



FILED
CLALLAM COUNTY

NOV 24 2021 @ 3:00 PM

NIKKI BOTNEN CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR THE COUNTY OF CLALLAM

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6 Diamond Point Dreams, LLC dba)
7 The Oasis Bar & Grill)
8)
9 Dakota Ventures LLC, dba Kokopelli)
10 Grill/Coyote BBQ Pub,)
11)
12 LNT LLC, dba Sunshine Café,)
13)
14 Double O Catering, dba Blackberry)
15 Café,)
16 Blondies Plate LLC, dba Blondies)
17 Plate,)
18)
19 Jose's Famous Salsa, LLC, dba Jose's)
20 Famous Salsa and Salsa House)
21 Restaurant,)
22)
23 Plaintiffs,)
24)
25 vs.)
26)
27 CLALLAM COUNTY, a Washington)
28 municipal corporation, and ALLISON)
29 BERRY, M.D., in her official capacity)
30 as Clallam County Health Officer,)
31 Defendants.)
32)
33)
34)

Case No.: 21 2 00597 05

**COMPLAINT FOR INJUNCTIVE
RELIEF AND DECLARATORY
JUDGMENT**

COMES NOW Plaintiffs by and through their undersigned counsel of record,

William Payne, and alleges and avers as follows.

#



Record Certification: I Certify that the electronic copy is a correct copy of the original, on the date filed in this office, and was taken under the Clerk's direction and control.
Clallam County Clerk, by [Signature] Deputy # pages: 12

I. PARTIES, VENUE, AND JURISDICTION

1
2 1.1 All Plaintiff-Petitioners (“Restaurants”) are Clallam County restaurant owners and
3 entities who have been directly, severely and irreparably harmed by the Clallam County
4 Public Health Order issued September 2, 2021 by Clallam County Health Officer, Allison
5 Berry, M.D.

6 1.2 Restaurants, are Washington corporations or LLCs and have paid all fees and taxes
7 due and has otherwise fulfilled all conditions precedent required to maintain this action. At all
8 times relevant to this action, Restaurants conducted business in Clallam County, Washington
9 as a duly licensed corporation/LLC/business/restaurant.
10

11 1.3 Defendant, Allison Berry, M.D., is the Clallam County Health Officer.

12 1.4 Clallam County is a Defendant in this matter due to the actions, and imminent actions
13 of its employee, the Clallam County Health Officer.
14

15 1.5 Defendant, Clallam County (the “County”) is a municipal corporation organized and
16 operating under the laws of the State of Washington, whose offices are located in Port
17 Angeles, Clallam County, Washington.

18 1.6 Jurisdiction and venue are proper in this court pursuant to RCW 7.40.010, RCW
19 7.24.010, and RCW 36.01.050(3).
20

21 II. FACTS

22 2.1 On February 29, 2020, Governor Jay Inslee declared a State of Emergency for all
23 counties in Washington State due to the public health emergency caused by the COVID-19
24 virus. Since then, the County and the State of Washington has issued mandatory lockdowns,
25 mask mandates, capacity limits, and many other restrictions. These restrictions alone have
26

1 made operating a local restaurant very difficult and have severely and irreparably damaged
2 small businesses and restaurants in Clallam County.

3 2.2 On September 2, 2021, the County, through the Clallam County Board of Health,
4 published Public Health Order – September 2, 2021 (the “Mandate”), issued by Clallam
5 County Health Officer, Allison Berry. The Mandate is attached hereto as “Exhibit A.”

6 2.3 The Mandate required all persons entering bars and restaurants in Clallam County to
7 provide proof that they are fully vaccinated against COVID-19. The Mandate also required
8 restaurants and bars operating in Clallam County to enforce this requirement or face permit
9 suspension and referral to the Washington State Department of Labor for additional
10 enforcement.

11 2.4 There is no option for a patron to provide a negative COVID-19 test or to wear a mask
12 in lieu of vaccination. There is also no accommodation for those who cannot get the vaccine
13 or those individuals that have already had COVID-19 and have, according to generally
14 accepted science, developed some immunity to COVID-19.

15 2.5 The requirements of the Mandate has caused irreparable damage and economic harm
16 to the Plaintiffs, including but not limited to lost revenue, lost customers and employees that
17 have resigned due to the mandate.
18
19
20

21 **III. FIRST CAUSE OF ACTION**
22 **DECLARATORY JUDGMENT PURSUANT TO RCW 7.24.010**

23 A. The Mandate Violates Equal Protection of the Laws

24 3.1 Plaintiffs re-allege and incorporate the preceding paragraphs as though fully set forth
25 herein.

26 3.2 Classifications created by state action which disadvantage a "suspect class" or impinge
upon the exercise of a "fundamental right" are subject to strict scrutiny, and will be upheld

1 only when they are precisely tailored to serve a compelling state interest. Plyler v. Doe, 457
2 U.S. 202, 216-17, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982). Classifications that disadvantage
3 certain other groups, such as women, are subject to an intermediate level of scrutiny, and will
4 be upheld only when they are shown to further a substantial interest of the state. *Id.* at 217,
5 102 S.Ct. at 2394.

6 3.3 Strict scrutiny should be applied in this case because the Mandate disadvantages a
7 “suspect class” and it impinges upon the Plaintiffs’ exercise of a “fundamental right.” The
8 fundamental right in this case is the freedom to inherit, purchase, lease, sell, hold, and convey
9 real and personal property – what is essentially economic liberty. The right to pursue a lawful
10 calling has long been recognized as a fundamental right. *Allgeyer v. Louisiana*, 165 U.S. 578,
11 589, 17 S.Ct. 427, 41 L.Ed. 832 (1897)

12
13 3.4 The mandate discriminates between restaurants and other business that are not
14 required to ask patrons for proof of vaccinations. It also discriminates between who are
15 vaccinated and those who are unvaccinated without regard for the reason a person may be
16 unvaccinated and a suspect class, including those who are unvaccinated due to religious
17 beliefs or medical disability.

18
19 3.5 The Mandate violates right of patrons and restaurants in Clallam County to equal
20 protection of the laws and should be subject to strict scrutiny.

21 B. The Mandate is Arbitrary and Capricious

22
23 3.6 Plaintiffs re-allege and incorporate the preceding paragraphs as though fully set forth
24 herein.

25 3.7 As stated above, the Mandate only applies to bars and restaurants. It does not apply to
26 entertainment establishments, it does not apply to gyms or fitness establishments, it does not

1 apply to visitors of long-term care facilities (where many of the outbreaks have occurred), and
2 it does not apply hotels and motels where people will also inevitably be removing their masks
3 to eat and drink.

4 3.8 The Mandate is also arbitrary and capricious because vaccinated status does not
5 guarantee that a person will not transmit the COVID-19 virus. The evidence is well
6 established now that vaccinated individuals are still able to infect others and be infected with
7 COVID-19.
8

9 3.9 The Mandate is arbitrary and capricious and should be invalid and unconstitutional.

10 C. The Mandate is not Narrowly Tailored

11 3.10 Plaintiffs re-allege and incorporate the preceding paragraphs as though fully set forth
12 herein.

13 3.11 The Mandate does not allow for exceptions for individuals who cannot be vaccinated
14 due to religious or medical reasons. It also does not allow for exceptions for individuals who
15 have previously contracted COVID-19 and are able to show proof of COVID-19 antibodies.
16 Many other jurisdictions and countries allow proof of having recovered from COVID-19
17 within a certain period of time as an alternative to proof of vaccinations. This is because those
18 individuals also possess a degree of immunity from the virus.
19

20 3.12 The Mandate allows vaccinated individuals who have compromised immune systems
21 to dine and drink at restaurants even though the vaccine is less effective for these individuals.
22 Most of the vaccinated individuals who have died of COVID-19 in Clallam County had
23 compromised immune systems making the vaccine less effective for them. If the goal is to
24 reduce deaths from COVID-19, then these individuals may actually be more likely to become
25 infected and seriously ill than a healthy and young unvaccinated individual or an individual
26

1 has who recovered from COVID-19. Yet, vaccinated individuals with compromised immune
2 systems are not prohibited from entering restaurants or bars in Clallam County.

3 3.13 Plaintiffs seek a declaratory judgment that the Order is invalid and unconstitutional
4 pursuant to RCW 7.24.020. It violates the rights of restaurants in Clallam County to equal
5 protection of the laws, it cannot pass strict scrutiny, it is arbitrary and capricious, and it is not
6 narrowly tailored.

7
8 **IV. SECOND CAUSE OF ACTION**
9 **INJUNCTION PURSUANT TO RCW 7.40.020**

10 4.1 Plaintiffs re-allege and incorporate the preceding paragraphs as though fully set forth
11 herein.

12 4.2 As stated above, the Mandate is invalid and unconstitutional and should not be
13 enforced.

14 4.3 Plaintiffs seek an injunction pursuant to RCW. 7.40.020 prohibiting the County from
15 enforcing the Order.
16

17 **V. PRAYER FOR RELIEF**

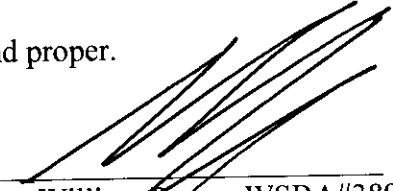
18 A. A declaratory judgment pursuant to RCW 7.24.020 that the Clallam County Public
19 Health Order issued on September 2, 2021 is not valid.

20 B. An injunction pursuant to RCW 7.40.020 prohibiting the County from enforcing the
21 Clallam County Public Health Order issued on September 2, 2021.

22 C. An award of statutory costs and attorney's fees;

23 D. Such further relief as the Court deems just and proper.

24
25 Respectfully Submitted and Dated: 11/23/2021

26 
William Payne, WSBA#38933
Attorney for Restaurants



Clallam County Department of Health and Human Services

111 E. 3rd Street • Port Angeles, WA 98362 • Phone: 360-417-2303 • Fax: 360-452-9605

COUNTY OF CLALLAM

State of Washington

In the Matter of Emergency Response to the
COVID-19 Pandemic

PUBLIC HEALTH ORDER—September 02, 2021

BACKGROUND

1. On February 29, 2020, Governor Jay Inslee issued Proclamation 20-05, which declared a State of Emergency in all Counties in Washington State to due to the public health emergency caused by the COVID-19 virus.
2. On March 11, 2020, the World Health Organization declared the outbreak of COVID-19 to be a pandemic.
3. On March 17, 2020, the Clallam County Board of Commissioners approved a Declaration of Emergency due to the COVID-19 pandemic.
4. On March 23, 2020, Governor Jay Inslee signed Proclamation 20-25 declaring that a State of Emergency continues to exist in all Counties in Washington State due to COVID-19. Proclamation 20-25 has been amended several times, most recently on August 20, 2021. Proclamation 20-25, et seq. limits Washingtonians' ability to participate in certain activities unless certain conditions are met.
5. As a result of the continued worldwide spread of COVID-19, its significant progression in Washington State, and the high risk it poses to our most vulnerable populations, Governor Jay Inslee subsequently issued amendatory proclamations exercising his emergency powers under RCW 43.06.220 by prohibiting certain activities and waiving and suspending specified laws and regulations.
6. The Clallam County Public Health Department has confirmed localized person-to-person spread of COVID-19 in Clallam County. Given the current understanding about how COVID-19 spreads, including by asymptomatic and pre-symptomatic persons, masks are an essential defense to the spread of COVID-19.
7. Viruses constantly change through mutation, and new variants of a virus are expected to occur over time. Multiple variants of the virus that causes COVID-19 have been documented on the Olympic Peninsula, in the United States, and globally during this pandemic. See <https://www.cdc.gov/coronavirus/2019-ncov/transmission/variant.html>.

8. COVID-19 vaccines are effective in reducing infection and serious disease. Widespread vaccination is the primary means we have as a state to protect everyone, including persons who cannot be vaccinated for medical reasons, youth who are not eligible to receive a vaccine, immunocompromised individuals, and vulnerable persons including persons in health care facilities, long-term care facilities and other congregate care facilities from COVID-19 infections.

9. COVID-19 vaccines are safe and effective. COVID-19 vaccines were evaluated in clinical trials involving tens of thousands of participants and met the U.S. Food & Drug Administration's rigorous scientific standards for safety, effectiveness, and manufacturing quality needed to support emergency use authorization. On August, 23, 2021, the FDA granted full approval to the Pfizer-BioNTech COVID-19 vaccine. To date, more than 368 million doses of COVID-19 vaccines have been given in the United States with 8.5 million of those doses administered in Washington, and serious safety problems and long-term side effects are rare.

10. After months of improving COVID-19 epidemiological conditions in Washington State, the emergence of highly contagious COVID-19 variants, including the "delta variant" that is at least twice as transmissible as the virus that emerged in late 2019, coupled with the continued significant numbers of unvaccinated people, have caused COVID-19 cases and hospitalizations to rise sharply among unvaccinated populations and have resulted in breakthrough infections in some fully vaccinated individuals.

11. The Centers for Disease Control and Prevention stated on July 27, 2021 that to maximize protection from the Delta variant and prevent possibly spreading it to others, wear a mask indoors in public if people are in an area of substantial or high transmission.

12. As of August 4, 2021, nearly 4.4 million Washingtonians, about 70% of those eligible and 58% of the total population, had initiated their vaccine series, leaving 2.1 million eligible Washingtonians who were unvaccinated

13. On August 12, 2021, Health Officers from all 35 local health jurisdictions in the State of Washington released the following recommendation: "The health officers from all 35 local health jurisdictions in Washington State have joined together to pass on their best public health advice to protect you, your family, and our communities. We recommend all residents wear facial coverings when in indoor public settings where the vaccination status of those around you is unknown. This step will help reduce the risk of COVID-19 to the public, including customers and workers, help stem the increase in COVID-19 cases and hospitalizations in many parts of the state and decrease the spread of the highly contagious Delta variant."

14. On August 13, 2021, Dr. Allison Berry issued an emergency order requiring masking when in indoor public spaces, offices, and businesses in Clallam and Jefferson Counties.

15. On August 20, 2021 Governor Inslee issued a mask mandate for the state of Washington requiring masking in indoor public spaces, allowing an exemption to remove one's mask when eating and drinking or when actively participating in athletics.

16. As of August 21, 2021, 495 outbreaks of COVID-19 have been tied traced to restaurants, and bars in Washington State. Localized transmission of COVID-19 and outbreaks related to restaurants and bars have been documented in Clallam County. Indoor bars and restaurants are known to pose a high risk for COVID-19 transmission as they encourage unmasking of large groups of people indoors.

17. Throughout the COVID-19 pandemic there have been waves of increased risk of transmission, requiring the ability to implement stricter mitigations and safety protocols as recommended by public health officials.

AUTHORITY TO ISSUE ORDER

1. RCW 70.05.070 vests authority in the Clallam County Health Officer to take such action as is necessary to maintain health and sanitation; to control and prevent the spread of any dangerous, contagious, or infectious diseases; and to take such measures as deemed necessary in order to promote the public health.

2. WAC 246-100-040(2) provides the Clallam County Health Officer “the powers of police officers, sheriffs, constables, and all other officers and employees of any political subdivisions within the jurisdiction of the health department to enforce immediately orders given to effectuate the purposes of this section in accordance with the provisions of RCW 43.20.050(4) and 70.05.120.” Under WAC 246-100-040(2), these powers include Clallam County’s police powers authorized by Wa. Const. art. XI, §11 and RCW 36.32.120(7).

3. The preservation of the public health is a proper subject for the exercise of the police power and is the first concern of the state. *State v. Superior Court for King Cty.*, 103 Wash. 409, 419, 174 P. 973, 976 (1918). *See also Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475, 116 S. Ct. 2240, 2245, 135 L. Ed. 2d 700 (1996). A county has the power to quarantine persons with infectious diseases. *City of Seattle v. Cottin*, 144 Wash. 572, 576, 258 P. 520, 521 (1927). Because protecting and preserving the health of its citizens from disease is an important governmental function, public health statutes and the actions of local health boards implementing those statutes are liberally construed. *Spokane Cty. Health Dist. v. Brockett*, 120 Wn.2d 140, 149, 839 P.2d 324, 329 (1992) (citations omitted). The legislatively delegated power to counties and health boards to control contagious diseases gives them extraordinary power which might be unreasonable in another context. *Id.*

4. WAC 246-100-036(3) requires the Clallam County Health Officer, when necessary, to institute disease control and contamination control measures as deemed necessary based on professional judgment, current standards of practice and the best available medical and scientific information.

5. Despite the declaration of emergency and best public health efforts, Clallam County has continued to experience rising rates of COVID-19 transmission and numerous outbreaks (defined as multiple positive tests for COVID-19 from a single location or event).

6. Clallam County is currently experiencing ongoing transmission of confirmed COVID-19 cases related primarily to the highly transmissible Delta variant, as are neighboring counties and Washington State as a whole.

7. Rates of COVID-19 transmission and hospitalization have been on the rise throughout the summer of 2021 due to the highly contagious Delta variant, largely in the unvaccinated population. As of August 31, 2021, hospitals in Clallam County have reached capacity and 98% of the staffed ICU beds in King, Snohomish and Pierce Counties are full.

8. COVID-19 vaccination continues to prevent hospitalization and save lives. 94% of those hospitalized for COVID-19 in Washington State between February 1, 2021 and August 21, 2021 were not fully vaccinated. 92% of those who have died during that same time period in Washington State were not fully vaccinated.

9. Based on professional judgment of the Clallam County Health Officer, it is necessary to issue this order requiring proof of vaccination for those high risk indoor environments, to include bars and restaurants - under the limitations listed below.

10. The Health Officer further finds that immediate enforcement of the below COVID-19 safeguards is necessary to prevent the spread of COVID-19 in Clallam County and for the preservation of public health, safety, and general welfare and lies within the existing authority of the Health Officer.

ORDER

IT IS ORDERED, by the Clallam County Health Officer that it is necessary that:

1. Effective September 4th and continuing until the Governor has declared the public emergency related to COVID-19 has ended or until this order is revoked earlier, all persons entering bars and restaurants in Clallam County must provide proof that they are fully vaccinated against COVID-19, except as provided in Section 2, below.
 - a. For purposes of this order, “fully vaccinated” means that a person has received all the required doses of a vaccine for COVID-19 (e.g., two doses of the Moderna or Pfizer-BioNTech vaccines, or one dose of the Johnson & Johnson vaccine) and 14 days have passed since the final dose.
 - b. Acceptable forms of proof of vaccination include a completed CDC vaccination card, a State Department of Health Certificate of COVID-19 Vaccination, a printed copy of the person’s State Department of Health vaccine record, a photograph of any of the preceding, or an app-based vaccine passport.
2. Proof of vaccination is not required in the following scenarios:
 - a. Employees of bars and restaurants who do not remove their masks at work are not required to provide proof of vaccination to their employers. Employers continue to be required to comply with all other requirements for employers in the Washington Department of Labor and Industries guidance (<https://www.lni.wa.gov/forms-publications/F414-164-000.pdf>), including the requirement to document the vaccine status of all employees.
 - b. Employees of bars and restaurants who are unable to be vaccinated because of a disability or the requirement to do so conflicts with their sincerely held religious beliefs, practice, or observance. Employers:
 - i. Must provide any disability-related reasonable accommodations and sincerely held religious belief accommodations to the requirements of this order that are required under the Americans with Disabilities Act of 1990 (ADA), the Rehabilitation Act of 1973 (Rehabilitation Act), Title VII of the Civil Rights Act of 1964 (Title VII), the Washington Law Against Discrimination (WLAD), and any other applicable law. As provided in the above-noted laws, employers are not required to provide accommodations if they would cause undue hardship to the employer. Reasonable accommodations must be determined on an individualized basis and may include wearing a mask or working remotely. The requirement of wearing a mask is reasonable accommodation for the purposes of this order.
 - ii. Must comply with the procedures required under the above-noted laws and any other applicable law when considering and deciding whether to provide accommodations.
 - iii. Must, to the extent permitted by law, before providing a disability-related reasonable accommodation to the requirements of this order, obtain from the individual requesting

the accommodation documentation from an appropriate health care or rehabilitation professional stating that the individual has a disability that necessitates an accommodation and the probable duration of the need for the accommodation.

- iv. Must, to the extent permitted by law, before providing a sincerely held religious belief accommodation to the requirements of this order, document that the request for an accommodation has been made and include a statement from the employee explaining the way in which the requirements of this order conflict with the sincerely held religious belief, practice, or observance of the employee.
 - v. Are prohibited from providing accommodations: (1) That they know are based on false, misleading, or dishonest grounds or information; (2) That they know are based on the personal preference of the individual and not on an inability to get vaccinated because of a disability or a conflict with a sincerely held religious belief, practice, or observance; or, (3) Without conducting an individualized assessment and determination of each individual's need and justification for an accommodation; i.e., "rubberstamping" accommodation requests.
- c. Children under 12 who are not yet eligible for COVID-19 vaccination are not required to prove vaccination status in bars or restaurants.

3. In addition, individuals in Clallam County must abide by any existing Proclamations from the Governor, Orders from the Secretary of the State Department of Health and any applicable Orders from the Clallam County Health Officer.

4. The Health Officer and his/her representatives are hereby authorized to inspect venues for compliance with the COVID-19 safeguards. Enforcement shall begin by providing the venue with an opportunity to remedy the violation, except that immediate suspension may be implemented when deemed necessary to correct an imminent or actual health hazard.

5. The Health Officer and his/her representatives are authorized to enforce non-compliance through the suspension of operating permits, or other remedies authorized by state law and/or the Clallam County Code.

6. Implementation Plan.

a. The Health Officer or his/her representative may conduct inspections of establishments pertaining to COVID-19 safeguards periodically and will respond to complaints. Upon determining that there is a violation of the COVID-19 safeguards, the Health Officer's representatives will provide education and guidance, to assist in coming into compliance, unless immediate permit suspension is necessary to respond to an imminent or actual health hazard.

b. Where immediate permit suspension is not necessary, the Health Officer's representatives will, within 72 hours of providing education/guidance, again determine whether compliance has been achieved. If there remains non-compliance with COVID-19 safeguards, permits will be suspended, and an immediate cessation of operations will be required.

c. If an immediate permit suspension was imposed, the establishment shall be responsible for reaching out to the Clallam County Department of Public Health to address potential reopening.

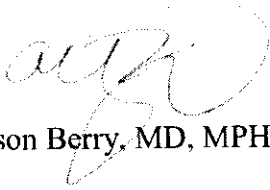
d. All establishments with a suspended permit will be required to submit corrective actions and meet with the Health Officer's representative to discuss such actions before they are allowed to schedule a reopening inspection.

e. The Health Officer's representatives also may request the assistance of the local police, Washington State Patrol, Clallam County Sheriff, and all other officers and employees of any political subdivision within Clallam County to enforce this health order.

f. Noncompliant establishments will also be referred to the Washington State Department of Labor and Industries for additional enforcement.

7. Consequences of Noncompliance. Noncompliance with this rule may subject the violator to permit suspension by the Health Officer. Any person who shall fail or refuse to obey any lawful order issued by any local health officer shall be deemed guilty of a misdemeanor punishable as provided under RCW 70.05.120. Violations of Secretary of Health directives and the Governor's Proclamations are misdemeanors and are subject to criminal penalties. Violations of Department of Labor and Industries are subject to fines and other enforcement remedies by that department.

Ordered this 2nd day of September, 2021



Allison Berry, MD, MPH

Clallam County Health Officer