

COPY

COPY

**UDALL|SHUMWAY**  
COUNSELORS AT LAW SINCE 1965

JUN 30 2020



CLERK OF THE SUPERIOR COURT  
A. MAY  
DEPUTY CLERK

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  
David R. Schwartz (SBN 009624)  
das@udallshumway.com  
James B. Reed (014015)  
jbr@udallshumway.com  
docket@udallshumway.com  
*Attorneys for Plaintiff*

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

**IN AND FOR THE COUNTY OF MARICOPA**

MOUNTAINSIDE FITNESS  
ACQUISITIONS, LLC, an Arizona  
limited liability company,

Plaintiff,

v.

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

Defendant.

CASE NO.:

**COMPLAINT**

**(Injunctive Relief; Declaratory Relief)**

Plaintiff, Mountainside Fitness Acquisitions Center (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 limited liability company with its principal place of business in Maricopa County, Arizona.
2. Defendant is the Governor of the State of Arizona, sued in his official capacity.
3. The acts complained of in the above-captioned action occurred in Maricopa County, Arizona.

1 4. Venue properly lies in this Court pursuant to A.R.S. § 12-401(16).

2 5. Jurisdiction is proper in this Court pursuant to A.R.S. § 12-123.

3 **GENERAL ALLEGATIONS**

4 6. Plaintiff is the sole member of indoor exercise gyms doing business  
5 under the trade name "Mountainside Fitness."

6 7. Mountainside Fitness has 18 locations in Maricopa County.

7 8. Plaintiff's services include providing equipment for personal exercise,  
8 personal training, basketball courts, group fitness classes, health and wellness  
9 instruction, nutritional programs, saunas and steam rooms and full-service locker  
10 rooms.

11 9. Plaintiff also provides child care for its members while they are using  
12 Plaintiff's facilities.

13 10. Prior to approximately March 1, 2020, Plaintiff had over 90,000 members.

14 11. On March 11, 2020, Defendant issued a declaration of a Public Health  
15 State of Emergency to address the 2019 novel coronavirus ("COVID -19").

16 12. On March 19, 2020, Defendant issued executive order 2020-09 "Limiting  
17 the Operations of Certain Businesses to Slow the Spread of COVID-19." Under  
18 executive order 2020-09, beginning March 20, 2020, all indoor gyms in Arizona were  
19 required to close access to the public.

20 13. Plaintiff's business was severely impacted financially by executive order  
21 2020-09. Plaintiff derives its revenue from member payments. Member payments were  
22 suspended to and through June 1, 2020. Members were allowed to freeze their  
23 membership, paid in full memberships were extended to cover the time of the closure,  
24 personal training sessions were rolled over during the closure, and some members  
25 canceled their memberships.

26 14. On March 23, 2020, Defendant issued executive order 2020-12  
27 "Prohibiting the Closure of Essential Services" withdrawing authority of towns, cities  
28

1 and counties to exercise their authority to order the closure of businesses deemed  
2 “essential.”

3 15. On March 30, 2020, Defendant issued executive order 2020-18, “Stay  
4 Home, Stay Healthy, Stay Connected,” which limited activities of Arizona residents  
5 outside of their personal residences to those involving transacting Essential Activities  
6 or Essential Functions or for non-essential business provided the business did not  
7 require in-person, on-site transactions.

8 16. After the closure mandated by executive order 2020-09, Plaintiff’s  
9 revenue from its 18 locations declined to \$----- [zero].

10 17. On April 29, 2020, Defendant issued executive order 2020-33 “Amending  
11 the Stay Home, Stay Healthy, Stay Connected” Order providing that businesses who  
12 were not classified as essential could operate and provide goods to their customers  
13 provided the businesses establish and implement best practices for preventing the  
14 transmission of COVID-19.

15 18. On May 8, 2020, retailers, cosmetologists and barbers were able to open  
16 for customers.

17 19. On May 11, 2020, restaurants were permitted to resume offering dine-in  
18 services to customers.

19 20. On May 12, 2020, Defendant issued executive order 2020-36 “Stay  
20 Healthy, Return Smarter, Return Stronger,” recognizing that Arizona had entered  
21 “Phase I” in the federal “Guidelines for Opening Up America Again” published by the  
22 Centers for Disease Control and the White House Coronavirus Task Force (hereinafter,  
23 “federal guidelines”). Executive order 2020-36 rescinded executive orders 2020-18,  
24 2020-24 and 2020-33.

25 21. The Phase I federal guidelines provided, “Gyms can open if they adhere  
26 to strict physical distancing and sanitation protocols.” Defendant explained in a May  
27 12, 2020 press conference that gyms in Arizona could reopen.

28

1           22.    The Phase I federal guidelines also provided that large venues such as sit-  
2 down dining, sporting venues and places of worship may operate under physical  
3 distancing protocols. In addition, elective surgeries could resume.

4           23.    However, under the Phase I federal guidelines, “Bars should remain  
5 closed.”

6           24.    In anticipation of reopening, Plaintiff invested substantially in providing  
7 training to its employees to ensure Plaintiff complied with strict physical distancing  
8 standards between members and between employees and members. Plaintiff purchased  
9 state-of-the art sanitation equipment. Plaintiff rearranged the physical layout of its  
10 facilities to allow for strict physical distancing. Plaintiff rearranged group fitness  
11 schedules to reduce the number of members in each fitness class. Plaintiff initiated  
12 contact-less check-in procedures for members. Plaintiff installed sanitizing stations  
13 throughout the facilities. Plaintiff required employees to have their temperatures  
14 checked prior to each shift, and any child in the childcare centers were required to have  
15 their temperatures checked.

16          25.    During the week of June 22, cities and towns in Maricopa County adopted  
17 orders that required the use of masks in general when maintaining physical distancing  
18 was impossible or impractical. Plaintiff reviewed its policies and provided additional  
19 training to its employees to help ensure that members wore masks in common areas and  
20 locker rooms. Plaintiff also required employees to wear masks at all times while  
21 working.

22          26.    On June 29, 2020, without any notice to Plaintiff, Defendant issued  
23 executive order 2020-43, “Pausing of Arizona’s Reopening, Slowing the Spread of  
24 COVID-19.” Under executive order 2020-43, “[i]ndoor gyms and fitness clubs or  
25 centers” were ordered to “pause operations until at least July 27, 2020, unless extended.”  
26  
27  
28



1           35. Article 2, § 4 of the Arizona Constitution also prohibits deprivation of  
2 life, liberty or property without due process of law.

3           36. Plaintiff's right to conduct business lawfully is a protected property  
4 interest.

5           37. Plaintiff was entitled to an opportunity to be heard before enactment of  
6 executive order 2020-43 to establish that Plaintiff's operation of its facilities is not a  
7 threat to public health.

8           38. Alternatively, Plaintiff is entitled to an opportunity to be heard after  
9 enactment of executive order 2020-43 to establish that Plaintiff's operation of its  
10 facilities is not a threat to public health.

11           39. Executive order 2020-43 allows Plaintiff to "receive authorization to  
12 reopen" after submitting a form as prescribed by ADHS that attests that Plaintiff  
13 complies with guidance issued by ADHS related to COVID-19 business operations.

14           40. Executive order 2020-43 may satisfy Plaintiff's procedural due process  
15 right to be heard, but to date there is no form available from ADHS to complete, and  
16 ADHS has not to date identified whether the guidance on the ADHS website is the  
17 guidance with which Plaintiff must comply.

18           41. Defendant's failure to provide Plaintiff with a pre-deprivation opportunity  
19 to be heard is a violation of Plaintiff's procedural due process rights under Article 2, §  
20 4 of the Arizona Constitutions.

21           42. Defendant's failure to provide Plaintiff with a post-deprivation  
22 opportunity to be heard is a violation of Plaintiff's procedural due process rights under  
23 Article 2, § 4 Arizona Constitution.

24           43. The Governor exceeded his authority in issuing executive order 2020-43  
25 without affording Plaintiff due process.

26  
27  
28



1           53. This Court may enjoin Defendant’s enforcement of executive order 2020-  
2 43. “The provisions of this [Arizona] Constitution are mandatory, unless by express  
3 words they are declared to be otherwise. Ariz. Const. art. II, § 32.

4           54. A justiciable controversy exists between Plaintiff and Defendant.

5           55. Plaintiff is entitled to declaratory relief that the adoption of executive  
6 order 2020-43 violated Plaintiff’s procedural due process rights and so is not  
7 enforceable.

8           56. Resolution of this litigation affects owners and operators of gyms  
9 statewide. Absent this litigation, Defendant will continue to use Defendant’s authority  
10 enforce executive order 2020-43. Operation of businesses in general and exercise  
11 facilities specifically serves an important governmental function.

12           57. Plaintiff is entitled to an award of its attorneys’ fees and costs pursuant to  
13 the private attorney general doctrine. *Cave Creek Unified Sch. Dist. v. Ducey*, 231 Ariz.  
14 342, 353, ¶ 35, 295 P.3d 440, 451 (App.), aff’d, 233 Ariz. 1, ¶ 35, 308 P.3d 1152 (2013).

15                                                       **Count III**

16                                               **(Violation of Equal Protection, Ariz. Const. Art. 2, § 13; Injunction and**  
17                                               **Declaratory Relief)**

18           58. Plaintiff incorporates all preceding allegations.

19           59. Arizona law prohibits Defendant from enacting any law that grants any  
20 person, privileges or immunities which, upon the same terms, shall not equally belong  
21 to all citizens or corporations. Ariz. Const. Art. 2, § 13.

22           60. Executive order 2020-43 creates an arbitrary classification between gyms,  
23 which are subject to closure, and other businesses, which are not subject to closure.

24           61. Executive order 2020-43 arbitrarily classifies gyms with bars for purposes  
25 of the closure requirements.

26  
27  
28



1           62. Executive order 2020-43 arbitrarily classifies gyms such as Plaintiff's  
2 facilities that operate with appropriate COVID protocols with gyms that do not operate  
3 with appropriate COVID protocols.

4           63. This Court may enjoin Defendant's enforcement of executive order 2020-  
5 43. "The provisions of this [Arizona] Constitution are mandatory, unless by express  
6 words they are declared to be otherwise. Ariz. Const. art. II, § 32.

7           64. A justiciable controversy exists between Plaintiff and Defendant.

8           65. Plaintiff is entitled to declaratory relief that the adoption of executive  
9 order 2020-43 violated Plaintiff's procedural due process rights and so is not  
10 enforceable.

11           66. Resolution of this litigation affects owners and operators of gyms  
12 statewide. Absent this litigation, Defendant will continue to use Defendant's authority  
13 enforce executive order 2020-43. Exercise facilities specifically serve an important  
14 public function.

15           67. Plaintiff is entitled to an award of its attorneys' fees and costs pursuant to  
16 the private attorney general doctrine. *Cave Creek Unified Sch. Dist. v. Ducey*, 231 Ariz.  
17 342, 353, ¶ 35, 295 P.3d 440, 451 (App.), aff'd, 233 Ariz. 1, ¶ 35, 308 P.3d 1152 (2013).

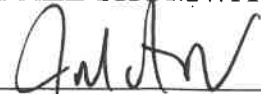
18  
19           **WHEREFORE**, Plaintiff prays for relief against Defendant as follows:

- 20           A. For temporary, preliminary and permanent injunctive relief  
21 prohibiting Defendant from enforcing executive order 2020-43  
22 against fitness centers generally and against Plaintiff specifically;
- 23           B. For a declaration that enforcing executive order 2020-43 against  
24 fitness centers generally and against Plaintiff specifically violates  
25 Art. 2, §§ 4 and 13 of the Arizona Constitution;
- 26           C. For an award of Plaintiffs' taxable costs and attorneys' fees; and  
27           D. For such other relief as the Court deems just and appropriate.
- 28

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**RESPECTFULLY SUBMITTED** this 30 day of June, 2020.

UDALL SHUMWAY PLC



---

Joel E. Sannes  
David R. Schwartz  
James B. Reed  
1138 North Alma School Rd., Suite 101  
Mesa, AZ 85201  
*Attorneys for Plaintiff*