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Advocates for American Disabled Individuals, LLC v. 1639 40th Street, LLC
Superior Court of the State of Arizona

Attorney General, Federal Courts Push Back Against Serial ADA Litigator

Since February 2016, Advocates for Individuals with Disabilities ("AID") has filed more than 1,500 lawsuits against Arizona businesses, all alleging the businesses failed to comply with the Americans with Disabilities Act (or the state equivalent) mostly due to minor violations of federal parking regulations. These lawsuits can prove costly for small businesses, as AID's typical opening demand in every lawsuit is $7,500, with most cases resolving for around $4,000.

Now, the Arizona Attorney General's Office and the federal courts are pushing back. Last week, the Attorney General filed a motion to intervene in one of the state court lawsuits, alleging that AID did not have standing to enforce these regulations in private lawsuits. The Attorney General subsequently filed a motion to consolidate the 1,200+ cases filed by AID currently pending in Maricopa County Superior Court. At the same time, federal district court judges have begun issuing Orders to Show Cause, requiring that AID prove that it has standing to bring these claims (meaning that it actually suffered an injury and that a member actually has the intent to return to the business in question). In the next week, AID will have to respond to at least three such orders in federal court.

While these efforts have slowed AID's litigation, it has not stopped it. Just last Friday - after the Attorney General's action and the Orders to Show Cause - AID filed another five lawsuits against Arizona businesses alleging failure to comply with the ADA. As a result, Arizona businesses need to remain aware of this potential litigation and ensure their properties (and especially their parking lots) are ADA-complaint.

Mark Zukowski, Steve Leach, Brandi Blair, and David Potts have successfully resolved a number of these cases and are available to discuss their recommendations for resolution of similar claims.

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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

ADVOCATES FOR AMERICAN DISABLED INDIVIDUALS, LLC, and David Ritzenthaler, dealing with Plaintiff's sole and separate claim, Plaintiff, vs. 1639 40TH STREET LLC, Defendant.	Case No: CV2016-090506 **STATE OF ARIZONA'S MOTION TO INTERVENE AS A LIMITED PURPOSE DEFENDANT** **AND** **REQUEST FOR EXPEDITED CONSIDERATION** (Assigned to the Hon. David M. Talamante)

Pursuant to Arizona Rule of Civil Procedure 24, and for the reasons set forth herein, the State of Arizona *ex rel.* Mark Brnovich, the Attorney General ("the State") hereby moves to intervene as a limited purpose defendant.[1] This case is one of thousands of public accommodation of disabilities cases that Plaintiff has filed in this Court since February, each of which is based on a statute for which the Arizona Legislature has given the State primary administrative responsibility. Plaintiff's systemic abuse of the judicial system through these thousands of serial claims imperils the public interest by threatening the separation of powers established by the Arizona Constitution as well as the effective enforcement regime established by the public through the Legislature. The State therefore seeks to intervene in this matter as of right under Rule 24(a), or in the alternative under permissive intervention under Rule 24(b), in order to protect the public interest, preserve the separation of powers, and otherwise advocate for its interests as the primary administrator of the Arizonans with Disabilities Act ("the AZDA"), Arizona Revised Statutes ("A.R.S.") §§ 41-1492, *et seq*. Pursuant to Ariz. R. Civ. P. 24(c), this Motion is accompanied by a proposed Answer setting forth the affirmative defenses of lack of standing and failure to state a claim. EXHIBIT A, Proposed Answer.

I. BACKGROUND

Plaintiff Advocates for Individuals with Disabilities, LLC is flooding this Court with lawsuits, apparently as part of a concerted effort to improperly use the judicial system for its own enrichment. Plaintiff claims to have filed over 2,000 cases and, on information and belief, intends to file thousands more cases in the near future. This action, like the rest of Plaintiff's

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[1] The State moves to intervene as a nominal defendant for the limited purpose of requesting that the well over one thousand other actions filed by the Plaintiff be consolidated into this action and dismissed on the basis of lack of subject matter jurisdiction, failure to state a claim, and Rule 11 failings common (and fatal) to those actions. The State expects to file promptly its motion to consolidate (or ask the Court to consolidate these cases *sua sponte*) and its standing-related filings upon the Court granting this motion to intervene. The State takes no position at this time as to whether an ADA or AZDA violation exists in any particular case.

serial filings, is premised on purported violations of the AZDA in the Defendant's parking lot, and demands thousands of dollars in damages, costs, and attorneys' fees. *See, e.g.*, Complaint ("Compl.") at ¶ 4 and p. 7-8. But the Complaint, like the rest of Plaintiff's virtually identical filings in other cases, fails threshold jurisdictional tests required of all civil litigation, and those filings, viewed as a whole, also appear to violate Rule 11.

When businesses are served with one of these serial complaints, they face a difficult choice. Unlike an individual, a business cannot represent itself in Superior Court. But hiring counsel to defend the claim will cost thousands, or potentially tens of thousands, of dollars. And when businesses attempt to settle, Plaintiff has publicly admitted that it "always" issues a standard opening settlement offer demanding $7,500. *See* AID Foundation, *AID Exposes ABC 15 Hateful Lies*, (published Aug. 19, 2016) ("AID Foundation Video"), https://www.youtube.com/watch?v=PZOE_h10N4A (at 2:55). This is grossly disproportionate to the alleged violations, with $7,500 being, in fact, an even greater amount than the State can obtain as a civil penalty for an offender's first violation after completing the investigation and conciliation process. *See* A.R.S. § 41-1492.09(C) (establishing a $5,000 penalty for a first offense). But for businesses, settling is still often cheaper than litigating, and Plaintiff boasts that they obtain an average settlement of $3,900. *See* AID Foundation Video (at 4:42).

Businesses that choose to fight back face a different problem, as demonstrated by Plaintiff's behavior in this and related cases. When businesses moved to relate their cases to make their defense economically rational, Plaintiff attempted to dismiss this case with prejudice after an answer was filed, an action not allowed by Ariz. R. Civ. P. 41(a) and 7.1. Plaintiff then claimed that the cases could not be related because "the case under which the Defendant moves for the Court to deem cases related and transferred"—this case—"has now been dismissed with prejudice, as of today." EXHIBIT B, Plaintiff's Opposition to Defendant's Motion to Deem Cases Related and Request Transfer, filed in CV2016-092105, p. 1 and 3. And when Plaintiff is removed to federal court, Plaintiff often drops its federal claims and requests a remand. *See,*

e.g., Advocates for American Disabled Individuals, L.L.C. v. Yee, No. CV2016-090488 (remand from Federal court on July 25, 2016 based on Plaintiff's Notice of Voluntary Dismissal of Federal Claims Without Prejudice and Motion to Remand).

Many of the businesses that have not settled or fought back are at risk of default, and Plaintiff recently filed what may be the first of many applications for default judgments. *See* EXHIBIT C, Notice and Application for Entry of Default, filed in CV2016-090554.

The Complaint in this case, as in many other cases, purports to be verified via the electronic signature of David Ritzenthaler. According to the Corporation Commission's website, Ritzenthaler is the Chairman and Director of Advocates for Individuals with Disabilities Foundation, Inc. http://ecorp.azcc.gov/Details/Corp?corpId=F21042916. The Advocates for Individuals with Disabilities Foundation, in turn, is the sole member of the Plaintiff LLC. http://ecorp.azcc.gov/Details/Corp?corpId=L20576609. News reports suggest that Ritzenthaler has not reviewed all of the complaints that were filed listing his "Electronic Signature Authorized" as the verifier of the complaint. Dave Biscobing & Shawn Martin, *Cash for Compliance? 'Advocacy' groups answers don't add up about serial ADA lawsuits*, ABC15.com, http://www.abc15.com/news/local-news/investigations/cash-for-compliance-advocacy-groups-answers-dont-add-up-about-serial-ada-lawsuits ("A reporter asked him the following question: 'Do you know how many lawsuits you've been involved with - how many your name's been put on?' Ritzenthaler answered, 'I believe about 160.' It wasn't 160. It was 530 – all of them filed in a three-month period from mid-February to mid-May. In fact, Ritzenthaler signed and attested to every one of the lawsuits under the penalty of perjury, court records show."). News reports also indicate that the suits were filed without Ritzenthaler having actually experienced or witnessed in person any of the alleged violations. *Id.* ("Ritzenthaler and his attorneys said he has not visited most of the businesses he's sued.").

Beyond these issues, Plaintiff's actions rely on public accommodation and services requirements established by the AZDA that the State is broadly tasked with investigating and, as

necessary, enforcing. *See* A.R.S. § 41-1492.09(A). Under the AZDA, the State must not only conduct investigations of filed allegations and pursue enforcement actions (where necessary), but also perform "periodic reviews of compliance of covered entities." *Id.* Moreover, A.R.S. § 41-1492.06(A) requires the State to adopt rules, which exist as part of the Arizona Administrative Code, "to carry out the intent" of the public accommodation and services requirements. *See* A.A.C. R10-3-401 through -412. As relevant to enforcement, the rules establish: the complaint process, A.A.C. R10-3-405 through -409; the State's investigative process, A.A.C. R10-3-410; and the conciliation process, A.A.C. R10-3-412.

The AZDA requires the State to investigate all alleged public accommodations or services complaints properly filed with the Attorney General. A.R.S. § 41-1492.09(A). It then provides for three possible outcomes. First, the State must dismiss the complaint and give notice to the complainant and the entity complained against if "no reasonable cause exists to believe that a violation of this article has occurred or is about to occur." *Id.* Second, the State may seek temporary or preliminary relief if, at any time, it concludes "that prompt judicial action is necessary to carry out the purposes of this article." *Id.* Finally, if the State determines reasonable cause exists for a violation, the State must attempt, for up to thirty days, to "effectuate a conciliation agreement." *Id.* If conciliation fails, the State must initiate a civil action. *Id.* Similarly, if the State finds reasonable cause to believe a party has breached a conciliation agreement, the State must file a civil action to enforce the agreement. *Id.*

In addition to State action, a private party may institute a civil action "for preventative or mandatory relief, including an application for a permanent or temporary injunction, restraining order or other order." A.R.S. § 41-1492.08(A). Under A.R.S. § 41-1492.09(B), the court adjudicating "any civil action under this article" may grant equitable relief and likewise has discretion to award "monetary damages to aggrieved persons." However, civil penalties may be obtained only by the State. A.R.S. § 41-1492.09(C). For a first violation, a civil penalty may not exceed $5,000, but any subsequent violation may result in a penalty of as much as $10,000.

Id. Likewise, courts may award attorneys' fees "in any action or proceeding under this section," meaning that fees only may be awarded in enforcement actions brought by the State. *See* A.R.S. § 41-1492.09(F). Fees can only be awarded to the prevailing party in such actions, and the Attorney General cannot be awarded fees, even if it prevails. *Id.*

Conciliation provides an alternative means of resolving public accommodation and services legal claims. Indeed, as previously noted, the Legislature *requires* the State to engage in conciliation, with a limited exception, before instituting a civil action. A.R.S. § 41-1492.09(A). Under the State's rules, the purpose of conciliation is to "attempt to achieve a just resolution of the [public accommodation or services] complaint and to obtain assurances that the respondent will satisfactorily remedy any violation . . . and take action that will assure the elimination of discriminatory acts or practices, or their prevention or recurrence." A.A.C. R10-3-412(A). Conciliation agreements must be in writing and executed by the complainant, respondent, and the State. *Id.* at (C)-(D). In conciliation, the State may seek monetary damages for complainants, "including compensatory damages and attorney fees," as well as equitable relief. *Id.* at (F).

II. INTERVENTION AS OF RIGHT UNDER RULE 24(a)

No statute confers upon the State an unconditional right to intervene in actions brought under A.R.S. Title 41, Article 8. However, the State may intervene in certain other civil rights matters, subject to the Court's discretion, "upon a certification that the case is of general public importance." *See* A.R.S. § 41-1481(D). Although no similar statutory language is directly applicable here, the State requests the court to take into consideration that the State believes the cases filed by Plaintiff, due solely to their volume and effects, have become an issue of general public importance.

The public importance of this case is rooted in Plaintiff's efforts to obtain relief for thousands of claims for which Plaintiff has no valid legal basis or legal standing. The State possesses a strong interest in the Court's interpretation and application of the AZDA, including

the standards for allowing private parties to obtain relief. Plaintiff's lack of legal basis and standing threatens to severely impair and impede the State's enforcement duties.

Under Rule 24(a), a party must be permitted to intervene, upon timely application:

> [W]hen the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Rule 24 is a remedial rule that "should be construed liberally in order to assist parties seeking to obtain justice in protecting their rights." *Dowling v. Stapley*, 221 Ariz. 251, 270 ¶ 58 (App. 2009). A successful motion to intervene as of right must fulfill four elements: "(1) the motion must be timely; (2) the applicant must assert an interest relating to the property or transaction which is the subject of the action; (3) the applicant must show that disposition of the action may impair or impede its ability to protect its interest; and (4) the applicant must show that the other parties would not adequately represent its interests." *Woodbridge Structured Funding, LLC v. Ariz. Lottery*, 235 Ariz. 25, 28 ¶ 13 (App. 2014).

A. THE STATE'S INTERESTS

The State holds a twofold interest in this action that warrants intervention as of right. The State's first interest is in ensuring the separation of powers memorialized in the Arizona Constitution remains robust and effective. No statute directly establishes this interest as one available to the State, but the Arizona Supreme Court has recognized that the Attorney General may make constitutionally based arguments when such arguments are "in support of [the Attorney General's] statutory authority[.]" *State ex rel. Woods v. Block*, 189 Ariz. 269, 273 (1997).[2] Here, the separation of powers issues presented by the Plaintiff's flood of improper and

[2] Unlike in *Woods*, the State is not seeking to be a Plaintiff in this case, so it does not need to establish its own standing. *See, e.g., Warth v. Seldin*, 422 U.S. at 498 ("[T]he standing question is whether the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as

unsupported lawsuits are a direct threat to the State's enforcement duties as well as the ongoing functioning of the Courts.

Plaintiff is circumventing the statutorily proscribed State enforcement process by claiming to "investigate" supposed violations of the federal Americans with Disabilities Act and the AZDA, while in reality apparently engaging in "trolling" litigation tactics designed to induce defendants into quick pre-suit or post-complaint settlement that merely enriches the Plaintiff.[3]

By signaling to other potential plaintiffs that it is more profitable to initiate litigation than enter the State's conciliation process or other pre-litigation settlement process, the Plaintiff imperils the State enforcement regime established by the Legislature. Plaintiff's tactics run contrary to the Legislature's expressed preference for resolving public accommodation and services complaints by means other than litigation, which applies equally to private action and State action. *See* A.R.S. § 41-1492.09(G) ("If appropriate, and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, fact-finding, mini-trials and arbitration, is encouraged to resolve disputes arising under this article."). Plaintiff's success in leveraging litigation tactics to obtain monetary relief for potentially invalid claims therefore directly affects the State's interests by impeding and impairing the State's investigation and enforcement duties and running directly counter to the Legislature's enforcement preference.

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to warrant his invocation of federal-court jurisdiction."). And in any event, there is already one defendant who unquestionably has standing, so defendant standing—to the extent it is even required—is met. *See Ariz. Indep. Redistricting Comm'n v. Brewer*, 229 Ariz. 347, 351 ¶ 15 (2012) (citing *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 189 n.7 (2008)).

[3] *See* Executive Office of the President, "Patent Assertion and U.S. Innovation" (2013), https://www.whitehouse.gov/sites/default/files/docs/patent_report.pdf (observing that "patent trolls" harm innovation in the United States by "focus[ing] on aggressive litigation, using such tactics [including] threatening to sue thousands of companies at once, without specific evidence of infringement against any of them.") Plaintiff's behavior here is analogous.

The Court's effectiveness is undermined by these tactics as well. Because Plaintiff's chief aim appears to be using the *in terrorem* effect of its serial litigation to produce out of court settlements, it is unlikely the Court will have the opportunity to evaluate the validity of most of Plaintiff's claims, much less whether Plaintiff is entitled to bring them at all. Moreover, unlike the results of the State's conciliation process, Plaintiff's tactics result in no enforceable agreement or court order, meaning there is no accountability to ensure any legitimate public accommodation or services violation is cured.

The State's second interest stems from the State's statutory enforcement duties concerning public accommodation and services disputes under the AZDA. *See* A.R.S. §§ 41-1492.06 and -1492.09. Given these duties, the State has a strong interest in how the Court interprets and applies this statutory scheme, which sufficiently warrants intervention of right. *See Weaver v. Synthes, Ltd. (U.S.A.)*, 162 Ariz. 442, 447-48 (App. 1989) ("courts have consistently found that the interest required to satisfy a Rule 24(a) [motion] must be based on a right which belongs to the proposed intervenor rather than to an existing party" (internal citations and quotation marks omitted)). Furthermore, the Court's interpretation and application of these statutes are likely to have a direct legal effect on the State's ability to effectively enforce the law by signaling whether private action is preferable to the State's conciliation process. *See Woodbridge Structured Funding*, 235 Ariz. at 28 ¶ 15.

B. TIMELINESS AND ADEQUATE REPRESENTATION

The State's intervention motion is timely. When considering timeliness of a motion to intervene, the Court must consider several factors, such as the lawsuit's stage and whether intervention could have been sought earlier, but "[t]he most important consideration [in determining timeliness] is whether the delay in moving for intervention will prejudice the existing parties in the case." *State ex rel. Napolitano v. Brown & Williamson Tobacco Corp.*, 196 Ariz. 382, 384 ¶ 5 (2000). These factors all support the timeliness of the State's intervention. This case remains in its infancy. And the public importance of the matters posed

by Plaintiff's activities was not apparent until the full scope of Plaintiff's serial litigation and potential disruption of the separation of powers and the existing enforcement process became clear in recent weeks. Most importantly, the existing parties will not suffer prejudice because of the State's intervention; indeed, allowing the State to intervene will likely move this lawsuit and many others towards a more rapid and just resolution.

Furthermore, no private party can adequately represent the State's interests in this matter. *See Planned Parenthood Ariz., Inc. v. American Assn. of Pro-Life Obstetricians & Gynecologists*, 227 Ariz. 262, 279 ¶ 58 (App. 2011) ("The state must represent the interests of all people in Arizona…."). The statutory enforcement scheme enacted in A.R.S. Title 41, Article 8 establishes a unique process for the State to resolve public accommodation and services complaints and to seek civil penalties in appropriate cases. Only the State can represent and protect those interests.

III. PERMISSIVE INTERVENTION UNDER RULE 24(b)

The State alternatively seeks permissive intervention under Rule 24(b). In relevant part, Rule 24(b) allows "anyone" to intervene "upon timely application" when "an applicant's claim or defense and the main action have a question of law or fact in common." Additionally, "[i]n exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." *Id.* As with Rule 24(a), Rule 24(b) should be construed liberally and "the intervenor-by-permission does not even have to be a person who would have been a proper party at the beginning of the suit." *Dowling*, 221 Ariz. at 272 ¶ 67 (quoting *Bechtel v. Rose*, 150 Ariz. 68, 72 (1986)). Ultimately, whether a party may intervene under Rule 24(b) is left to the adjudicating court's discretion. *See id.* at ¶ 16 (concluding trial court did not abuse its discretion in performing Rule 24(b) analysis).

The same reasons proffered for the State's intervention as of right also support allowing it to intervene permissibly. The State's interests in preserving the constitutional separation of powers and the effectiveness of its enforcement duties under the AZDA are significant public

interests that warrant the State's involvement. In addition, allowing the State to intervene will aid in properly addressing and resolving the serious jurisdictional questions that loom over the thousands of claims the Plaintiff has brought in this Court. Notwithstanding whether the Court allows the State to intervene, those jurisdictional questions remain, although in many cases they risk not being adjudicated if the original defendants fail to appear. In such cases, Plaintiff will prevail on claims for which there is no jurisdictional basis and obtain significant relief that is not properly provided for in law or statute. That result would jeopardize the AZDA's purposes as established by the Legislature, the State's enforcement efforts to enact that purpose, and the Court's ability to properly adjudicate valid claims.

Because permissive intervention is subject to the Court's discretion, the Court should allow the State to intervene because the State, through the Attorney General, has unique interests and expertise in the legal issues raised by Plaintiff's actions, which go to the very heart of fundamental separation of powers issues under Arizona law. The State's perspective, experience, and statutorily-established function in the operation of the AZDA would be helpful to the Court. Given these and ample other reasons to allow the State's intervention, the Court should not hesitate to exercise its discretion in allowing the State to intervene in this matter.

IV. REQUEST FOR EXPEDITED CONSIDERATION

As previously noted on page 4, *supra*, Plaintiff appears to have begun filing applications for default against certain defendants. To minimize this and other harms, the State waives any reply and respectfully requests that this Court rules on this Motion to Intervene as soon as is practicable.

V. CONCLUSION

For the foregoing reasons, the State respectfully requests that the Court grant the State's request to intervene as of right pursuant to Rule 26(a) or, in the alternative, permit the State to intervene pursuant to Rule 26(b). The State further requests that the Court give expedited consideration to this motion.

RESPECTFULLY SUBMITTED: August 24, 2016.

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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

ADVOCATES FOR AMERICAN DISABLED INDIVIDUALS, LLC, and David Ritzenthaler, dealing with Plaintiff's sole and separate claim, Plaintiff, vs. 1639 40TH STREET LLC, Defendant.	Case No: CV2016-090506 **STATE OF ARIZONA'S MOTION TO CONSOLIDATE CASES FOR LIMITED PURPOSES, SET A SCHEDULING CONFERENCE, ALLOW LEAVE TO SERVE BY OTHER MEANS** **AND** **REQUEST FOR EXPEDITED CONSIDERATION** (Assigned to the Hon. David M. Talamante)

Pursuant to Arizona Rule of Civil Procedure 42(a), and for the reasons set forth herein, the State of Arizona *ex rel.* Mark Brnovich, the Attorney General ("the State") hereby moves to consolidate the cases listed in Appendix A for the following limited purposes:

(1) considering whether the complaints filed by these Plaintiffs should be dismissed on the basis of common issues of law and fact; and

(2) considering whether the Court should issue any sanctions or other remedial orders.[1]

The State is currently seeking to intervene to pursue these limited purposes.[2] If these cases are consolidated, and the State is permitted to intervene as a limited purpose defendant, the State intends to file a motion seeking dismissal of all consolidated cases on the basis of threshold questions of law and fact common to all consolidated cases, including, but not limited to, Plaintiffs' lack of standing. Consolidation would thus allow the Court to resolve in one instance threshold questions common to over one thousand cases, benefiting the parties involved in the cases, providing consistent adjudication of these issues, and reducing the burden on the

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[1] "Plaintiffs" in this motion refers to the plaintiffs in the cases listed in Exhibit A: Advocates for American Disabled Individuals LLC ("AADI LLC"), Advocates for Individuals with Disabilities LLC ("AID LLC"), Advocates for Individuals with Disabilities Foundation Inc. ("AID Foundation"), and David Ritzenthaler ("Ritzenthaler"). These four plaintiffs are closely related, as evidenced by court and Corporation Commission filings—AADI LLC is simply the former legal name of AID LLC (http://ecorp.azcc.gov/Details/Corp?corpId=L20576609); AADI LLC and Ritzenthaler were collectively referred to as "Plaintiff" on the initial cases (including this one); AID LLC and Ritzenthaler were collectively referred to as "Plaintiff" on the later cases (*see, e.g.*, CV2016-092155 Complaint); Ritzenthaler is the Director and Chairman of AID Foundation (http://ecorp.azcc.gov/Details/Corp?corpId=F21042916); and Ritzenthaler verified AID Foundation's recent complaints, which state that the Foundation is directed by Ritzenthaler (*see, e.g.*, CV2016-011385 Complaint at ¶ 21).

[2] The State files this motion as prompted by the Court, with the Court's permission to not include all 1,289 captions in the motion, as would typically be required under Local Rule 3.1.

At this point, the State's motion to intervene is under consideration, with a response set for September 6. Although the State is currently a non-party, Rule 42(a) does not require a motion from a party for consolidation. In fact, a court may order cases consolidated *sua sponte* under Rule 42(a). *Infra* at p. 6. As previously stated, the State takes no position at this time as to whether an ADA or AZDA violation exists in any particular case.

court system. In addition, consolidation will enable the Superior Court to examine whether it actually has jurisdiction over the cases flooding its system. *See Arvizu v. Fernandez*, 183 Ariz. 224, 226 (App. 1995) (A "court has the duty to inspect its jurisdiction *sua sponte*.").

I. BACKGROUND

Since February 12, 2016, Plaintiffs have filed well over 1,500 complaints, and Plaintiffs' counsel has stated in open court that Plaintiffs will "probably file 8,000 cases in the next two months." Oral Argument on August 12, 2016 in CV2016-090503. Indeed, just days after this Court ruled in CV2016-090503 that the plaintiff in that case lacked standing, Plaintiffs' counsel filed eighty-one new complaints, also with standing deficiencies.[3]

Based on the State's research, 1,289 cases filed by Plaintiffs remain active and pending in Maricopa County Superior Court as of the date of this filing, and those cases are listed in Appendix A.[4] The Court may take judicial notice of the records of these actions. *In re Sabino R.*, 198 Ariz. 424, 425 ¶ 4 (App. 2000) ("[i]t is proper for a court to take judicial notice of its own records or those of another action tried in the same court").

A. Common Allegations

On information and belief, and based on a random sampling,[5] all of those complaints listed in Appendix A have the following elements:

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[3] *Compare* CV2016-090503, Dkt. 15 (minute entry entered 8/12/16 and filed 8/16/16) *with* Appendix A, CV2016-011285 (filed Aug. 8/17/16) through CV2016-011479 (filed Aug. 8/18/16). It appears that these complaints were signed on August 8, 2016, but they were filed on August 17 and 18. In any case, Plaintiffs have made no effort to withdraw these complaints.

[4] The State realizes that some of these cases may have been dismissed in between the time the State checked these public dockets and the filing of this Motion. But given that Plaintiffs should be aware which cases they have recently dismissed, if Plaintiffs know that any of the cases listed have been recently dismissed, they can provide that information to the Court.

[5] The State has not yet been able to scrutinize the complaints filed in each of the 1,289 pending actions, or the amended complaints filed in some of those cases, many of which were filed under "Notices of Errata." *See, e.g.*, CV2016-006761, *Advocates for Individuals with Disabilities Foundation, Inc.*, Dkt. 4 ("Notice of Errata" attaching First Amended Complaint

1) Legal Basis:

a. The complaints allege violations of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101 *et seq.*, and the Arizonans with Disabilities Act ("the AZDA"), Arizona Revised Statutes ("A.R.S.") §§ 41-1492 *et seq.*;

b. The complaints either allege:

i. That the defendant business is a public accommodation (without specifying the nature of the public accommodation or, in the case of several hundred complaints, erroneously claiming that the defendant operates a hotel); or

ii. That the defendant business is a commercial facility;

c. The complaints allege violations regarding one or more of the following five issues:

i. Handicapped parking signs in which the bottom of the sign is less than 60 inches from the ground;

ii. Handicapped parking signs that do not include a designation that the handicapped parking spot is "van accessible";

iii. Handicapped parking signs that do not have the International Symbol of Accessibility;

iv. Insufficient number of handicapped parking spots;

v. Improper locations for handicapped parking spots.[6]

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with substantive changes.). But the mass-produced, copy-and-paste nature of all of the complaints viewed suggests that all complaints filed on the same day contain the same allegations (other than having different defendants). The State has conducted a random sampling of the complaints listed in Exhibit A, and makes its claims on the basis of this random sampling. Plaintiff, of course, is free to point out any complaints that contradict the State's findings from its random samplings, or argue that certain cases should not be consolidated.

[6] Tellingly, many of the early complaints list several of these issues with an "and or" qualifier, failing to adequately inform each defendant about which one of the issues Plaintiffs

d. The complaints allege that persons with disabilities are "deterred" from visiting the location in the future;

e. The complaints allege that the defendants have a "historical failure" to comply with the ADA and AZDA;

2) Relief Requested:

a. The complaints seek declaratory judgments that the defendant was in violation of the ADA and AZDA and "took no action" to ensure its public accommodation was fully accessible;

b. The complaints seek permanent injunctive relief, asking the Court to:

i. Direct the business to comply with the ADA and AZDA; and

ii. Order the business closed until it is in full compliance;

c. The complaints seek attorneys' fees ("no less than $5,000") as well as payment of costs and expenses;

d. The complaints seek monetary damages under the AZDA (specified in later complaints to be "no less than $5,000");

3) Signatures on Complaints:

a. The complaints purport to be signed by Peter Strojnik;

b. The complaints purport to be verified under penalty of perjury via an "electronic signature authorized" by David Ritzenthaler or an electronic signature by Fabian Zazueta as an "authorized agent."

B. Common Omissions

Just as important as what the complaints allege is what they fail to allege:

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are complaining. *See, e.g.*, Complaint at ¶ 10 ("insufficient handicapped parking spaces, insufficient designation or signage **and or** insufficient disbursement of such parking spaces" (emphasis added)).

1) Notice:

a. The complaints fail to allege that the defendants refused to fix the alleged violations, or were even notified about the alleged violations.

2) Disability:

a. The complaints fail to allege that they are brought by a person with an identified disability who actually was or would be injured by the alleged violations.

3) Organization:

a. The complaints brought by the organizational Plaintiffs fail to identify a single member who has been affected by the alleged violations.

4) Visit:

a. The complaints fail to allege that a person with an identified disability:

i. Was actually denied equal access;

ii. Suffered any sort of injury-in-fact; or

iii. Encountered the alleged barriers.

b. In fact, the complaints fail to allege that a person with an identified disability **ever visited, or expressed an intent to visit** the pertinent location, prior to filing the complaint.

5) Future intent:

a. The complaints fail to allege that a person with an identified disability has any intent, desire, or reason to visit the location at issue in the future, whether it is fully accessible to persons with disabilities or not.

II. CONSOLIDATION UNDER RULE 42(A)

Arizona Rule of Civil Procedure 42(a) states:

When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the

> actions, or it may order all the actions consolidated, and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

This rule makes plain that consolidation is a matter of the Court's discretion. *Cf. Cypress on Sunland Ass'n v. Orlandi*, 227 Ariz. 288, 295 ¶ 20 (App. 2011) (court of appeals reviews orders to consolidate for abuse of discretion). The rule requires no motion or other application from the parties—indeed, courts may order consolidation of cases *sua sponte*. *Allen v. Superior Court of Maricopa Cnty.*, 86 Ariz. 205, 209 (1959); *cf. In re Adams Apple, Inc.*, 829 F.2d 1484, 1487 (9th Cir. 1987) (federal "trial courts may consolidate cases sua sponte").

Consolidation "does not merge the suits into a single cause, or change the rights of the parties." *Yavapai Cnty v. Superior Court In and For Yavapai Cnty.*, 13 Ariz. App. 368, 370 (1970) (internal citations and quotation marks omitted). Instead, consolidation is done "for limited purposes or for the trial of certain issues only." *Torosian v. Paulos*, 82 Ariz. 304, 315 (1957). Consolidation allows the courts to bundle together common questions of law or fact, ensuring that legal questions affecting multiple cases are resolved consistently. *See Behrens v. O'Melia*, 206 Ariz. 309, 310-11 (App. 2003); *Hancock v. McCarroll*, 188 Ariz. 492, 495 (App. 1996) (upholding trial court decision to consolidate on the basis of "sufficient commonality of the questions of law").

Here, substantially similar complaints were filed in over 1,500 cases, with many of those complaints being virtually (or in some cases, completely) identical.[7] Though the defendants' identities and locations vary, the complaints still contain common questions of law and fact regarding the basis of Plaintiffs' claims. If the State's motion to intervene is granted, the State

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[7] For example, in CV2016-011163, Plaintiff AID Foundation sued Preeti-Seema Apartments LP, regarding a business located at 963 McQueen Rd. in Chandler. In CV2016-011164, the exact same complaint was brought against the same defendant, regarding the same business at the same location. Neither complaint has been dismissed by Plaintiff.

intends to file a motion seeking resolution of these common threshold questions. As such, these cases are perfect candidates for consolidation.

The high number of cases the State seeks to consolidate weighs in favor of consolidation, not against it. Without consolidation, the risk of common legal questions being resolved inconsistently is very high. *See Behrens*, 206 Ariz. at 310. Even if this case were to be dismissed, hundreds of other pending cases would remain, and Plaintiffs would—by their own admission—file thousands more cases.

Moreover, the State's interests in the constitutional separation of powers, the effectiveness of its enforcement duties under the AZDA, and the statutory interpretation of the AZDA, as outlined in the Motion to Intervene, will be best addressed by consolidating the actions as requested in this motion. *See* Motion to Intervene at 7-9. Plaintiffs' actions threaten the State's interests, and consolidation will serve to ensure these interests are quickly and consistently addressed.

III. CONSOLIDATION UNDER LOCAL RULE 3.1

Under Local Rule 3.1(c)(1), a motion to transfer related cases may be brought by a party who believes that such cases:

(A) arise from substantially the same transaction or event;

(B) involve substantially the same parties or property;

(C) call for determination of substantially the same questions of law; or

(D) for any other reason would entail substantial duplication of labor if heard by different judges.

Defendant moved to transfer twelve related cases under this rule, under largely the same grounds as this motion. The Court granted that motion and related those cases to this one. The unique commonality between those cases is that the defendants at issue are represented by Jennings, Strouss, & Salmon and are willing to fight Plaintiffs rather than settle. Other than that, the cases are like the other open cases listed in Appendix A.

Consolidation is governed by Local Rule 3.1(c)(2). That rule refers to a motion to consolidate pursuant to Rule 42(a), but unlike Local Rule 3.1(c)(1), it does not refer to a motion by a party. Therefore, the State may file a motion, even though it is not yet a party (and in any case, the Court may consolidate cases *sua sponte*).

Rule 3.1(c)(2) dictates that the consolidation motion "be heard by the judge assigned to the earliest-filed case." This case is the earliest-filed case that has not been dismissed or removed. It was filed on February 12, 2016, among dozens of other nearly identical complaints. In order to determine which case was filed first, the State reviewed the times written by the clerk next to the "filed" notation on the civil cover sheet. For the first group of complaints, the earliest time written is 1:15pm (CV2016-090508), and then later times are written in case number order to the latest time, which is 1:26 pm (CV2016-090487). In other words, contrary to what one might expect, the '508 case is the earliest case, followed in order by '507, '506, '505, through '487. The '508 and '507 cases have been voluntarily dismissed with prejudice, and like other such cases, are not included in Appendix A. Therefore, this case, filed at 1:16 pm on February 12, 2016, is the earliest-filed case sought to be consolidated.

Without consolidation, hundreds more defendants will be forced to (1) expend thousands of dollars in order to settle or fight legally invalid claims, or (2) risk a default judgment. Many defendants have already capitulated under the temporal and monetary pressures of hiring a lawyer and responding to a complaint asking for thousands of dollars and an order that would shut down their business. Plaintiffs have publicly proclaimed that $7,500 is "always the opening negotiation amount" they demand to settle each case, regardless of the allegations, and that as of August 18, Plaintiffs already had settled 209 cases for an average of about $3,900.[8] If

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[8] *See* AID Foundation, *AID Exposes ABC 15 Hateful Lies*, (published Aug. 19, 2016), https://www.youtube.com/watch?v=PZOE_h10N4A (at 2:55 and 4:25).

Plaintiffs insert confidentiality clauses into their settlements with defendants, preventing the State from testing the accuracy of these numbers at this stage of the proceedings.

accurate, this means Plaintiffs have already collected a staggering total of $815,100 in settlements, almost all of which were reached without a court ever considering the threshold issues the State seeks to raise.

At present, hundreds of defendants are either at risk of a default judgment or are rapidly approaching default. And Plaintiffs have started to file applications for default, seeking penalties just as severe as the ones in their complaints. For example, in CV2016-004628, *Advocates for Individuals with Disabilities, LLC v. Megha LLC*, Plaintiffs' counsel, Peter Strojnik, filed a sworn affidavit last Wednesday seeking "not less than $5,000" in attorneys' fees for himself, even though the only document he filed before the application for entry of default in that case was the mass-produced, copy-and-paste complaint, similar to the one issued here.

Some defendants in these cases are now aware of the State's motion to intervene, but are still uncertain of the best course of action, as intervention or consolidation will not stay, suspend, or extend any deadlines. With over one thousand cases still pending and response deadlines approaching or passing for defendants every week, only consolidation can ensure that further settlements or expenses are not incurred before the underlying threshold questions can be resolved.

IV. REQUEST FOR A SCHEDULING CONFERENCE

Pursuant to Rule 16(d), the State further requests that, if the Court grants this Motion to Consolidate, the Court hold a scheduling conference as soon as possible to address the just and efficient administration of the consolidated cases. To provide the Court and the parties maximum notice, the State hereby expresses its intention to request at that conference that the Court (1) set an initial briefing schedule for motions on the issues for which consolidation is granted, and (2) enter a scheduling order staying, suspending, or otherwise enlarging all deadlines in the consolidated cases until 60 days after the Court issues an order stating that the Court has fully and finally resolved the issues on which consolidation was granted, including:

- all answer deadlines pursuant to Rules 12 and 15;

- all current or future deadlines for filing responsive pleadings or otherwise defending pursuant to the grace period in Rule 55(a)(4);[9]
- all deadlines and requirements to respond to any discovery already or subsequently propounded or served or any motions to compel, and for serving initial or supplemental disclosure statements under Rules 26-36; and
- all deadlines for filing a joint report and proposed scheduling orders under Rule 16(b).

V. REQUEST FOR LEAVE TO SERVE BY OTHER MEANS

Pursuant to Rule 5(c)(2)(D), the State respectfully requests leave to serve this Motion by other means. Under Local Rule 3.1(c)(2), a copy of this Motion must be filed in each case that the State seeks to consolidate. The State intends to file in each case, but locating and serving the defendants in 1,289 cases would be impracticable. *See Blair v. Burgener,* 226 Ariz. 213, 219 ¶ 18 (App. 2010) (recognizing that alternative service under 4.1(k) is proper when it would otherwise be "extremely difficult or inconvenient" to effectuate service); *cf.* Ariz. R. Civ. P. 5(d).[10] The State therefore requests that the Court permit service of this Motion and attachments by the following alternate means: (i) filing a copy of the Motion and attachments through Turbocourt in each case in which it seeks to consolidate; (ii) hand delivering a single copy of the Motion and attachments to Mr. Peter Strojnik, counsel for American Disabled Individuals LLC,

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[9] Upon information and belief, there is only one case of the cases the State seeks to consolidate in which an application for default is pending (CV2016-004628), and that application was filed on August 24, 2016.

[10] This rule provides in relevant part:

> In any action in which there are unusually large numbers of defendants, the court, upon motion or of its own initiative, may order that service of the pleadings of the defendants and replies thereto need not be made as between the defendants and . . . the filing of any such pleading and service thereof upon the plaintiff constitutes due notice of it to the parties. A copy of every such order shall be served upon the parties in such manner and form as the court directs.

Although it only applies to pleadings, its logic should inform the Court's decision under Rule 5(c).

Advocates for Individuals with Disabilities LLC, Advocates for Individuals with Disabilities Foundation Inc., and David Ritzenthaler; (iii) hand delivering a single copy of the Motion and attachments to counsel for the defendant in CV2016-090506; and (iv) conspicuously posting a copy of the Motion and attachments, as well as the Court's order granting service by other means, on the Attorney General's website, www.azag.gov. A separate proposed order granting leave to serve by other means is attached to this Motion.

VI. REQUEST FOR EXPEDITED CONSIDERATION

As noted above, the clock is ticking for defendants in many of these cases to file responsive motions or pleadings. Other defendants are already at risk of a default judgment, and in some cases, Plaintiffs are already seeking default judgments and thousands of dollars in attorneys' fees. An order to consolidate these cases, coupled with a scheduling conference to extend the deadlines in these cases, would ensure that the fundamental, threshold jurisdictional questions are considered before these cases proceed further. It would also allow the Court to provide guidance to the parties on the jurisdictional issues before Plaintiffs file 8,000 more cases raising the same questions. As such, consolidating these actions in order to deal now with the underlying, common defects in the existing cases would be appropriate and helpful.

The State waives any reply and respectfully requests that this Court rule on this Motion to Consolidate as soon as is practicable. **In particular, the State requests that the Court grant leave to serve by other means as soon as possible so that the State may notify defendants in all 1,289 cases through alternative means.**

V. CONCLUSION

For the foregoing reasons, the State respectfully requests that the Court consolidate the cases listed in Appendix A for the limited purposes of considering whether the common questions of whether the complaints filed by the Plaintiffs should be dismissed and whether the Court should issue any sanctions or remedial orders. If the Court does consolidate the cases, the State further requests that the Court hold a scheduling conference as soon as possible to extend

deadlines in these cases until the common questions can be resolved. Finally, the State also requests that the Court give expedited consideration to this motion and its request for leave to serve by other means.

RESPECTFULLY SUBMITTED: August 30, 2016.

MARK BRNOVICH,
ATTORNEY GENERAL

BY: _____

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Document electronically transmitted
to the Clerk of the Court for filing using
AZTurboCourt this 30th day of August, 2016.

COPY of the foregoing HAND DELIVERED
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/s/ *Nyla Hunsinger*