

STATE OF MINNESOTA
COUNTY OF POLK

DISTRICT COURT
NINTH JUDICIAL DISTRICT

Case Type: Other Civil
(Consumer Protection)

State of Minnesota, by its Attorney General,
Keith Ellison,

Court File No. _____

Plaintiff,

COMPLAINT

vs.

Boardwalk Bar and Grill, LLC,

Defendant.

The State of Minnesota, by its Attorney General, Keith Ellison, for its Complaint against Defendant Boardwalk Bar and Grill, LLC alleges as follows:

INTRODUCTION

1. In response to the ongoing COVID-19 pandemic, on March 13, 2020, Governor Tim Walz declared a peacetime emergency, which was most recently extended until at least through December 14, 2020 pursuant to Executive Order 20-97. From March 2020 through November 2020, the governor attempted to slowly and safely reopen the Minnesota economy, placing restrictions on businesses to slow the community spread of COVID-19. By November 18, 2020, however, Minnesota reported over 240,000 confirmed cases of COVID-19 in the state, with 100,000 of those cases being added in only 42 days. Thus, on November 18, 2020, Governor Walz issued Emergency Executive Order 20-99, “implementing a four week dial back on certain activities to slow the spread of COVID-19.”

2. In relevant part, Executive Order 20-99 temporarily prohibits restaurants and bars from offering on-premises consumption of food or beverages (including alcoholic beverages) and from allowing ingress, egress, use, and occupancy by members of the public except to allow up to five members of the public on the premises for the purpose of picking up food or beverages for off-site consumption. Executive Order 20-99 also encourages restaurants and bars to “offer food and beverage using delivery services, window service, walk-up service, drive-through service, or drive-up service,” while the temporary restrictions are in place.

3. Despite Executive Order 20-99’s express restrictions, which have the full force and effect of law, Boardwalk Bar and Grill, LLC, which owns and operates a bar/restaurant in East Grand Forks, has provided on-premises consumption of food and beverages and allowed the public to enter the establishment beyond the restrictions of Executive Order 20-99 since December 9, 2020.

4. Emergency Executive Order 20-99’s prohibitions on on-premises dining and restrictions on restaurant and bar occupancy are necessary to protect public health and safety during the ongoing COVID-19 pandemic. COVID-19 is easily transmissible and deadly. On-premises consumption at bars and restaurants pose a particularly high risk of COVID-19 transmission because it allows people to gather and congregate around others from different households to eat and drink without face coverings, often for extended periods of interactions. Despite the public health harm this poses to Minnesotans, Boardwalk Bar and Grill, LLC has refused to comply with Executive Order 20-99. On December 9, 2020, Defendant promoted on its restaurant’s Facebook page that “we will be opening TODAY at 4:00 pm for dine-in services and will be open Tuesday through Saturday from 4:00 pm to 11:00 pm.” That same day, officers with the East Grand Forks Police Department further observed the restaurant full with customers.

5. In short, Boardwalk Bar and Grill, LLC is ignoring the risks of the virus and has disregarded the prohibitions established by Emergency Executive Order 20-99 to protect the public's health and safety. Attorney General Keith Ellison therefore brings this action to protect the public health and safety by enforcing Executive Order 20-99 and to enjoining from extending, offering, or otherwise making available on-premises consumption at its location, and enjoining Boardwalk Bar and Grill, LLC from further violating Emergency Executive Order 20-99.

PARTIES

6. Keith Ellison, the Attorney General of the State of Minnesota, is authorized under Minnesota Statutes chapter 8 and has common law authority, including *parens patriae* authority, to bring this action to enforce Emergency Executive Order 20-99, to vindicate the State's sovereign and quasi-sovereign interests, and to remediate all harm arising out of—and obtain full relief for—violations and/or threatened violations of Emergency Executive Order 20-99.

7. Defendant Boardwalk Bar and Grill, LLC, is a business with its principal executive office address at 415 2nd Street NW, East Grand Forks, Minnesota 56721 and is owned and/or managed by Jane Moss.

JURISDICTION AND VENUE

8. This Court has subject matter jurisdiction over this action pursuant to Minnesota Statutes sections 8.01, 8.31, Emergency Executive Order 20-99, and under common law.

9. This Court has personal jurisdiction over Defendant because Defendant has violated and/or threatened to violate Emergency Executive Order 20-99 in Minnesota, thereby causing and threatening to cause injury to the public health and safety of Minnesota residents.

10. Venue in Polk County is proper under Minnesota Statutes section 542.09 because the cause of action arose in Polk County.

FACTUAL BACKGROUND

I. THE COVID-19 PANDEMIC IS AN ONGOING PUBLIC HEALTH EMERGENCY, WHICH HAS REQUIRED MINNESOTA TO TAKE ACTION TO PROTECT PUBLIC HEALTH AND SAFETY.

11. Minnesota's fight against the COVID-19 virus represents one of the greatest public health emergencies this state has handled in its 162-year history. In part, the magnitude of Minnesota's response has been in reaction to the uniquely virulent characteristics of the disease: In one study, researchers found that a single infected person likely spread the virus to 53 other people during the course of a single choir rehearsal.¹ Minnesota is fighting the infection, but the virus continues to spread and the need for emergency preventative measures remains in order to protect public health and safety.

12. COVID-19 kills people. In Minnesota alone, as of December 10, 2020, COVID-19 has already caused at least 4,198 deaths. 367,218 positive cases have been reported across the state with 25,862 of those positive cases reported in the first week of December alone.²

13. Minnesota is currently experiencing some of the highest numbers of COVID-19 cases since the beginning of the pandemic. For example, it took Minnesota over 6 months to record its first 100,000 positive COVID-19 cases, but only 41 days to add an additional 100,000 new cases. Just 16 days later, Minnesota logged another 100,000 positive cases.

¹ Hammer et al., *High SARS-CoV-2 Attack Rate Following Exposure at a Choir Practice—Skagit County, Washington, March 2020*, 69 MORBIDITY & MORTALITY WEEKLY R. 16, 606-10 (May 15, 2020), available at, <https://www.cdc.gov/mmwr/volumes/69/wr/mm6919e6.htm>.

² *Situation Update for COVID-19, Updated December 10, 2020*, MINN. DEPT. OF HEALTH, <https://www.health.state.mn.us/diseases/coronavirus/situation.html>.

14. In the months of November and December of 2020, Minnesota has been recording record numbers of daily new cases, hospitalizations, intensive care unit admissions, and deaths. Surging COVID-19 cases are pushing Minnesota's hospital system to a critical point.³ Due to unprecedented staffing shortages, many hospitals are diverting patients to other facilities and making difficult choices, like discharging patients that normally would have longer hospital stays. Hospitals are running out of critical care beds that are a necessity for COVID-19 patients experiencing severe symptoms.

15. Minnesota's neighboring states have been experiencing some of the highest number of cases per capita in the country. North Dakota has had the second-highest positivity rate in the nation over the past seven days according to the CDC. As of December 10, 2020, the CDC reported that North Dakota had 11,408 COVID-19 cases for every 100,000 people in the state—an infection rate of over 11 percent—nearly double that of Minnesota.

16. In Polk County, at least 35 individuals have passed away due to COVID-19 and 2,964 have tested positive. Polk County is presently experiencing extremely high rates of community spread of COVID-19. The 14-day case rate per 10,000 people has jumped dramatically from 54.45 for the reporting period of October 4, 2020 to October 17, 2020, to 218.10 for the reporting period of November 15, 2020 to November 28, 2020. Indeed, according to one report Polk County presently has a COVID-19 positivity rate of 12.9%, which is far higher than Minnesota's statewide average of 7.9%. Moreover, in Grand Forks, ND, where much of the hospital infrastructure upon which residents of Polk County rely is located, approximately 95% of hospital beds (18 of 19 beds) are occupied. This is the deadly backdrop

³ Howatt, Glen, New bar, restaurant and gym COVID-19 restrictions expected in Minnesota, MINNEAPOLIS STAR TRIB. (Nov. 18, 2020), *available at* <https://www.startribune.com/new-bar-restaurant-and-gym-restrictions-expected-in-minn/573107051/>.

against which the Defendant has decided to defy an order intended to stem community spread of a virus and unlawfully remain open to the public for on-premises consumption of food and beverages.

17. COVID-19 can easily be spread through respiratory droplets exhaled into the air by individuals not wearing face coverings. The on-premises consumption of food and beverages at bars and restaurants in Minnesota continues to pose substantial risks to public health and safety. Bars and restaurants pose a particularly high risk of COVID-19 transmission because they allow people to gather and congregate around people from different households while eating and drinking without face coverings, often for extended periods of interaction. Individuals cannot remain masked while they are eating and drinking, and many people leave their masks off in bars and restaurants while talking. Bars and restaurants can be loud, leading to a larger volume of respiratory droplets in the air as people talk, raise their voices to be heard, or laugh. Moreover, both the consumption of alcohol at these establishments and gathering with close friends or family can lower inhibitions and interfere with effective social distancing. This is especially true at bars later at night when individuals are more prone to move about and mingle within these establishments. All of these factors make bars and restaurants high risk for the easy transmission of COVID-19.

18. For example, one study examined COVID-19 transmission in a bar during a St. Patrick's Day celebration in Vietnam. The study found that it was likely that a single person spread the virus to 18 other people over the course of a single night, even though only 4 of the 18 reported being in close contact with the infectious individual.

19. In another study publicized by the national Centers for Disease Control and Prevention ("CDC"), a significant viral outbreak occurred at a family gathering at a restaurant.

Not only did the family members who attended the meal become ill, but other patrons unassociated with the reunion became sick. The researchers' hypothesis indicates that the virus was spread simply through the air of the restaurant.

20. In yet another study, an outbreak of three cases occurred at a restaurant including one case who sat 21 feet away from the infector for only 5 minutes.

21. An outbreak is generally defined as multiple cases of illness related by time and place in which an epidemiologic investigation suggests person-to-person transmission or contamination occurred. It is challenging to document the full scope of any COVID-19 outbreak, by what is known as secondary and tertiary transmission of COVID-19. This is because a person may have COVID-19 and be asymptomatic or experience mild symptoms and never get tested, but still be able to infect others. And importantly, the contact tracing process relies on truthful and accurate self-reporting from persons infected or exposed to the virus. If a person exposed to the virus does not fully disclose their symptoms, activities, or contacts, then the total numbers related to an outbreak will be underreported. Because of these challenges, the total impact of outbreaks in Minnesota will never be fully known. Instead, these documented outbreaks represent just the tip of the iceberg of transmission and there are likely many more cases from the outbreak source that haven't been identified.

22. Minnesota Department of Health's contact tracing investigations have shown that apart from long term care settings, bars and restaurants are among the settings most frequently associated with COVID-19 outbreaks in Minnesota. Specifically, the Minnesota Department of Health has already traced 448 COVID-19 outbreaks and 4,145 confirmed cases of COVID-19 to bars and restaurants in Minnesota.

23. Minnesota has had success in keeping its infection rate and mortality count relatively lower than some other areas, in part through its outreach to educate Minnesotans on the restrictions in place, and in part by placing certain restrictions on activities that are more likely to result in spread of the virus like large events and fully occupied bars or restaurants with people from different households congregating in close proximity. Nevertheless, Minnesota is currently experiencing some of the highest numbers of COVID-19 cases since the beginning of the pandemic. Minnesota's attempts to slow the spread of COVID-19 are an attempt to protect the health and safety of its residents. These efforts have been deemed necessary by the Governor, including in Polk County.

24. On March 13, 2020, Governor Tim Walz declared a peacetime emergency as a result of the COVID-19 pandemic. At its emergency meeting on March 16, the Executive Council of the State of Minnesota approved the peacetime emergency to protect Minnesotans from COVID-19. The peacetime emergency was most recently extended and approved by the Executive Council until at least through December 14, 2020, pursuant to Executive Order 20-97.

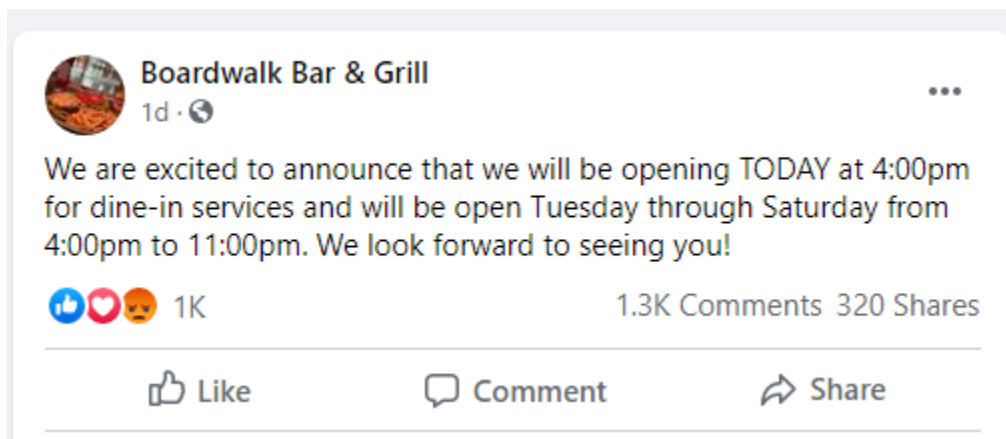
25. In order to protect public health and safety by slowing the "community spread" of COVID-19, on November 18, 2020, Governor Walz issued Executive Order 20-99, which, in relevant part, orders that "restaurants, . . . bars, . . . and other Places of Public Accommodation offering food, beverages (including alcoholic beverages), or tobacco products for on-premises consumption are closed to ingress, egress, use, and occupancy by member of the public, except as set forth below." Executive Order 20-99 goes on to specify that restaurants and bars may "permit up to five members of the public at one time . . . for the purpose of picking up their food or beverage orders." On-premises consumption is temporarily prohibited, as is any occupancy above five members of the public waiting for their orders, until December 18, 2020 at 11:59 p.m.

26. Executive Order 20-99 was promulgated by the Governor under the authority of Minnesota Statutes section 12.21, subdivision 3, clause (1), was approved by the Executive Council, and filed in the Office of the Secretary of State. Thus, pursuant to Minnesota Statutes section 12.32, Executive Order 20-74 has “the full force and effect of law” during the peacetime emergency. Moreover, Executive Order 20-99 authorizes the Attorney General to enforce its provisions and seek any relief available pursuant to Minnesota Statutes section 8.31, including civil penalties up to \$25,000 per occurrence, costs of investigation and attorney’s fees and costs, and injunctive relief.

II. BOARDWALK BAR AND GRILL, LLC VIOLATED EXECUTIVE ORDER 20-99.

27. Beginning on December 9, 2020 and continuing as of the date of this Complaint, Defendant Boardwalk Bar and Grill, LLC, which owns and operates a bar/restaurant in East Grand Forks, has opened to ingress, egress, use, and occupancy by more than five members of the public, as well as for the on-premises consumption of food and beverages (including alcoholic beverages), in direct violation of Emergency Executive Order 20-99.

28. On December 9, 2020 at 9:51 a.m., Defendant posted the following on its public Facebook account:



29. Subsequently, officers with the East Grand Forks Police Department arrived at Defendant's bar/restaurant at 3:57 p.m. on December 9, 2020, and observed members of the public entering the restaurant. Upon entering the bar/restaurant, the officers observed people seated at several tables, with alcoholic beverages in front of them. The officers provided Defendant a copy of Executive Order 20-99. The officers also informed Defendant's owner and/or manager, Jane Moss, that Defendant's bar/restaurant was open in violation of Emergency Executive Order 20-99, and Ms. Moss indicated to the officers that she understood this. While the officers were there, they observed additional members of the public entering the bar/restaurant.

30. Subsequently, at 8:03 p.m. on December 9, 2020, an East Grand Forks Police Department officer drove by Defendant's bar/restaurant and observed that it was very full with customers. This same officer drove by the bar/restaurant again at 9:51 p.m. and observed that there was still substantial business at the bar/restaurant. This same officer drove by the bar/restaurant a third time at 11:01 p.m. and noted that there were still approximately three customers still inside the bar/restaurant.

31. On December 10, 2020, the Minnesota Department of Health issued a Cease and Desist letter to Defendant pursuant to Minnesota Statutes section 144.99, subdivision 6, finding that its conduct violated Emergency Executive Order 20-99 and ordering that it cease and desist from operating as a bar/restaurant providing on-premises consumption of food or beverages. Nevertheless, Defendant publicly represented that despite receiving the Cease and Desist letter, it would continue to remain open for on-premises consumption of food and beverages in violation of Executive Order 20-99.

32. Governor Walz's Emergency Executive Order 20-99 was issued to slow the community spread of COVID-19 and thereby protect public health and safety. This includes, in part, requiring settings that are especially high risk for the easy transmission of COVID-19 from person to person and out into the community to temporarily close to on-premises dining and restrict entry by members of the public to protect the public's health and safety. Without such restrictions, the dangerous public health emergency Minnesota is currently facing would continue to worsen threatening the health, safety, and lives of Minnesotans. Attorney General Keith Ellison has authority to enforce Executive Order 20-99 and brings this action to enjoin and remediate Defendant Boardwalk Bar and Grill, LLC's violations described herein.

COUNT I
VIOLATION OF EMERGENCY EXECUTIVE ORDER 20-99

1. Plaintiff re-alleges all prior paragraphs of this Complaint.
2. Paragraph 7.c.iii.(A)(1) of Executive Order 20-99 provides in relevant part:

c. Places of Public Accommodation. Places of Public Accommodation are subject to the following requirements and limitations:

...

iii. Certain Place of Public Accommodation Closed to Members of the Public. The following Places of Public Accommodation are closed to

members of the public as set forth below. “Members of the public” means people who are not workers affiliated with the Place of Public Accommodation.

(A) Restaurants, food courts, cafes, coffeehouses, bars, . . . and other Places of Public Accommodation offering food, beverages (including alcohol beverages), or tobacco products for on-premises consumption are closed to ingress, egress, use, and occupancy by members of the public, except as set forth below.

1. The above establishments may, and are encourages to, offer food and beverage using delivery services, window service, walk-up service, drive-through service, or drive-up service. In offering food or beverage service under this paragraph, a Place of Public Accommodation may permit up to five members of public accommodation for the purpose of picking up their food or beverage orders. All such establishments must[] follow the requirements for all businesses set forth below and industry-specific guidance available on the Stay Safe Minnesota website (<https://staysafe.mn.gov>).
2. Because indoor dine-in service is prohibited at restaurants, for the purposes of Minnesota Laws 2020, Chapter 75, Limited Off-Sale for Restaurants Closed by Executive Order, nothing in this Executive Order constitutes, prescribes, or should be deemed as, the expiration, termination, or rescission of the closure of restaurants as set forth in Executive Order 20-04, as modified and extended by Executive Orders 20-18 and 20-33, or any subsequent order. As set forth in Minnesota Laws 2020, Chapter 75, limited off-sale of alcoholic beverages is authorized only for take-out service with a prepared take-out food order, and delivery is not authorized.

3. Defendant is a “Place of Public Accommodation” as defined by Executive Order 20-99 paragraph 5.f because Defendant is a business (as defined by Executive Order 20-99 paragraph 5.c) whose goods, services, facilities, privileges, advantages, or accommodations are extended, offered, sold, or otherwise made available to the public.

4. Defendant is a restaurant or bar, as those terms are used in Executive Order 20-99 paragraph 7.c.iii.A, because Defendant offers food or beverages for on-premises consumption and thus must be closed to ingress, egress, use, and occupancy by members of the public from

November 20, 2020 at 11:59 pm at least until December 18, 2020 at 11:59 pm, except that Defendant may permit up to five members of the public at one time for the purpose of picking up their to-go food or beverage orders.

5. On and after December 9, 2020, Defendant has provided on-premises consumption of food or beverages to the public, and has allowed more than five members of the public in the bar/restaurant at any one time.

6. Defendant's conduct, practices, and actions described in this Complaint constitute multiple, separate violations of Emergency Executive Order 20-99.

PRAYER FOR RELIEF

WHEREFORE, the State of Minnesota, by its Attorney General, Keith Ellison, respectfully asks this Court to award judgment against Defendant as follows:

1. Declaring that Defendant's actions, as set forth above, constitute multiple, separate violations or threatened violations of Emergency Executive Order 20-99;

2. Enjoining Defendant and its employees, officers, directors, agents, successors, assignees, affiliates, merged or acquired predecessors, parents or controlling entities, subsidiaries, and all other persons acting in concert or participation with them, from engaging in any conduct in violation or threatened violation of Emergency Executive Order 20-99 or any future Executive Orders relating to restaurants, bars, or similar facilities;

3. Awarding judgment against Defendant for restitution, disgorgement, and/or damages to the State under the *parens patriae* doctrine, the general equitable powers of this Court, Minnesota Statutes section 8.31, and any other authority, for all violations described in this Complaint;

4. Awarding judgment against Defendant for civil penalties of up to \$25,000 pursuant to Minnesota Statutes section 8.31, subdivision 3, and section 645.24, for each separate violation of Emergency Executive Order 20-99;

5. Awarding the State of Minnesota its costs, including litigation costs, costs of investigation, and attorneys' fees, as authorized by Minnesota Statutes section 8.31, subdivision 3a; and

6. Granting such further relief as provided by law or equity or as the Court deems appropriate and just.

Dated: December 11, 2020

KEITH ELLISON
Attorney General
State of Minnesota

/s/ Jason Pleggenkuhle
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MINN. STAT. § 549.211 ACKNOWLEDGMENT

The party on whose behalf the attached document is served acknowledges through its undersigned counsel that sanctions, including reasonable attorney fees and other expenses, may be awarded to the opposite party or parties pursuant to Minn. Stat. § 549.211.

/s/ Jason Pleggenkuhle
JASON PLEGGENKUHLE