

**MODERN AGE TOBACCO
AND GIFTS, INC., D/B/A,
MODERN AGE,**

Plaintiff,

vs.

**CITY OF GAINESVILLE,
A municipal subdivision of Alachua
County,**

And

**BOARD OF COUNTY
COMMISSIONERS OF ALACHUA
COUNTY,
A political subdivision of the State of
Florida,**

Defendants.

_____ /

**IN THE CIRCUIT COURT IN AND FOR
ALACHUA COUNTY, FLORIDA**

CIVIL DIVISION

CASE NO.: 01-2020-CA-1039

DIVISION K

**COMPLAINT OF DECLARATORY JUDGMENT AND REQUEST FOR INJUNCTIVE
RELIEF**

The Plaintiff, MODERN AGE TOBACCO AND GIFTS, INC., (hereinafter “MODERN AGE”) and hereby seeks a Declaratory Judgment against the Defendants, CITY OF GAINESVILLE (hereinafter “CITY”) and BOARD OF COUNTY COMMISSIONERS OF ALACHUA COUNTY (hereinafter “COUNTY”) and further seeks both permanent and temporary Injunctive Relief against he Defendant, and says the following in support thereof:

Parties

1. Plaintiff is a for-profit, family owned, retail establishment operating three (3) retail store fronts in Alachua County, Florida.
2. Defendant COUNTY is a charter County within North Central Florida, jointly administering and enforcing Alachua County Emergency Orders 2020-09 and 2020-12,

as well as Emergency Orders 2020-91 and 2020-92 issued by Florida Governor Ron DeSantis.

3. Defendant CITY is a municipality within Alachua County, jointly administering and enforcing Alachua County Emergency Orders 2020-09 and 2020-12, as well as Executive Orders 2020-91 and 2020-92 issued by Florida Governor Ron DeSantis.

Jurisdiction and Venue

4. This is an action for Declaratory Relief pursuant to *Fla. Stat. 86.011* and Jurisdiction is vested in this Court.
5. Plaintiff seeks a declaration that it meets the criteria to remain in business under Alachua County Orders 2020-09 and 2020-12, and the superseding Executive Orders of the Governor 2020-91 and 2020-92.
6. Venue is proper in this Court as the enforcement of the Orders listed in paragraph five (5) restricting Plaintiff's ability to operate its retail operations will occur in Alachua County, under the authority of agents of the Defendants.

Facts Commons to All Counts

7. MODERN AGE is a family owned and operated retail establishment that has conducted business in Alachua County, for more than thirty (30) years.
8. MODERN AGE operates three (3) retail store fronts in Alachua County, two of which are within the limits of the City of Gainesville.
9. MODERN AGE sells a wide variety of products including, but not limited to, tobacco products, vaping products and devices, CBD and Hemp based food items, a variety of medical devices for the use or ingestion of medicinal cannabis, Butane for both lighters and cooking appliances, and related products.

10. MODERN AGE is properly permitted and licensed by the State, City and County to operate its business.
11. On or about March 23, 2020, Defendant COUNTY issued EO 20-09 with the concurrence and cooperation of Defendant CITY. *EO-20-09 attached as Exhibit "A"*.
12. In response MODERN AGE applied for inclusion as an essential business through the Alachua County Manager's Office and converted its operation to retail delivery.
13. MODERN AGE received approval to operate as a delivery business in accordance with Sections 10 and 9(n) of the Emergency Order.
14. Since approximately March 24, 2020, MODERN AGE has not permitted customers to enter its retail locations.
15. Since that date orders have been taken by phone or email and products have been delivered to the customers by a store employee outside the retail building.
16. On or about March 30, 2020 Governor Ron DeSantis issued Executive Orders 2020-91 and 2020-92 superseding the Emergency Order issued by Defendant COUNTY. *See attached Exhibits "B" and "C"*.
17. On or about April 4, 2020, Plaintiff received a Notice of Violation from Defendant CITY indicated that they could no longer operate delivery operations unless they ceased taking credit card payment in person.
18. In response Plaintiff purchased additional credit card equipment enabling phone or online processing of credit card information.
19. Plaintiff invested in excess of \$3,000.00 to comply with the notice.
20. Shortly thereafter Plaintiff was informed by agents of Defendant CITY that they would have to cease delivery operations unless the deliveries were conducted completely off property of MODERN AGE.

21. Plaintiff complied and ceased curbside and parking lot delivery, and instead walked products to customers off property.
22. On or about April 9, 2020, Plaintiff's retail locations were visited by police and fire representatives of Defendant CITY stating the business was non-essential.
23. On that date and time Plaintiff was informed that would also have to cease delivery operations unless they delivered to "home or business."
24. While MODERN AGE supports two (2) generations of its family owners and fifteen (15) employees, it does not have the staff or logistical capability to conduct mass delivery throughout Alachua County.
25. MODERN AGE is unaware of any third party delivery business such as 352 Delivery et al., which will deliver their particular variety of retail products.
26. As such MODERN AGE will be unable to continue business operations if they continue to be regarded as a non-essential business or alternatively if they are forced to comply with Defendants' arbitrary definition of delivery.
27. That Alachua County Emergency Order 2020-12 states, "In addition to any permitted Minimum Basic Operations, all retail and commercial businesses may perform remote work so that a **business's employees may interact with each other and/or with customers solely through electronic or telephonic means, and deliver services or products via only electronic means or mailing, shipping, or delivery services.**" *See Attached Exhibit "D", paragraph 6.*
28. That Executive Order 2020-91 states, "E. All businesses or organizations are encouraged to provide delivery, carry-out or **curbside service outside of the business or organization**, of orders placed online or via telephone, to the greatest extent practicable." *See Attached Exhibit "B", section 2(E).*
29. That Executive Order 2020-91 supersedes any County Order. *See Attached Exhibit "C".*

30. There is no definition of delivery as being limited to a home or business in any of the relevant Orders, nor is Plaintiff aware of such a narrow legal definition in any other context.
31. That EO 2020-91 also incorporates the essential business and services list of Miami-Dade County which provides, “a. Healthcare providers, including, but not limited to, hospitals, doctors' and dentists' offices, urgent care centers, clinics, rehabilitation facilities, physical therapists, mental health professionals, psychiatrists, therapists, and pharmacies;” are essential. *See Attached Exhibit “B”, page 25 (page 2 of Miami-Dade Order).*
32. Plaintiff sells medical equipment and devices as defined by Sections 499.003 and 381.986.¹
33. That the Miami-Dade Order, incorporated by reference under EO 2020-91 also lists as essential, “aa. Provision of propane or natural gas.” *Exhibit “B”, page 27 (page 4 of Miami-Dade Order).*
34. MODERN AGE sells Butane natural gas.
35. That the Miami-Dade Order, incorporated by reference under EO 2020-91 also lists as essential, “b. Grocery stores, farmers' markets, farm and produce stands, supermarkets, food banks, convenience stores, and other establishments engaged in the retail sale of canned food, dry goods, fresh fruits and vegetables, pct supply, fresh meats, fish, and poultry, and any other household consumer products (such as cleaning and personal care products). This authorization includes stores that sell groceries and also sell other non-

¹ Under Fla. Stat. 499.003 (subsection of the Florida Drug and Cosmetic Act) a medical device is defined as “(15) “Device” means any instrument, apparatus, implement, machine, contrivance, implant, in vitro reagent, or other similar or related article, including its components, parts, or accessories, which is:…b) Intended for use in the diagnosis, cure, mitigation, treatment, therapy, or prevention of disease in humans or other animals, or…” As it pertains to a medical cannabis delivery device, Fla. Stat. 381.986 states “(g) “Marijuana delivery device” means an object used, intended for use, or designed for use in preparing, storing, ingesting, inhaling, or otherwise introducing marijuana into the human body, and which is dispensed from a medical marijuana treatment center for medical use by a qualified patient, except that delivery devices intended for the medical use of marijuana by smoking need not be dispensed from a medical marijuana treatment center in order to qualify as marijuana delivery devices.”

grocery products, and products necessary to maintaining the safety, sanitation, and essential operations of residences;” *Exhibit “B”, page 25 (page 2 of Miami-Dade Order)*.

36. That MODERN AGE sells pre-packaged food items.

COUNT I- REQUEST FOR DECLARATORY JUDGMENT

Plaintiff hereby incorporates by reference paragraphs one (1) through thirty-six (36) and further states as follows,

37. That MODERN AGE is uncertain regarding its rights and requires a judicial declaration to resolve the pending dispute.

38. Specifically seeks a declaration regarding the following issues created by Executive Order 2020-91 and Emergency Order 2020-12:

- (a) Declaration as an essential business as a retail provider of medical services and products;
- (b) Declaration as an essential business as a retail provider of natural gas;
- (c) Declaration as an essential business as a retail provider of food products;
- (d) Declaration that Plaintiff’s delivery procedure complies with Executive Order 2020-91 and delivery to a home or business exclusively is not required.

39. Injury and damages are pending given Defendants’ ongoing enforcement, and Plaintiff stands to suffer irreparable harm in the form of lost profit, loss of revenue, termination or furlough of staff and loss of customer base.

40. This action presents an actual, present and *bona fide* dispute concerning the impingement of Plaintiff’s rights to conduct business in Alachua County.

WHEREFORE the Plaintiff prays the Court grant relief as follows:

- (a) Judicial Declaration of Plaintiff’s rights as listed *supra*,

- (b) Entry of an Order enjoining the Defendants from further enforcement in violation of Plaintiff's rights,
- (c) Costs as permitted by rule or statute,
- (d) Any other such relief in equity deemed proper by the Court.

**COUNT II: REQUEST FOR EMERGENCY INJUNCTIVE RELIEF PENDING
DISPOSITION**

Plaintiff hereby incorporates by reference paragraphs one (1) through forty (40) and further states as follows,

- 41. Defendants' continued interpretation and enforcement of Executive Order 2020-91 requiring delivery solely to a home or business threatens Plaintiff with irreparable loss of revenue and customer base by causing total cessation of business indefinitely.
- 42. That Plaintiff has attempted to comply with every emergency and executive order to date, including through the expenditure of substantial monetary investment, but is without the ability to further modify its business practice to meet the Defendants' legal interpretation of the State shelter in place order.
- 43. As such, no adequate remedy beyond enjoining enforcement exists to prevent injury to Plaintiff.
- 44. Plaintiff has a substantial likelihood of prevailing on the merits in this matter based upon the plain language of the Orders (*attached hereto*) and the legal standard which mandates that in the interpretation of a highly punitive order or ordinance, all reasonable inferences be made in favor of the business or license holder. *See Equity Corp. Holdings, Inc. v. Department of Banking and Finance, Div. of Finance, 772 So.2d 588, 590 (Fla. 1st DCA 2000).*
- 45. The risk of harm to the public or Defendants' is minimal if Plaintiff is permitted to continue its delivery operations. At present no more than one employee, utilizing all recommended safety precautions interacts with a customer. Interactions take place outside and do not require exchange of cash or credit in person.

46. At present Plaintiff's operations involve less person to person contact than other businesses that continue to operate including hardware stores, restaurants, grocery stores or liquor stores.
47. Plaintiff's operations involve less person to person contact than convenience stores or gas stations which will likely be where Plaintiff's customers turn for tobacco products should they be forced to close.

WHEREFORE the Plaintiff prays the Court grant relief as follows:

- (e) Entry of an Emergency Order enjoining the Defendants from further enforcement in violation of Plaintiff's rights,
- (f) Costs as permitted by rule or statute,
- (g) Any other such relief in equity deemed proper by the Court.

Respectfully Submitted this 13th day of April, 2020.

GLASSMAN & ZISSIMOPULOS LAW

/s/ Jesse Smith, Esq.

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