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12 ***IN THE SUPERIOR COURT OF THE STATE OF ARIZONA***

13 ***IN AND FOR THE COUNTY OF MARICOPA***

14 **STATE OF ARIZONA, BY AND
15 THROUGH THE ARIZONA
16 DEPARTMENT OF HEALTH
17 SERVICES,**

18 **Plaintiff,**

19 **vs.**

20 **METRO SPORTS BAR AND
21 RESTAURANT, INCORPORATED, an
22 Arizona corporation, dba METRO
23 SPORTZ BAR; ED AND AL, INC. an
24 Arizona corporation, dba BOOMERANG
25 BAR AND BILLIARDS and dba RIVER
CITY POCKETS; MAVERICK
SALOON, INC. an Arizona corporation,
dba MAVERICK SALOON; ALFONSO
A. LARRIVA; ALFONSO RUIZ,**

Defendants.

No.

**APPLICATION FOR
PRELIMINARY AND PERMANENT
INJUNCTION;**

**APPLICATION FOR ORDER TO
SHOW CAUSE FOR EXPEDITED
HEARING AS TO WHY A
PRELIMINARY INJUNCTION
SHOULD NOT ISSUE TO
PROHIBIT VIOLATIONS OF THE
SMOKE-FREE ARIZONA ACT**

(NON-CLASSIFIED CIVIL)

1 Plaintiff, State of Arizona, by and through the Arizona Department of Health
2 Services (hereinafter “Department”), hereby files its Application for a Preliminary and
3 Permanent Injunction against the Defendants and requests that this Court issue an Order
4 to Defendants, to Show Cause if any they may have, why Plaintiff should not be granted
5 a Preliminary Injunction against the Defendants’ continuing violations of the Smoke-Free
6 Arizona Act set forth in A.R.S. § 36-601.01. This Application is supported by the
7 Memorandum of Points and Authorities, Exhibits and Affidavits attached hereto; and the
8 Complaint and Exhibits filed herein, all of which are incorporated by this reference.

9
10 **MEMORANDUM OF POINTS AND AUTHORITIES**

11 **A. General Background of the Act.**

12 In November 2006, the voters of the State of Arizona passed Proposition 201, the
13 Smoke-Free Arizona Act (“the Act”), which generally prohibits smoking in most indoor
14 public places and places of employment. A.R.S. § 36-601.01. The Smoke-Free portions
15 of the Act became enforceable on May 1, 2007. A.R.S. §§ 42-3251.02(B)(2).
16 Implementation and enforcement of the Act are the responsibility of the Department.
17 A.R.S. § 36-601.01(G). A copy of the Act is attached hereto and to the accompanying
18 Complaint as Exhibit 1, and is incorporated herein by reference.

19 A.R.S. § 36-601.01(B) sets forth the general rule that “smoking is prohibited in all
20 public places and places of employment within the State of Arizona”. Under the Act, a
21 “public place” is defined generally as “any enclosed area to which the public is invited or
22 in which the public is permitted,” and includes for purposes of this matter, such places as
23 bars, entertainment facilities or venues, and restaurants, the type of establishments

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1 operated by the Defendants in this matter. A.R.S. § 36-601.01(A)(9). A “place of
2 employment” is generally defined as an enclosed area under the control of a public or
3 private employer that employees normally frequent during the course of employment.
4 A.R.S. § 36-601.01(A)(7).

5 The Act further defines “enclosed area” as “all space between a floor and ceiling
6 that is enclosed on all sides by permanent or temporary walls or windows (exclusive of
7 doorways), which extend from the floor to the ceiling. Enclosed area includes a
8 reasonable distance from any entrances, windows and ventilation systems so that persons
9 entering or leaving the building or facility shall not be subjected to breathing tobacco
10 smoke and so that tobacco smoke does not enter the building or facility through
11 entrances, windows, ventilation systems or any other means.” A.R.S. § 36-601.01(A)(3).

12 The Act imposes affirmative duties upon owners, operators, managers or other
13 persons having control of public places and places of employment. These duties include
14 the duty to prohibit smoking, to clearly and conspicuously post ‘no-smoking’ signs and
15 information on where complaints regarding smoking may be registered, remove ashtrays
16 from any area where smoking is prohibited, and inform any person who is smoking in
17 violation of the law to stop smoking. A.R.S. § 36-601.01(B); A.R.S. § 36-601.01(E); and
18 A.R.S. § 36-601.01(I).

19 The Act authorized the Department to promulgate rules for the implementation
20 and enforcement of the Act. A.R.S. § 36-601.01(G)(11). The Department adopted rules,
21 effective May 1, 2007; they are found at Arizona Administrative Code (“A.A.C.”), R9-2-
22 101 through R9-2-112. An “outdoor patio” is defined at R9-2-108. That rule describes
23 the physical requirements of an “outdoor patio” to be: an area contiguous to a public

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1 place or place of employment; at least one side of the patio consisting of open space or
2 permeable material or both or a combination of those two and a non-permeable wall that
3 is not higher than 3 ½ feet or the minimum height required by a local ordinance or
4 building code; and, either no overhead covering (ceiling) or an overhead covering that is
5 permeable or a combination of both. A.A.C. R9-2-108 (A). A copy of this rule is
6 attached to Exhibit 1.

7 **B. The Defendants.**

8 Defendant Metro Sports Bar and Restaurant, Incorporated is the owner of Metro
9 Sportz Bar, a public place and place of employment under the Act. Defendant Ed and Al,
10 Inc., is the owner of Boomerang Bar and Billiards and River City Pockets, both public
11 places and places of employment under the Act. Defendant Maverick Saloon, Inc., is the
12 owner of Maverick Saloon, a public place and place of employment under the Act.
13 Defendant Alfonso Larriva is an operator, manager, or other person in control of Metro
14 Sportz Bar. Defendant Alfonso Larriva and Defendant Alfonso Ruiz are both operators,
15 managers, or other persons in control of the following: Boomerang Bar and Billiards;
16 River City Pockets; and Maverick Saloon. All of these Defendants have affirmative legal
17 obligations under the Act. *See*, Complaint, paragraphs 9-13.

18 **C. The Defendants are Openly and Continuously in Violation of the Act.**

19 Starting May 1, 2007, all public places and places of employment were required to
20 be in compliance under the Act. As more fully described in the Complaint filed
21 concurrently herewith and incorporated by reference, the named Defendants are openly
22 defying the regulatory aspect of the Act. As bars/restaurants/entertainment/sports
23 facilities, the named establishments are clearly considered public places and places of

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1 employment under the Act; yet, despite repeated inspections and warnings, these
2 establishments are permitting smoking, are not posting 'no-smoking' signs in the
3 establishments, are not removing ashtrays and are not advising smoking customers to
4 stop smoking as required by the Act. Affidavits of Department employees, Don
5 Herrington, R.S., Brigitte Dufour, R.S., and Harmony Duport are attached hereto and
6 incorporated herein by reference. These Affidavits document the inspections and
7 violations found at each of the referenced businesses. A summary of those observed
8 violations follows:

9 METRO SPORTZ BAR

10 The Department received 23 complaints about the Metro Sportz Bar during the
11 first three days of the Act's effective date. The Department conducted an initial
12 inspection of the Metro Sportz Bar located at 10402 N Black Canyon Highway, Phoenix,
13 AZ on May 3, 2007. On that date, the Department employees observed people smoking,
14 ashtrays scattered throughout the Bar, no-smoking signs not present, and no employee
15 informing the customers that smoking was prohibited. These are violations of A.R.S. §
16 36-601.01(B), (E) and (I).

17 Department employees returned to the Metro Sportz Bar each day from May 4-9,
18 2007, to determine whether the facility was attempting to come into compliance with the
19 Act. On each day noted, Department employees identified the same type of violations
20 identified on May 3, 2007, and issued Notices of Violations for each day. Copies of the
21 Notices of Violation, the Department's Inspection/Investigation Reports, and photographs
22 are attached to the Complaint as Exhibits 2-8.

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1 BOOMERANG BAR AND BILLIARDS

2 As a result of a complaint filed by the Maricopa County Environmental Services
3 Department ("MCESD") against Boomerang Bar and Billiards, located at 6601 W
4 Thomas Rd, Phoenix, AZ, Department employees conducted an inspection of that facility
5 on May 7, 2007. The Department employees observed individuals smoking inside
6 Boomerang Bar and Billiards, ashtrays containing ashes and cigarettes butts located on
7 tables, no 'no-smoking' signs at the entrances of the establishment and no bar staff
8 asking patrons not to smoke. The Department determined that Boomerang Bar and
9 Billiards was in violation of A.R.S. §36-601.01(B), (E), (I).

10 Department employees returned to the Boomerang Bar and Billiards on May 8th
11 and May 9th to determine compliance with the Act. On both days, Department employees
12 observed the same violations. The Department issued Notices of Violations to
13 Boomerang Bar and Billiards for each day that violations were noted. Copies of the
14 Notices of Violation, the Department's Inspection/Investigation Reports, and photographs
15 are attached to the Complaint as Exhibits 9-11.

16 RIVER CITY POCKETS

17 As a result of a complaint filed by the MCESD against River City Pockets located
18 at 1107 East Bell Road, Phoenix, Arizona, Department employees conducted an
19 inspection of that facility on May 7, 2007. The Department employees observed people
20 smoking inside River City Pockets, ashtrays with smoking material scattered throughout
21 the facility, no 'no-smoking' signs present, and no employee informing the patrons that
22 smoking was prohibited. The Department determined that River City Pockets was in
23 violation of A.R.S. §36-601.01(B), (E) and (I).

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1 Department employees returned to River City Pockets on May 8th and May 9th to
2 determine compliance with the Act. On both days, Department employees observed the
3 same violations. The Department issued Notices of Violations to River City Pockets for
4 each day that violations were noted. Copies of the Notices of Violation, the Department's
5 Inspection/Investigation Reports, and photographs are attached to the Complaint as
6 Exhibits 12-14.

7 MAVERICK SALOON

8 As a result of a complaint filed by the MCESD against the Maverick Saloon,
9 located at 9605 North 19th Avenue, Phoenix, Arizona, Department employees conducted
10 an inspection of that facility on May 7, 2007. The Department employees observed
11 people smoking inside Maverick Saloon, ashtrays were scattered throughout the facility,
12 no 'no-smoking' signs present, and no employee informing patrons that smoking was
13 prohibited. The Department determined that Maverick Saloon was in violation of A.R.S.
14 §36-601.01(B), (E) and (I).

15 Department employees returned to Maverick Saloon on May 8th and May 9th to
16 determine compliance with the Act. On both days, Department employees observed the
17 same violations. The Department issued Notices of Violations to Maverick Saloon for
18 each day that violations were noted. Copies of the Notices of Violation, the Department's
19 Inspection/Investigation Reports, and photographs are attached to the Complaint as
20 Exhibits 15-17.

21 **D. The State Is Entitled To An Injunction Against Continuing Violations** 22 **Of The Act.**

23 Metro Sportz Bar, Boomerang Bar and Billiards, River City Pockets, and
24 Maverick Saloon meet the definitions of a 'public place' and 'place of employment'
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1 under the Act, and therefore must be in compliance with the Act. First, these businesses
2 meet the descriptive type of facility covered by the definition of a ‘public place’—a bar,
3 restaurant, or entertainment facility or venue. Second, they meet the definition of public
4 place--an enclosed area to which the public is invited or in which the public is permitted.
5 A.R.S. §36-601.01(A)(9). Third, they are places of employment because they are
6 enclosed areas under the control of a public or private employer that employees normally
7 frequent.

8 Defendant Larriva has, however, personally and through bar employees, advised
9 Department employees that he has discovered a ‘loophole’ under the law, and that each
10 of the bars identified herein have been modified so that they are no longer covered by the
11 Act. Specifically, Defendant Larriva advised Department employees that the Metro
12 Sportz Bar is exempt from the law because he has installed two permanent metal vents in
13 an outside wall. According to Defendant Larriva, these vents are not ‘windows’ and
14 therefore his Bar is an ‘unenclosed area’ and not subject to the law. Other bar employees
15 have made similar references to vents being installed to exempt the other bars referenced
16 herein from the Act. *See*, the Complaint, paragraphs 29, 49, 59, and 72.

17 Unfortunately, this interpretation is not supported under the Act. An ‘enclosed
18 area’ means all space between a floor and ceiling that is enclosed on all sides by
19 permanent or temporary walls or windows that extend from the floor to the ceiling, and
20 includes a reasonable distance from any entrance, window or ventilation system. A.R.S.
21 §36-601.01(A)(3). The Department’s inspections at the four bars disclosed the existence
22 of vents in exterior walls. However, the installation of vents into an enclosed wall, or the
23 substitution of a ‘vent’ for a temporary or permanent window does not change the
24 character of a premises being ‘enclosed’ for purposes of the Act. The modified premises
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1 still meet the fundamental definition of an enclosed area—they are still enclosed on all
2 sides by walls that extend from floor to ceiling. Each bar remains an enclosed area of a
3 public place or place of employment under the Act.

4 In addition, Defendant Larriva has also communicated his claim of a ‘loophole’
5 through various media outlets. *See*, copy of newspaper article entitled “Bar owners are
6 advised to follow smoking ban”, Arizona Republic, May 9, 2007, attached and
7 incorporated herein as Exhibit 2. In this article, Defendant Larriva is quoted as saying
8 that for the Metro Sportz Bar, Boomerang Bar and Billiards, and River City Pockets, at
9 least one window has been replaced in each facility with a louvered vent, making them no
10 longer enclosed. This argument has no legal basis or support under the Act.

11 As for the Maverick Saloon, Defendant Larriva asserts in the article that because
12 he has removed larger windows and replaced them with vents, much of the outside/front
13 wall is now vented; therefore, according to Defendant Larriva, the bar is now a patio and
14 smoking is allowed. This argument also fails because the Maverick Saloon is still
15 enclosed by walls going from floor to ceiling. Neither the number of vents in a wall, nor
16 the size of the vents in the wall is determinative; what is determinative is the existence of
17 a wall from floor to ceiling. Further, for the Maverick Saloon to qualify as an ‘outdoor
18 patio’ where smoking is permitted under the Act, the ‘outdoor patio’ would have to meet
19 the definition of A.A.C. R9-2-108. The Maverick Saloon cannot qualify as an outdoor
20 patio because it does not exist contiguous to a public place or place of employment
21 controlled by the proprietor of the Maverick Saloon, A.A.C. R9-2-108 (A)(1) and (A)(2);
22 the modified wall with the vents does not meet the criteria established in A.A.C. R9-2-
23 108 (A)(3)(a); and it has both a ceiling and a roof, A.A.C. R9-2-108 (A)(3)(b).

1 If these Defendants can avoid the Act by simply installing vents in walls, or
2 replacing windows with ‘vents’, or by simply propping doors open, there would be no
3 way to enforce the Act and the will of the people of the State of Arizona would be
4 thwarted. In all four establishments where the Department has documented violations of
5 the Act, the Defendants have openly, continuously, and willfully violated the Act. The
6 ‘loopholes’ claimed by the Defendants are nothing more than flagrant attempts to avoid
7 compliance with the law. These establishments are enclosed areas and meet the
8 definitions of a public place and place of employment under the Act. The entry of a
9 Preliminary Injunction against the Defendants’ continuing violations is the only available
10 remedy to the State.

11 **E. The Law Mandates That A Preliminary and Permanent Injunction**
12 **Issue**

13 As a general rule, a party seeking a Preliminary Injunction needs to show a strong
14 likelihood of success on the merits, the possibility of irreparable injury not remediable by
15 damages if the relief is not granted, that the balance of hardships favors the party, and
16 that public policy favors the injunction. *Shoen v. Shoen*, 167 Ariz. 58, 63, 804 P.2d 787,
17 792 (App. 1990). However, under A.R.S. § 36-601.01(G) (8), the Department may apply
18 for injunctive relief to enforce the provisions of the Smoke-Free Arizona Act. The
19 Arizona Supreme Court has held that such statutes are designed to make it easier for the
20 State to obtain injunctive relief against specific illegal acts. “Where a state agency has
21 been authorized to institute proceedings in equity to prevent and restrain specified
22 violations of the law, irreparable injury need not be shown.” *Arizona State Board of*
23 *Dental Examiners v. Hyder*, 114 Ariz. 544, 546, 562 P.2d 717, 719 (1977)(en banc).
24 “Harm is conclusively presumed from the legislative declaration.” *Id.*

1 Plaintiff is highly likely to succeed on the merits because the Act clearly covers
2 bars, restaurants and billiard halls; the type of “public places” or “places of employment”
3 operated by the Defendants. While Defendants claim an exemption from the law, the
4 State has demonstrated that the alleged ‘loopholes’ approach the height of absurdity.
5 There is no support for the ‘loophole’ claimed by the Defendants, and any claim that this
6 type of facility can avoid the Act by such subterfuge undermines the entire purpose of the
7 Act.

8 The balance of hardships favors Plaintiff because it is likely that Plaintiff will
9 succeed on the merits and suffer irreparable harm in the future if Defendant is not
10 enjoined from violating the Act. A moving party may demonstrate that the balance of
11 hardships favors the injunction by establishing “either (1) probable success on the merits
12 and the possibility of irreparable injury; or (2) the presence of serious questions and the
13 ‘balance of hardships tip sharply in its favor’.” *Shoen v. Shoen*, 167 Ariz. 58, 63, 804
14 P.2d 787, 792 (App. 1990), quoting *Justice v. NCAA*, 577 f.2d 356, 363 (D.Ariz. 1983).

15 The Department can establish either prong of this test, but the first prong is most
16 obvious. The Department has already demonstrated the likelihood of success on the
17 merits. If the Defendants are permitted to continue their course of conduct based on the
18 specious arguments for exemption and disingenuous interpretation of the terms of the
19 Act, it will permit the continued violation of the clear prohibitions of the Act and thwart
20 the will of the voters of the State of Arizona who determined that smoking was not to be
21 permitted in a “public place” or “place of employment”.

22 Finally, public policy demands a finding in the Department’s favor. The Act is the
23 most basic declaration of public policy, as the public has, through the passage of the Act,
24 authorized the Department to obtain injunctive relief in cases of this type. The Act
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1 determined that a “public place” or “place of employment” shall not permit smoking, and
2 that affirmative non-smoking actions must take place. The Defendants are avoiding
3 compliance and are publicly challenging, through media outlets, the Act’s application to
4 them. This flaunting of the public’s will and the lack of concern over the potential fines
5 involved demonstrate that the balance of hardships favor the entry of the Preliminary
6 Injunction. No other remedy is appropriate.

7 THEREFORE, the Plaintiff requests that this Court immediately set an expedited
8 show cause hearing at its earliest convenience on Plaintiff’s Petition for Preliminary
9 Injunction to show cause why the Defendants, their officers, agents, employees or anyone
10 acting for them or on their behalf or in concert with them, shouldn’t be:

- 11 1) Deemed subject to the Act;
- 12 2) Enjoined from further violations of the Act. This Injunction should include, but
13 is not limited to, ordering the Defendants to enforce the prohibition against
14 smoking in these establishments in accordance with the Act; inform both
15 existing and prospective employees of the prohibition on smoking; the posting
16 of appropriate ‘no-smoking’ signs as required by the Act; posting of signs or
17 information identifying where complaints regarding violations of the Act may
18 be registered; removal of all ashtrays from areas where smoking is prohibited;
19 and requiring any owner, operator, manager or employee of these
20 establishments to inform any person who is smoking in violation of this law to
21 stop smoking.

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3) Subject to any additional and further orders of this Court designed to ensure compliance with the Act.

DATED this 14th day of May, 2007.

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Assistant Attorneys General
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Original filed May ____, 2007 with:

Clerk of the Superior Court
Maricopa County Superior Court
201 West Jefferson
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Copy sent to be served May _____, 2007 to:

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Copy mailed May ____, 2007 to:
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