
3. Whether Florida’s interior design law violates equal protection by arbitrarily or unreasonably singling out the plaintiffs for special burdens or restrictions that are not imposed on others similarly situated.
4. Whether Florida’s interior design law violates due process by imposing arbitrary or unreasonable restrictions on the plaintiffs’ ability to earn an honest living.
5. Whether Florida’s interior design law violates the Privileges or Immunities Clause of the Fourteenth Amendment by imposing impermissible burdens on the plaintiffs’ ability to work in the occupation of their choice.
6. Whether Florida’s interior design law imposes an undue burden on interstate commerce.
7. Whether the title act impermissibly censors free speech.

J. ANY DISAGREEMENT AS TO THE APPLICATION OF FRE/FRCP

Other than the Defendants' objections to the Plaintiffs' trial exhibits noted above, the parties are unaware of any disagreements concerning application of the FRE or FRCP at this time.

K. LIST OF ALL PENDING MOTIONS.

1. Plaintiffs' Motion to for Summary Judgment.
2. Defendants' Motion for Summary Judgment.

L. JURY OR NON-JURY CASE.

This is a non-jury case.

M. COUNSEL'S ESTIMATES OF THE LENGTH OF TRIAL.

Three days.

Dated this 8th day of January, 2010.

Respectfully submitted,

BILL McCOLLUM
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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of January, 2010, a true and correct copy of the **JOINT PRETRIAL STIPULATION** was electronically filed using the Court's ECF system and sent via the ECF electronic notification system to:

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