ORIGINAL

Attorneys for Plaintiff

UDALL SHUMWAY

JEFF FINE
Clerk of the Superior Court
By Sharon Szakacs, Deputy
Date 08/10/2020 Time 15:20:02
Description Amount
CASEM CV2020-094524
CIVIL NEW COMPLAINT 333.00
TOTAL AMOUNT 333.00

Receipt# 27899342

2

1

4

5

6

7

8

9

10 11

12

13

1415

٧.

16

17

18 19

20

2122

23

2425

26

27

28

1138 NORTH ALMA SCHOOL ROAD, SUITE 101 MESA, ARIZONA 85201 Telephone: 480.461.5300 | Fax: 480.833.9392

Joel E. Sannes (SBN 015999)
jes@udallshumway.com
James B. Reed (014015)
jbr@udallshumway.com
Carson T. H. Emmons (SBN 024094)
cthe@udallshumway.com
docket@udallshumway.com

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

MESA GOLFLAND, LTD., an Arizona limited partnership,

Plaintiff,

DOUGLAS A. DUCEY, Governor of Arizona, in his official capacity;

Defendant.

CASE NO.: CV 2020-094524

COMPLAINT

(Injunctive Relief; Declaratory Relief; Damages Pursuant to 28 U.S.C. § 1983)

Plaintiff, Mesa Golfland Ltd. (hereinafter "Plaintiff"), by and through undersigned counsel, for its complaint against the Defendant Douglas A. Ducey (hereinafter "Defendant"), alleges and states as follows:

PARTIES, JURISDICTION AND VENUE

- 1. Plaintiff is an Arizona corporation with its principal place of business in Maricopa County, Arizona.
- 2. Defendant Douglas A. Ducey, the Governor of the State of Arizona, sued in his official capacity. All actions of Defendant Ducey alleged herein were taken under color of law.
 - 3. Governor Ducey is referred to herein as "Defendant."

The acts complained of in the above-captioned action occurred in Maricopa County, Arizona.
 Venue properly lies in this Court pursuant to A.R.S. § 12-401(16).
 Jurisdiction is proper in this Court pursuant to A.R.S. § 12-123.

GENERAL ALLEGATIONS

- 7. Plaintiff operates the business known as Golfland Sunsplash in Mesa, Maricopa County, Arizona.
- 8. "Sunsplash" is a water park. Sunsplash's attractions include water slides, a wave-pool, a lazy river, and attractions for young children who are not swimmers yet.
- 9. On March 11, 2020, Defendant issued a declaration of a Public Health State of Emergency to address the 2019 novel coronavirus ("COVID -19").
- 10. On March 23, 2020, Defendant issued executive order 2020-12 "Prohibiting the Closure of Essential Services" withdrawing authority of towns, cities and counties to exercise their authority to order the closure of businesses deemed "essential."
- 11. On March 30, 2020, Defendant issued executive order 2020-18 ("EO 2020-18"), "Stay Home, Stay Healthy, Stay Connected," which limited activities of Arizona residents outside of their personal residences to those involving transacting Essential Activities or Essential Functions or for non-essential business provided the business did not require in-person, on-site transactions
 - 12. Water parks were not on the list of Essential Businesses.
 - 13. As a result of EO 2020-18, Plaintiff closed all operations.
- 14. On May 12, 2020, Defendant issued executive order 2020-36 "Stay Healthy, Return Smarter, Return Stronger," recognizing that Arizona had entered "Phase I" in the federal "Guidelines for Opening Up America Again" published by the Centers for Disease Control and the White House Coronavirus Task Force (hereinafter,

÷I

8

10 11

12

13 14

15 16

17

18

19

20 21

22

23

25

26

27

28

"federal guidelines"). Executive order 2020-36 rescinded executive orders 2020-18, 2020-24 and 2020-33.

- On May 13, 2020, Defendant published an official press release allowing 15. pools that follow guidance from the Arizona Department of Health Services ("ADHS") to reopen.
- On May 13 through May 15, 2020, Plaintiff reopened some of the water 16. attractions at Sunsplash.
- On May 14, 2020, ADHS and Defendant published guidance for the 17. operation of swimming pools and aquatic venues. At all times, Plaintiff was in compliance with the ADHS and Defendant's guidance.
 - On June 29, 2020, without any notice to Plaintiff, Defendant issued 18. executive order 2020-43 ("EO 2020-43"), "Pausing of Arizona's Reopening, Slowing the Spread of COVID-19." Under executive order 2020-43, "water parks" were ordered to "pause operations" until at least July 27, 2020.
 - In executive order 2020-43, "[p]ools operated as part of a public 19. accommodation, such as those at hotels" were allowed to "continue to operate."
 - Under executive order 2020-43, water parks were to "receive 20. authorization to reopen" after they "submit a form as prescribed by the Arizona Department of Health Services [ADHS] that attests the entity is in compliance with guidance issued by ADHS related to COVID-19 business operations."
 - Plaintiff anticipated that on or before July 27, 2020, it would be allowed 21. to reopen Sunsplash in accordance with ADHS protocols.
 - On information and belief, the Defendant did not prepare or even begin to 22. prepare protocols for water parks to reopen.
 - Plaintiff provided ADHS with its safety-plan for reopening and asked for 23. authority to reopen based on its safety-plan.

- 24. Do date, neither Defendant nor ADHS has commented on Plaintiff's safety-plan to reopen.
- 25. Defendant has not provided Plaintiff with any means by which Plaintiff can establish that its safety-plan will be effective to reduce the risk of COVIDF-19 transmission.
- 26. On July 23rd, the Defendant effectively revoked any commitment to allow water parks to reopen with his Executive Order 2020-52 ("EO 2020-52"). EO 2020-52 provides:

The provisions of Executive Order 2020-43, ordered July 27, 2020, including those pausing busines operations for certain businesses, shall be extended, remain in place and continue to be reviewed for repeal or revisions every two weeks.

- 27. Although water parks like Sunsplash have been ordered closed, the exception in EO 2020-43 allowing "[p]ools operated as part of a public accommodation, such as those at hotels" to continue operations has allowed water parks at hotels in Maricopa County to remain open.
- 28. On information and belief, the following hotels or resorts are operating water parks:
 - A. The Oasis at Arizona Grand Resort: The Oasis is a seven-acre water park with an 8-story water slide, two other water slides, a wave pool, a lazy river, a 25 person hot tub, a swimming pool, a childrens' pool, and a restaurant.
 - B. The Westin Kierland Resort & Spa: Kierland is a water park with a 110-foot water slide, a lazy river, a "Flowrider" surf simulator, two swimming pools and a hot tub.
 - C. JW Marriott Phoenix Desert Ridge Resort & Spa: The Desert Ridge Marriott has five pools, a lazy river, a waterslide and children's splash area.

- D. Hyatt Regency Gainey Ranch: The Hyatt Regency has a 2.5-acre water playground, with a sand beach and 3-story, high speed waterslide, ten swimming pools, 40 waterspouts and a Grecian-style water temple.
- E. Fairmont Scottsdale Princess: Scottsdale Princess has two water slides, three pool areas, and on Saturday nights offers a "Dive-In" movie for guests. It also has a zero-entry deck for young children.
- F. Great Wolf Lodge: Great Wolf has a four-story tubing slide, a splash "tree house," a splash pool, a wave pool, a lazy river, and a riverrafting simulation.
- G. Ritz Carlton Dove Mountain: The Ritz Carlton Dove Mountain has three swimming pools and a 235-foot water slide.
- H. JW Marriott Tucson Starr Pass Resort & Spa: The Tucson JW Marriott resort has a lazy river, multi-level swimming pools, a water slide and dancing fountains.
- Westin La Paloma Tucson: The Westin La Paloma in Tucson has five pools and a 177-foot water slide.
- J. El Conquistador Tucson: El Conquistador has six pools and a 143-foot waterslide.
- K. Pointe Hilton Tapatio Cliffs Resort: The Pointe Tapatio has a 143-foot water slide, two pools and a 40-foot waterfall.
- L. The Phoenician: The Phoenician has upper pools and a lounge deck, a mother-of-pearl pool, a 197-foot twisting waterslide, and a splash pad with spray-guns and falling buckets of water.
- 29. In addition to hotel water parks remaining open, Defendant has kept the Slide Rock State Park open, which charges a fee for individuals to swim, wade and slide down a 1.2 mile section of Oak Creek. Slide Rock is an outdoor water park.

1	30. In addition, many municipal water parks remain open. For example, the
2	City of Chandler's Hamilton Aquatic Center is open. It has a zero-depth play pool; 115-
3	foot SCS interactive play structure; water vortex; current river; and two water slides.
4	The City of Mesa's Rhodes Aquatic Complex features a surfing simulator. Mesa's
5	Shepherd Aquatic Complex has a children's pool, a mushroom fountain aquatic feature,
6	and a water slide.
7 8	Count I (Violation of Procedural Due Process, Ariz. Const. Art. 2, § 4; Injunction and Declaratory Relief)
9	31. Plaintiff incorporates all preceding allegations.
10	32. Article 2, § 4 of the Arizona Constitution prohibits deprivation of life,
11	liberty, or property without due process of law.
12	33. Plaintiff's right to conduct business lawfully is a protected property
13	interest.
14	34. Plaintiff was entitled to an opportunity to be heard before enactment of
15	Executive Order 2020-43 and 2020-52 to establish that Plaintiff's operation of its
16	facilities is not a threat to public health.
17	35. Plaintiff has not been provided with any opportunity to be heard to
18	establish that Plaintiff's operation of its facilities is not a threat to public health.
19	36. Alternatively, Plaintiff is entitled to an opportunity to be heard after
20	enactment of Executive Order 2020-43 and 2020-52 to establish that Plaintiff's
21	operation of its facilities is not a threat to public health.
22	37. Defendant's failure to provide Plaintiff with a pre-deprivation opportunity
23	to be heard is a violation of Plaintiff's procedural due process rights under Article 2, §4
24	of the Arizona Constitutions.
25	38. Defendant's failure to provide Plaintiff with a post-deprivation
26	opportunity to be heard is a violation of Plaintiff's procedural due process rights under
~=	Article 2 8 4 Arizona Constitution.

- 39. The Governor exceeded his authority in issuing Executive Orders 2020-43 and 2020-52 without affording Plaintiff due process.
- 40. This Court may enjoin Defendant's enforcement of Executive Order 2020-43 and 2020-52. "The provisions of this [Arizona] Constitution are mandatory, unless by express words they are declared to be otherwise." Ariz. Const. Art. II, § 32
 - 41. A justiciable controversy exists between Plaintiff and Defendant.
- 42. Plaintiff is entitled to declaratory relief that the adoption of Executive Orders 2020-43 and 2020-52 violated Plaintiff's procedural due process rights and so is not enforceable.
- 43. Plaintiff is entitled to an award of its attorneys' fees and costs pursuant to the private attorney general doctrine. Cave Creek Unified Sch. Dist. v. Ducey, 231 Ariz. 342, 353, ¶35, 295 P.3d 440, 451 (App.), aff'd, 233 Ariz. 1, ¶35, 308 P.3d 1152 (2013).

Count II (Violation of Substantive Due Process, Ariz. Const. Art. 2, § 4; Injunction and Declaratory Relief)

- 44. Plaintiff incorporates all preceding allegations.
- 45. There is no rational basis for the closure of Plaintiff's water park.
- 46. Alternatively, there is no rational basis for the closure of Plaintiff's water park when Plaintiff is observing recommended protocols to prevent the transmission of COVID 19.
- 47. Defendant's closure of Plaintiff's water park is arbitrary and irrational, violating Plaintiff's right under Article 2, § 4 of the Arizona Constitution to be free from deprivation of property without due process of law.
- 48. This Court may enjoin Defendant's enforcement of Executive Order 2020-43 and 2020-52. "The provisions of this [Arizona] Constitution are mandatory, unless by express words they are declared to be otherwise. Ariz. Const. Art. II, § 32.
 - 49. A justiciable controversy exists between Plaintiff and Defendant.

- 50. Plaintiff is entitled to declaratory relief that the adoption of Executive Order 2020-43 and 2020-52 violated Plaintiff's substantive due process rights and so is not enforceable.
- 51. Plaintiff is entitled to an award of its attorneys' fees and costs pursuant to the private attorney general doctrine. *Cave Creek Unified Sch. Dist. v. Ducey*, 231 Ariz. 342, 353, ¶ 35, 295 P.3d 440, 451 (App.), aff'd, 233 Ariz. 1, ¶ 35, 308 P.3d 1152 (2013).

Count III (Violation of Equal Protection, Ariz. Const. Art. 2, § 13; Injunction and Declaratory Relief)

- 52. Plaintiff incorporates all preceding allegations.
- 53. Arizona law prohibits Defendant from enacting any law that grants any person, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations. Ariz. Const. Art. 2, § 13.
- 54. Executive Orders 2020-43 and 2020-52 create an arbitrary classification between "water parks" such as Plaintiff's facility, which is subject to closure, and other hotel and resort "pools" that are as much a "water park" as Plaintiff's facilities, but which are not subject to closure.
- 55. Executive Orders 2020-43 and 2020-52 create an arbitrary classification between "water parks" such as Plaintiff's facility, which is subject to closure, and Stateowned and operated outdoor water parks, such as Slide Rock, which are not subject to closure.
- 56. Executive Orders 2020-43 and 2020-52 create an arbitrary classification between "water parks" such as Plaintiff's facility, which is subject to closure, and municipal water parks, which are not subject to closure
- 57. This Court may enjoin Defendant's enforcement of Executive Orders 2020-43 and 2020-52. "The provisions of this [Arizona] Constitution are mandatory, unless by express words they are declared to be otherwise. Ariz. Const. Art. II, § 32.

3

8 9

10 11

12

13

14

15 16

17

18 19

20

21 22

23

24

25 26

27

A justiciable controversy exists between Plaintiff and Defendant. 58.

Plaintiff is entitled to declaratory relief that the adoption of Executive 59. Orders 2020-43 and 2020-52 violated Plaintiff's rights to equal protection and so is not enforceable.

Plaintiff is entitled to an award of its attorneys' fees and costs pursuant to 60. the private attorney general doctrine. Cave Creek Unified Sch. Dist. v. Ducey, 231 Ariz. 342, 353, ¶ 35, 295 P.3d 440, 451 (App.), aff'd, 233 Ariz. 1, ¶ 35, 308 P.3d 1152 (2013).

Count IV

(Violation of Equal Protection and Due Process, United States Const., 14th Amendment, Injunction and Declaratory Relief and Damages)

- Plaintiff incorporates all preceding allegations. 61.
- The 14th Amendment to the United States Constitution provides, "No state 62. shall . . . deny to any person within its jurisdiction the equal protection of the laws." It further provides that no state may "deprive any person of life, liberty or property, without due process of law."
- Executive Orders 2020-43 and 2020-52 create an arbitrary classification 63. between "water parks" such as Plaintiff's facility, which is subject to closure, and other hotel and resort "pools" that in are as much a "water park" as Plaintiff's facilities, which are not subject to closure.
- Executive Orders 2020-43 and 2020-52 create an arbitrary classification 64. between "water parks" such as Plaintiff's facility, which is subject to closure, and Stateowned and operated outdoor water parks, such as Slide Rock, which is not subject to closure.
- Executive Orders 2020-43 and 2020-52 create an arbitrary classification 65. between "water parks" such as Plaintiff's facility, which is subject to closure, and municipal water parks, which are not subject to closure
 - A justiciable controversy exists between Plaintiff and Defendant. 66.

///

- 67. Plaintiff has been damaged by Defendant's adoption and enforcement of Executive Orders 2020-43 and 2020-52 in an amount to be proven at trial.
- 68. Pursuant to 42 U.S.C. §§ 1983 and 1988, Plaintiff is entitled to declaratory relief, injunctive relief and damages arising from Defendant's denial of Plaintiff's rights to equal protection and/or due process of law under the 14th Amendment to the United States Constitution.
- 69. Plaintiff found it necessary to engage the services of private counsel to vindicate their rights under the law. Plaintiffs are therefore entitled to an award of attorneys' fees pursuant to 42 U.S.C. § 1988.

WHEREFORE, Plaintiff prays for relief against Defendant as follows:

- A. For temporary, preliminary and permanent injunctive relief prohibiting Defendant from enforcing Executive Orders 2020-43 and 2020-52 against Plaintiff;
- B. For a declaration that enforcing Executive Orders 2020-43 and 2020-52 against Plaintiff violates Art. 2, §§ 4 and 13 of the Arizona Constitution and the 14th Amendment to the United States Constitution;
- C. For an award of damages to Plaintiff in an amount to be proven at trial;
- D. For an award of Plaintiffs' taxable costs and attorneys' fees; and
- E. For such other relief as the Court deems just and appropriate.

RESPECTFULLY SUBMITTED this 10 th day of August 2020.

UDALL SHUMWAY PLC

Joel E. Sannes

Joel E. Sannes
James B. Reed

Carson T.H. Emmons

1138 North Alma School Rd., Suite 101

Mesa, AZ 85201

Attorneys for Plaintiff

ORIGINAL

UDALL

CLERK OF THE SUPERIOR COURT FILED S. SZAKACS. DEP

20 AUG 10 PM 3: 1基

3

1

2

71.45

4

1138 NORTH ALMA SCHOOL ROAD, SUITE 101 MESA, ARIZONA 85201

5

6

Attorneys for Plaintiff

11

10

12

13

14

15

16

17

18

19 20

21 22

23

24 25

26 27

28

Telephone: 480.461.5300 | Fax: 480.833.9392

Joel E. Sannes (SBN 015999) jes@udallshumway.com James B. Reed (014015) jbr@udallshumway.com Carson T. H. Emmons (SBN 024094) cthe@udallshumway.com docket@udallshumway.com

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

MESA GOLFLAND, LTD., an Arizona limited partnership,

Plaintiff,

٧. DOUGLAS A. DUCEY, Governor of

Arizona, in his official capacity;

Defendant.

CASE NO. V 2020 - 094524

PLAINTIFF'S PETITION FOR ISSUANCE OF ORDER TO SHOW CAUSE

Pursuant to Ariz. R. Civ. P. 7.3 and 65, Plaintiff, Mesa Golfland Ltd. (hereinafter "Plaintiff"), by and through undersigned counsel, having filed a Complaint for injunctive relief and declaratory relief and a Verified Application for Temporary, Preliminary and Permanent Injunctive Relief, requests the Court issue an order to show cause that Defendant the Hon. Douglas A. Ducey appear to give reason why Plaintiff's request for temporary injunctive relief should not be granted. A form of Order to Show Cause is submitted herewith.

RESPECTFULLY SUBMITTED this 10^{to} day of August 2020.

UDALL SHUMWAY PLC

Joel E. Sannes
James B. Reed
Carson T.H. Emmons
1138 North Alma School Rd., Suite 101
Mesa, AZ 85201
Attorneys for Plaintiff