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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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**BOOMERANG BAR AND BILLIARDS**

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

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

**RIVER CITY POCKETS**

As a result of a complaint filed by the MCESD against River City Pockets located at 1107 East Bell Road, Phoenix, Arizona, Department employees conducted an inspection of that facility on May 7, 2007. The Department employees observed people smoking inside River City Pockets, ashtrays with smoking material scattered throughout the facility, no ‘no-smoking’ signs present, and no employee informing the patrons that smoking was prohibited. The Department determined that River City Pockets was in 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 8<sup>th</sup> and May 9<sup>th</sup> 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 19<sup>th</sup> 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 8<sup>th</sup> and May 9<sup>th</sup> 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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1 Copy mailed May \_\_\_\_, 2007 to:

2 Clerk of the Department  
3 Arizona Department of Health Services  
4 150 North 18<sup>th</sup> Avenue, Suite 500  
5 Phoenix, Arizona 85007

6 By: \_\_\_\_\_

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