

COVER SHEET FOR FILING CIVIL ACTIONS

COMMONWEALTH OF VIRGINIA

Case No.

(CLERK'S OFFICE USE ONLY)

Portsmouth

Circuit Court

FISH AND SLIPS, LLC

v./In re:

DALE . FARINO, ET AL.

PLAINTIFF(S)

DEFENDANT(S)

I, the undersigned [] plaintiff [] defendant [x] attorney for [x] plaintiff [] defendant hereby notify the Clerk of Court that I am filing the following civil action. (Please indicate by checking box that most closely identifies the claim being asserted or relief sought.)

GENERAL CIVIL

Subsequent Actions

- [] Claim Impleading Third Party Defendant
[] Monetary Damages
[] No Monetary Damages
[] Counterclaim
[] Monetary Damages
[] No Monetary Damages
[] Cross Claim
[] Interpleader
[] Reinstatement (other than divorce or driving privileges)
[] Removal of Case to Federal Court

Business & Contract

- [] Attachment
[] Confessed Judgment
[] Contract Action
[] Contract Specific Performance
[] Detinue
[] Garnishment

Property

- [] Annexation
[] Condemnation
[] Ejectment
[] Encumber/Sell Real Estate
[] Enforce Vendor's Lien
[] Escheatment
[] Establish Boundaries
[] Landlord/Tenant
[] Unlawful Detainer
[] Mechanics Lien
[] Partition
[] Quiet Title
[] Termination of Mineral Rights

Tort

- [] Asbestos Litigation
[] Compromise Settlement
[] Intentional Tort
[] Medical Malpractice
[] Motor Vehicle Tort
[] Product Liability
[] Wrongful Death
[] Other General Tort Liability

ADMINISTRATIVE LAW

- [] Appeal/Judicial Review of Decision of (select one)
[] ABC Board
[] Board of Zoning
[] Compensation Board
[] DMV License Suspension
[] Employee Grievance Decision
[] Employment Commission
[] Local Government
[] Marine Resources Commission
[] School Board
[] Voter Registration
[] Other Administrative Appeal

DOMESTIC/FAMILY

- [] Adoption
[] Adoption - Foreign
[] Adult Protection
[] Annulment
[] Annulment - Counterclaim/Responsive Pleading
[] Child Abuse and Neglect - Unfounded Complaint
[] Civil Contempt
[] Divorce (select one)
[] Complaint - Contested*
[] Complaint - Uncontested*
[] Counterclaim/Responsive Pleading
[] Reinstatement - Custody/Visitation/Support/Equitable Distribution
[] Separate Maintenance
[] Separate Maintenance Counterclaim

WRITS

- [] Certiorari
[] Habeas Corpus
[] Mandamus
[] Prohibition
[] Quo Warranto

PROBATE/WILLS AND TRUSTS

- [] Accounting
[] Aid and Guidance
[] Appointment (select one)
[] Guardian/Conservator
[] Standby Guardian/Conservator
[] Custodian/Successor Custodian (UTMA)
[] Trust (select one)
[] Impress/Declare/Create
[] Reformation
[] Will (select one)
[] Construe
[] Contested

MISCELLANEOUS

- [] Amend Death Certificate
[] Appointment (select one)
[] Church Trustee
[] Conservator of Peace
[] Marriage Celebrant
[] Approval of Transfer of Structured Settlement
[] Bond Forfeiture Appeal
[] Declaratory Judgment
[] Declare Death
[] Driving Privileges (select one)
[] Reinstatement pursuant to § 46.2-427
[] Restoration - Habitual Offender or 3rd Offense
[] Expungement
[] Firearms Rights - Restoration
[] Forfeiture of Property or Money
[] Freedom of Information
[] Injunction
[] Interdiction
[] Interrogatory
[] Judgment Lien-Bill to Enforce
[] Law Enforcement/Public Official Petition
[] Name Change
[] Referendum Elections
[] Sever Order
[] Taxes (select one)
[] Correct Erroneous State/Local
[] Delinquent
[] Vehicle Confiscation
[] Voting Rights - Restoration
[] Other (please specify)

[] Damages in the amount of \$ are claimed.

06/26/2024

DATE

[] PLAINTIFF

[] DEFENDANT

[x] ATTORNEY FOR

[x] PLAINTIFF

[] DEFENDANT

LOUIS N. JOYNES, II, ESQUIRE

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*"Contested" divorce means any of the following matters are in dispute: grounds of divorce, spousal support and maintenance, child custody and/or visitation, child support, property distribution or debt allocation. An "Uncontested" divorce is filed on no fault grounds and none of the above issues are in dispute.

VIRGINIA: THE CIRCUIT COURT FOR THE CITY OF PORTSMOUTH

FISH AND SLIPS, LLC,

Plaintiff,

v.

Dale Farino

CEO Virginia ABC Authority

Civil No. :

THE VIRGINIA ALCOHOL CONTROL

BOARD,

TIM HUGO in his Official Capacity as a Virginia Control Board Member,

MARK STEPANIAN in his Official Capacity as a Virginia Control Board Member,

BILL EUILLE in his Official Capacity as a Virginia Control Board Member,

GREGORY F. HOLLAND in his Official Capacity as a Virginia Control Board Member,

LISA JENNINGS in her Official Capacity as a Virginia Control Board Member,

And

Hon. Glenn Youngkin

Governor

THE COMMONWEALTH OF VIRGINIA,

Defendants

COMPLAINT

COMES NOW, the Plaintiff Fish and Slips, LLC, a Virginia Limited Liability Company, located at 10 Crawford Parkway, Portsmouth, Virginia 23704 (hereinafter "Restaurant"), by counsel and files the following Complaint for declaratory and injunctive relief against the Defendants, the Commonwealth of Virginia ("Virginia") and the Virginia Alcohol Control Board. This Complaint involves the MBAR (Mixed Beverage Annual Review) statute, Sec. 4.1-210(A)(1) of the Code of Virginia. That statute, over the years, has been amended and has had

exclusions added to the point that it no longer serves rational basis or achieves any lawful purpose. The various amendments are violative of provisions of the Virginia Constitution and statutory provisions and policies of the Commonwealth. MBAR forcefully controls, in an anticompetitive manner, the price of food rather than the sale of mixed beverages. In support of its Complaint, the Plaintiff hereby respectfully states unto this Honorable Court as follows:

INTRODUCTION

Plaintiff's Complaint seeks both injunctive and declaratory relief from the unconstitutional MBAR food-beverage ratio statute, Va. Code §4.1-210(A)(1), which unconstitutionally restricts holders of mixed beverage restaurant licenses by requiring that the "gross receipts from the sale of food cooked or prepared, and consumed on the premises and non-alcoholic beverages served on the premises....amount to at least 45% of the gross receipts from the sale of mixed beverages and food." This law, first enacted by the Commonwealth of Virginia in 1934, is unconstitutional on several grounds, including but not limited to a violation of Plaintiff's rights under the Fourteenth Amendment's Due Process and Equal Protection Clauses as a result of Virginia improperly relying on the state's Twenty-First Amendment powers to regulate alcoholic beverages. Additionally, the manner in which MBAR is now administered creates practices that tend to decrease competition and adversely affects prices, violative of the laws and policies of the Commonwealth.

PARTIES

1. The Plaintiff, RESTAURANT, is a Virginia Limited Liability Company and business legally organized under the laws of the Commonwealth of Virginia that, in accordance with Virginia Code § 4.1-100, is an established a place of business (i)

where meals with substantial entrees are regularly sold and (ii) which has adequate facilities and sufficient employees for cooking, preparing, and serving such meals for consumption at tables in dining areas on the premises, and includes establishments specializing in full course meals with a single substantial entree. RESTAURANT is a current holder of a mixed beverage license as provided for by the defendant Virginia Alcoholic Beverage Control Board (ABC) and has faithfully abided by the requirements of 3 VAC5-50-110, and has attempted to faithfully abide by the requirements of Virginia Code Section 4.1-210 (A) (1).

2. That your Plaintiff Restaurant operates its business from the harbor docks in downtown Portsmouth and as one would expect there is a seasonal aspect to the business- i.e. the performs better by selling more food in the warmer months (May, June, July, August, and September) then in the cooler and colder months. The Restaurant must curtail its month's liquor sales to meet the MBAR requirements in the cool and cold months.
3. That your Plaintiff Restaurant is located at 10 Crawford Parkway, Portsmouth, Virginia, which happens to be only 4.02 miles from the Rivers Casino which is located at 3630 Victory Boulevard, Portsmouth, Virginia and which has no MBAR requirements.
4. Defendant, Dale Farino, is the CEO of the Virginia ABC Authority, responsible for the carrying out, execution of enforcement of all ABC laws and regulations, including MBAR

5. The Defendant Commonwealth of Virginia, through the Governor, Glenn Youngkin, is a governmental body under the auspices of which Virginia Code §4.1-210(A)(1) is enforced. And the ABC Authority is called upon, by the Governor, to raise and provide sums of monies to fund various functions of the Commonwealth, not only the administration of the ABC Authority.
6. The Virginia Alcohol Beverage Control Board (“ABC”) is a public safety agency in the Commonwealth, consisting of five (5) members, appointed by the Governor, who are charged with the administration of the state’s alcoholic beverage-related laws; they oversee and enforce Virginia’s MBAR regulatory structure over restaurants that do business in the Commonwealth and are licensed by the ABC to serve alcohol and mixed-beverages to its customers. The board consists of Tim Hugo, Mark Stepanian, Bill Eulle, Gregory F. Holland, and Lisa Jennings.
7. All defendants are sued in their respective official capacities, but are subject to declaratory and injunctive relief as they are administering the unconstitutional MBAR provision.

JURISDICTION AND VENUE

8. This Court has subject matter jurisdiction over this dispute pursuant to Va. Code § 17.1-513.
9. This Court has personal jurisdiction over Defendants as citizens, government officials, and/or governmental/administrative bodies of the Commonwealth of Virginia and/or pursuant to Va. Code § 8.01-328.1(A)(1).

10. Venue is proper in this Court pursuant to Va. Code § 8.01-261 because this action seeks an injunction against the enforcement of unconstitutional laws at Plaintiffs' businesses in Portsmouth, Virginia, and pursuant to Va. Code § 8.01-262 because the cause of action arose and Plaintiffs are located in Portsmouth, Virginia.

FACTUAL BACKGROUND

11. Section 4.1-210(A)(1) of the Code of Virginia applies to holders of mixed beverage restaurant licenses and requires, among other things, that the "[m]ixed beverage restaurant licenses, which shall authorize the licensee to sell and serve mixed beverages for consumption in dining areas and other designated areas of such restaurant. Such license may be granted only to persons (i) who operate a restaurant and (ii) gross receipts from the sale of food cooked or prepared, and consumed on the premises and nonalcoholic beverages served on the premises... amount to at least 45% of the gross receipts from the sale of mixed beverages and food." This "food-beverage ratio" must be reviewed by the Virginia Alcoholic Beverage Control Board ("ABC Board") each year, and each holder of a mixed-beverage license must keep meticulous records and accountings to ensure that it complies with the law, or forfeit the ability to sell distilled spirits to its customers. Wine and beer sales are not a part of this calculation, having been removed in 1990 through a legislative amendment to this code section. Thus, all calculations of the food-to-beverage ratio include the sale amount of liquor only to the restaurant's customers on a monthly basis. In a nutshell, "Food" means food and nonalcoholic beverages. "Mixed Beverages" means liquor. It does not include beer and wine. In other words, a restaurant must take its gross receipts from food and nonalcoholic beverage sales and divide it by its gross receipts

from food, nonalcoholic beverage sales, and mixed beverage sales. The resulting figure must be 45% or more in order for the restaurant to be in compliance. If the restaurant is off of the 45% requirement at all, it can lose its liquor license for a period of time penalty, or entirely.

12. The historical framework of the food-to-ratio mixed-beverages requirement harken back to the days of Prohibition, when the 19th Amendment to the United States Constitution was passed (over a century ago). The Eighteenth Amendment was ratified on January 16, 1919 after years of advocacy by the temperance movement. The subsequent enactment of the Volstead Act established federal enforcement of the nationwide prohibition on alcohol. As many Americans continued to drink despite the amendment, Prohibition gave rise to a profitable black market for alcohol, fueling the rise of organized crime. Throughout the 1920s, Americans increasingly came to see Prohibition as unenforceable, and a movement to repeal the Eighteenth Amendment grew until the Twenty-first Amendment was ratified in 1933. Section 1 of the Twenty-first Amendment expressly repealed the Eighteenth Amendment. However, Section 2 of the Twenty-first Amendment still allowed for the banning of the importation of alcohol into states and territories that had laws prohibiting the importation or consumption of alcohol. Several states continued to be "dry states" in the years after the repeal of the Eighteenth Amendment.
13. Virginia and its counties were no exception to the struggles states had in regulating alcohol after the passage of the Twenty-first amendment to the constitution. At a referendum election on October 3, 1933, the people of Virginia voted to overcome a continuation of the state prohibition against liquor and opted for "a plan of liquor

control.” A legislative Liquor Control Committee began developing recommendations for instituting this plan of liquor control which became the Virginia Alcohol Beverage Control Act of 1934. Many of the provisions contained in the original version of the “ABC Act” are still in effect today. However, in its 1934 report, entitled “Liquor Control,” the Committee disapproved of liquors by the drink for consumption in public establishments because, at that time in Virginia’s history, the electorate explicitly opposed “the return of the saloon” when it chose a plan of liquor control. Saloon culture and its “attendant evils” were blamed for many of the societal problems that lead to Prohibition, and avoiding a return of that culture became a primary focus of those individuals tasked with setting up effective alcohol regulatory schemes in Virginia after the repeal of Prohibition. When announcing ratification of the Twenty-First Amendment on December 5, 1933, President Franklin D. Roosevelt said: “I ask especially that no State shall by law or otherwise, authorize the return of the saloon either in its old form or in some modern guise.” The saloon, as it existed in pre-prohibition days according to the government, was a menace to society and must never be allowed to return, because it promoted poverty, crime and drunkenness. Public opinion at that time in the 20th century equated these societal evils of alcohol consumption as a matter of public concern that the government should eradicate; such evils could be uniformly found in these local saloons according to it, and the government undertook such eradication by eliminating the bar and prohibiting restaurants from serving “liquor by the drink.” Consequently, and taking this public concern to heart, the Liquor Control Committee of 1934 opposed allowing liquors by the drink in restaurants, equating such a practice to that which existed in pre-

Prohibition saloons. The Liquor Control Committee acknowledged that “[n]o one [had] yet satisfactorily defined a saloon,” but determined that “a ... restaurant which serves distilled liquors at tables is not a saloon in the common acceptance of the word, but really the only difference is that the bar and swinging doors are missing.”

14. In Virginia, the serving of liquor by the drink – or “mixed beverages” – in licensed restaurants was eventually approved by the General Assembly in 1968, when the ABC Act was amended to allow for service of mixed beverages at licensed restaurants in localities upon passage of a local referendum to allow the conduct. The requirement of a local referendum is still in place today, and there continue to be localities that are considered “dry counties” because they have (even to this day) not approved the sale of mixed beverages by a vote of the local citizenry. When the General Assembly approved the sale of mixed beverages in 1968, concerns about the resurgence of the “saloon” (what is called a “bar” in modern times) still existed, and even exist to this day. The food-beverage ratio was instituted as a way to curb excessive alcohol consumption and ensure that mixed beverages were only served in full-service restaurants and dining establishments, thereby prohibiting the establishment of free-standing “bars.” Additionally, these establishments could not serve alcohol if they allowed “immoral, indecent, or profane language;” or, have fewer than 50 seats at tables, thereby excluding small restaurants from participating in the sale of liquor by the drink; and, in order to maintain its mixed-beverage license, the restaurant could not hire certain kinds of people. “No licensee ... shall knowingly employ in the licensed business any person who has the general reputation as a

prostitute, homosexual, panderer, gambler, habitual law violator, person of ill repute, user of or peddler of narcotics or person who drinks to excess.”

15. In the beginning of the institution of the “liquor by the drink” law, mixed beverage licensees were required to sell more food (at that time, meaning meals rather than food, such as a single hamburger) than alcoholic beverages, including, initially, wine and beer. As a result, the food-to-alcohol ratio was set at the time as a 51/49 percent ratio, meaning that restaurants were not allowed to make more money selling alcohol than they made from selling meals. The law was amended numerous times over the years that gradually eroded the food to beverage MBAR regulations originally created by removing some of the original requirements as set forth above, and the state eventually, abandoned the meal requirement, allowing food only, and reduced the food to alcohol ratio to 45/55. Subsequent amendments to the code section arbitrarily exempted beer and wine from the ratio, (allowing restaurants to sell them in unlimited quantities), even though a 12-ounce beer and a 4-ounce glass of wine has as much alcohol as a 1-ounce shot of liquor. The current law has been in effect since 1990, and has not been modified since, despite a number of attempts to do so in the Virginia General Assembly.

16. Ultimately, and according to the bill’s original legislative sponsor Del. Henry Howell, Jr., the establishment of the Virginia ABC Board and its corresponding laws were intended to keep the price of liquor so low that bootleggers could not compete with the state, and were also intended to promote temperance, and rather than it being used to fill the coffers of the Virginia treasury, it would be used as a means of “social control.” However, Del. Howell’s admonition that the sale of distilled spirits would

not be used for filling the state treasury has rung hollow, as the state regularly posts profits of nearly one billion dollars per year through its sales of liquor to the public. And, because these government-run ABC stores control the price of liquor in Virginia, restaurants often must raise their food prices that they charge their customers, in order to stay in compliance with the MBAR law, when the government arbitrarily raised the prices of liquor, such as when the Virginia General Assembly did in order to balance its budget in 2014.

17. Additionally, a law passed by the General Assembly in 2022 (HB 455, Del. B. Knight) allowed Virginia to exempt casino and gaming parlors from MBAR, enabling them to operate (24 hours a day) without the same food-to-beverage ratio requirements imposed upon Virginia restaurants, thereby giving these establishments, that have a bar and restaurant facility within them a competitive advantage over the restaurants that operate in the same region as the gaming establishment, because these entities can offer complimentary and/or high end “top shelf” liquor without having to comply with the food-to-beverage ratios. Simply put, the MBAR law and the exemptions to it with regard to casinos allow the casino to attract customers with the availability of \$2000 shots of Perry VanWinkle bourbon, where the restaurant nearby could not without fear of being out of compliance with the food-to-mixed beverage regulations.

18. There are other exemptions to the food-to-beverage ratio MBAR, which include: a) “cocktails-to-go” alcohol delivery services; b) sale of alcohol at malls and designated retail open-spaces; and c) amphitheaters and open spaces that hold regular events.

19. The state Constitution also makes it clear that the erosion of the MBAR law over the years has created an unlevel playing field, that benefits some Virginia businesses, while unconstitutionally impairing others for reasons that fail the “rational basis” test. For example, Article I Section 1 creates the fundamental right of Virginia’s citizens to acquire and possess property on equal footing with the rest of the citizenry (“[t]hat all men are by nature equally free and independent and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety”), in its coexistence with Article I Section 4, which sets forth the principle that no man (or set of men) are entitled to exclusive or separate privileges: “That no man, or set of men, is entitled to exclusive or separate emoluments or privileges from the community.” Here, the MBAR laws and exemptions, as well as the government controlling the price of distilled spirits, interfere with the Plaintiff being able to set food prices (not based upon competition but rather based upon its need to be in compliance with state law), as well as conferring exclusive and separate privileges upon other similar businesses (i.e., casinos) that Plaintiff is expressly deprived of by law.

20. In fact, the Virginia Constitution prohibits the passage of any of these very laws that create such exemptions. Specifically, Article IV Section 15 states: “No private corporation, association, or individual shall be specially exempted from the operation of any general law, nor shall a general law's operation be suspended for the benefit of any private corporation, association, or individual.” Because the MBAR law, as

written permits such exemptions, it and the subsequent laws that create such exemptions violate Article IV Section 15 of the Virginia Constitution.

21. Moreover, such a prohibition as referenced directly above is similarly stated in Article IV Section 14(8)(sub. 18) of the Virginia Constitution: “The General Assembly shall not enact any local, special, or private law...[r]emitting, releasing, postponing, or diminishing any obligation or liability of any person, corporation, or association to the Commonwealth.” Quite simply, the Virginia Constitution does not permit the General Assembly to make laws that releases any corporation of its obligations under law owed to the Commonwealth, and therefore all statutory exemptions carved from the MBAR law are unconstitutional as applied.

22. And, because Virginia uses its control over distilled spirits, and dictates the price of liquor that is sold to businesses that hold mixed beverage licenses (such increasing it in order to raise state revenues needed to balance the state’s biennium budget), the MBAR laws effectively are a tax. Under Article X Section 1 of the constitution, all taxes must be uniform in their assessment upon Virginia businesses, which MBAR is not.

23. The Plaintiff is a restaurant duly licensed and authorized to transact business as a restaurant in the Commonwealth of Virginia since 2016. Plaintiff applied for and was issued a mixed beverage license by the Commonwealth of Virginia on July 5, 2017 and has maintained that license in force up through and including the date of the filing of this lawsuit.

24. Your Plaintiff, Restaurant, is located approximately four (4) miles from the Rivers Portsmouth Casino, and fourteen (14) miles from a Rosie's Gaming Emporium. Like the casino and Rosie's, the Restaurant operates a fine dining restaurant establishment with a bar within the existing premises. However, unlike the casino and the gaming emporium, the Restaurant is not allowed to offer games of chance and/or gambling to its patrons, and it (The Restaurant) does not have any exemption to the MBAR laws and is not allowed to serve alcohol twenty-four (24) hours a day.
25. The MBAR laws and regulations were instituted by Virginia no longer are needed to accomplish their original goal – to prevent saloons from existing in Virginia. And, these gradual relaxing of the restrictive rules and regulations, coupled with the numerous exemption created by subsequent statutes, demonstrate that while a rational basis for such laws may have existed nearly a century ago in the establishment of the ABC regulatory system, they are now antiquated and violative of the Virginia Constitution and the 14th Amendment of the United States Constitution.
26. Today, the MBAR law does not achieve the rationale of prohibiting saloons but rather it is effectively adversely impacting the ability and freedom of restaurant entrepreneurs to freely price the food and meals that they serve to their customers. For any restaurant that is maintaining the 45/55 ratio, if the ABC raises prices for mixed beverages, the restaurant, to maintain the required ratio and to keep its license to sell mixed beverages, has no choice but to raise its food prices.
27. Larger restaurants, who have no problem maintaining the required 45/55 ratio can avoid any price increases and thus have a competitive advantage.

28. The laws of the Commonwealth are not allowed to craft such competitive advantages.
See Sec. 59.1-9.2 of the Code of Virginia
29. To further illustrate the point that your Plaintiff asserts, that the Mixed Beverage Annual Review no longer achieves any rational basis one needs only to consider 3 VAC 5-50-110 (c) (2) wherein a restaurant is required to have “monthly sales of food prepared on the premises of a mixed beverage restaurant licensee shall not be less than FOUR THOUSAND DOLLARS (\$4,000.00), of which at least TWO THOUSAND DOLLARS (\$2,000.00) shall be in the form of meals.”
30. That if the legislature is truly trying to prevent a restaurant from being a bar or a saloon then 3 VAC 5-50-110 achieves this purpose by not only requiring the sales of food, but further requiring that half of the sale of food must be in the form of meals.
31. That 3 VAC 5-50-110 (A) (5) provides the definition of meal as: “meal” means a selection of foods for one individual served and eaten, especially at one of the customary regular occasions for taking food during the day such as breakfast, lunch or dinner that consists of at least one main dish of meat, fish, poultry, legumes, nuts, seeds, eggs or other protein sources accompanied by vegetables, fruit, grain, or starch products.”
32. That with such a strict requirement as provided for in 3 VAC 5-50-110 the MBAR serves no rational purpose and the legislative intent behind the MBAR has already been realized through the aforementioned regulation.
33. That the MBAR is an illegitimate and unfair tax on all Virginia restaurants, one needs only to read Michael Marty’s June 8, 2024 article entitled “Virginia ABC Cuts It’s

Way to Profit amid Liquor Sales Decline” and then take it to its logical and undeniable effect on Virginia’s restaurants (a copy of Marty’s article is attached hereto as Exhibit A). In his article Marty outlines that “ABC now faces ONE HUNDRED AND TEN MILLION (\$110,000,000) short fall in budget revenue. To rectify this shortfall, ABC has cut costs and upon information and belief is increasing prices on the spirits it (ABC) sells. The glaring problem is that any and all price increases on spirits directly affects the MBAR for every restaurant in Virginia by the licensee paying more for spirits they must necessarily sell more food in order to comply with the MBAR formula. Consequently every patron of Virginia’s restaurants will probably pay more as well as the costs are passed onto the patron.

CAUSES OF ACTION

CLAIM FOR DECLARATORY JUDGMENT RELIEF

COUNT I

Violation of Article I Sections 1 and 4 of the Constitution of Virginia

34. Plaintiff incorporates all prior paragraphs as though fully restated herein, verbatim.
35. Article I Section 1 creates the fundamental right of Virginia’s citizens to acquire and possess property on equal footing with the rest of the citizenry (“[t]hat all men are by nature equally free and independent and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.”

36. Article I Section 4, which sets forth the principle that no man (or set of men) are entitled to exclusive or separate privileges: “That no man, or set of men, is entitled to exclusive or separate emoluments or privileges from the community.”

37. MBAR laws and exemptions, as well as the government controlling the price of distilled spirits, interfere with the Plaintiff being able to set food prices as it wholly determines based upon market pressures and value, but rather based upon its need to be in compliance with state law, as well as conferring exclusive and separate privileges upon other similar businesses (i.e., casinos) that Plaintiff is expressly deprived of by law. Therefore, the ABC laws and regulations as it pertains to “restaurants” is a form of taxation by the state. As applied, Plaintiff is unfairly, unequally, and unconstitutionally taxed in comparison to casinos and gaming emporiums, that have restaurants and bars on their premises.

COUNT II

Violation of the Virginia Antitrust Act

38. Plaintiff incorporates all prior paragraphs as though fully restated herein, verbatim.

39. Additionally, the manner in which the MBAR law is administered is violative of the competitive policies of the Commonwealth as set forth in the Virginia Antitrust Act, Sec. 59.1-9.1 et. Seg MBAR adversely decreases competition amongst restaurants regarding food pricing without the mandatory oversight that the Commonwealth and its agencies require.

COUNT III

Violation of Article IV Sections 14(8) and 15 of the Constitution of Virginia

40. Plaintiff incorporates all prior paragraphs as though fully restated herein, verbatim.
41. Article IV Section 14(8)(sub. 18) of the Virginia Constitution: “The General Assembly shall not enact any local, special, or private law...[r]emitting, releasing, postponing, or diminishing any obligation or liability of any person, corporation, or association to the Commonwealth.”
42. The Virginia Constitution does not permit the General Assembly to make laws that releases any corporation of its obligations under the law and owed to the Commonwealth, and therefore all statutory exemptions carved from the MBAR law are unconstitutional as applied.
43. Article IV Section 15 states: “No private corporation, association, or individual shall be specially exempted from the operation of any general law, nor shall a general law's operation be suspended for the benefit of any private corporation, association, or individual.” Because the MBAR law, as written permits such exemptions, it and the subsequent laws that create such exemptions violate Article IV Section 15 of the Virginia Constitution.
44. Under this Article, the MBAR related laws and regulations, as well as all statutory exemptions created to these laws and regulations are unconstitutional as applied to the Plaintiff.

COUNT IV

Violation of Article X Section 1 of the Constitution of Virginia

45. Plaintiff incorporates all prior paragraphs as though fully restated herein, verbatim.
46. Article X Section 1 of the constitution states: “All property, except as hereinafter provided, shall be taxed. All taxes shall be levied and collected under general laws and shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax.”
47. Virginia, in exerting its authority and control over alcohol, and in particular distilled spirits, dictates the price of liquor that is sold to businesses that hold mixed beverage licenses. The Virginia General Assembly is empowered and has utilized its price control authority of liquor to raise prices in order to raise state revenues needed to balance the state’s biennium budget. Therefore, the MBAR laws are a tax upon both citizens and restaurants in Virginia.
48. Because Article X Section 1 of the constitution mandates that all taxes must be uniform in their assessment upon Virginia businesses that operate restaurants that hold mixed beverage licenses, the application of the ABC laws and regulations, including but not limited to MBAR are not uniform when applied to restaurants that do not also offer games of chance and casino gambling to its patrons.
49. Therefore, since casinos and gaming emporiums do not have to raise the prices of their food sold at their establishments in order to be in compliance with the MBAR food to beverage ratio when the state increases the prices of distilled spirits sold to it

by the state, such amounts to an unfair advantage and unconstitutional tax upon Plaintiff in violation of Article X Section 1 of the Virginia Constitution.

COUNT V

Violation of the Due Process Clause of the 14th Amendment of the United States Constitution

50. The Due Process Clause of the 14th Amendment to the United States Constitution states that “[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”
51. The MBAR and applicable ABC enabling statutes were created nearly a century ago by the Commonwealth of Virginia for the rational basis of prohibiting the creation of stand-alone bars and saloons in the state after the repeal of Prohibition through the 21st Amendment.
52. The current MBAR laws, ABC regulations and statutory exemptions granted to certain classes of businesses are not uniform, and thereby deprive the Plaintiff of its liberty and property without the due process of law, and deprive Plaintiff of the right of equal protection under the laws, in that they are applied differently to businesses similarly situated to Plaintiff’s restaurant.

COUNT VI

Request for Temporary and Permanent Injunctive Relief

53. Plaintiff incorporates all prior paragraphs as though fully restated herein, verbatim.

54. Temporary injunctive relief is necessary to preserve the *status quo ante* pending litigation.

55. Moreover, Plaintiff has been and will continue to be irreparably harmed absent the issuance of a temporary and permanent injunction.

56. Plaintiff has no adequate remedy at law.

57. Defendants will not be harmed if a temporary and/or permanent injunction is granted.

58. Plaintiff is likely to succeed on the merits.

59. The public interest in the preservation of the Virginia Constitution's guarantees of equal protection, due process, and protections of the citizenry under Article I, Sections 1 and 4, Article IV Sections 14(8) and 15 in the equal application of the law, Article X, Section 1.

PRAYER FOR RELIEF

WHEREFORE, your Plaintiff prays for the following relief:

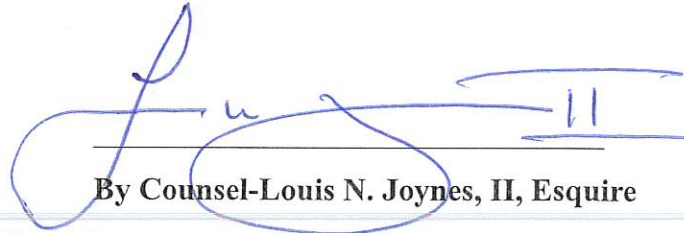
1. That this Honorable Court declare that the MBAR statutes, ABC regulations and exemptions granted thereto by the Virginia General Assembly as unconstitutional under Counts I, II, III, IV and V of Plaintiff's Complaint;

2. That this Honorable Court grant Plaintiff both temporary and permanent injunctive relief as prayed for in Count VI of Plaintiff's Complaint; and

3. That this Honorable Court grant Plaintiff any and all other relief that this Court deems mete and just under the circumstances.

Respectfully Submitted,

FISH AND SLIPS, LLC,



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https://richmond.com/news/state-regional/government-politics/virginia-abc-general-assembly/article_ac109072-24ee-11ef-8d9c-47d49363cdc0.html

TOP STORY | EDITOR'S PICK

Virginia ABC cuts its way to profit amid liquor sales decline

Michael Martz

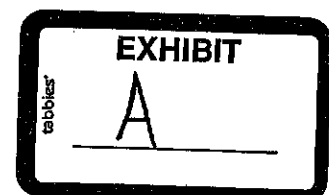
Jun 8, 2024



The Virginia ABC complex opened about three years ago in Hanover County. Officials say the Virginia Alcoholic Beverage Control Authority's profit margin is tracking slightly ahead of the revised forecast for this year, as it makes up for some lost revenue by reducing expenses.

Times-Dispatch

Michael Martz



The **Virginia Alcoholic Beverage Control Authority** is trying to get back on track to profitability and stability after a reckoning with declining liquor sales that dealt a big blow to the profit margins it had promised to the state in this fiscal year and the two-year budget that takes effect on July 1.

The **General Assembly** lowered its expectation for ABC profits by almost \$5 million in the current fiscal year and \$44 million in the next one, as the state-owned liquor monopoly faced a drop in retail sales of almost \$40 million in the first 10 months of the current year — through April 30.

The revenue shortfall is based on the budget that the authority adopted in August and the revenue forecast used by Gov. Glenn Youngkin last fall to build his proposed two-year state budget.

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ABC now faces \$110 million shortfall in budget revenue

But ABC officials said Friday that the authority's profit margin is tracking slightly ahead of the revised forecast for this year, as it makes up for some lost revenue by reducing expenses.

“Our objective is to generate greater profit, so we’re not going to stop,” **Chief Administrative Officer David Alfano** told the authority board of directors.

Federal suit dismissed

The authority is also moving beyond a \$1 million federal lawsuit that its then-director of retail operations, Jennifer Burke, filed against it last year. U.S. District Court Judge Robert Payne dismissed the lawsuit on Thursday, based on a settlement reached last month. ABC did not disclose the terms of the settlement, and Burke's attorney did not respond to a request for comment on Friday.

Burke resigned her position on June 3, ABC officials said. Lori Murphy, a 28-year ABC employee, became director of retail operations on Thursday, after serving in an interim capacity since late April.

"I'm just really excited to help us move forward," Murphy told the board.

The authority, established in 2018 after a transition from a state agency created 84 years earlier at the end of Prohibition, has a new CEO, Dale Farino, a former alcoholic beverage distribution executive. Farino will lead the authority on another transition, as it becomes fully independent of the executive branch of government in the new state budget on July 1. Youngkin had initially appointed Farino to the board, but then named him as CEO in late April.

Officials welcomed signs of progress after a tumultuous year in which four of its top executives — including CEO Travis Hill — departed as the Youngkin administration pushed for lower operating costs and higher profit margins.

The administration's effort to transform the authority backfired after the board adopted a delayed budget in August that assumed revenue growth of 5.1%, the same as Youngkin proposed in his five-year forecast for the Governor's Advisory Committee on Revenue Estimates in November.

Instead, revenues grew by 1.4%, as industry predictions of declining liquor sales and shifting consumer preferences proved true. The budget cut operating expenses to boost the expected profit margin by \$21 million, but ABC fell \$4.9 million short, despite making an additional \$11 million in cuts to operating costs.

“The spirits market changed,” Alfano said in an interview.

\$110M shortfall projected

Earlier this year, ABC officials estimated that the authority would fall \$110 million short in profits for the new two-year budget. The assembly lowered its revenue forecast for ABC by \$44.1 million for the first year of the new budget, but did not act on the \$66 million shortfall predicted in the second year.

The authority board expects to adopt a new budget on June 27 for the next fiscal year, beginning four days later. As of Friday, the new budget assumes net profits of \$233.2 million, which would be slightly better than under the revised budget, but about \$11 million less than the net profit that the Youngkin administration predicted in the budget adopted last year.

Progress has come largely through cuts in operating costs, especially for labor, as the Virginia ABC continues to leave many vacant jobs unfilled.

“We’re looking at every position,” Alfano said. “If it’s critical to the operation of the business, we fill it. If it’s not, we’re making the decision to forgo some of the jobs.”

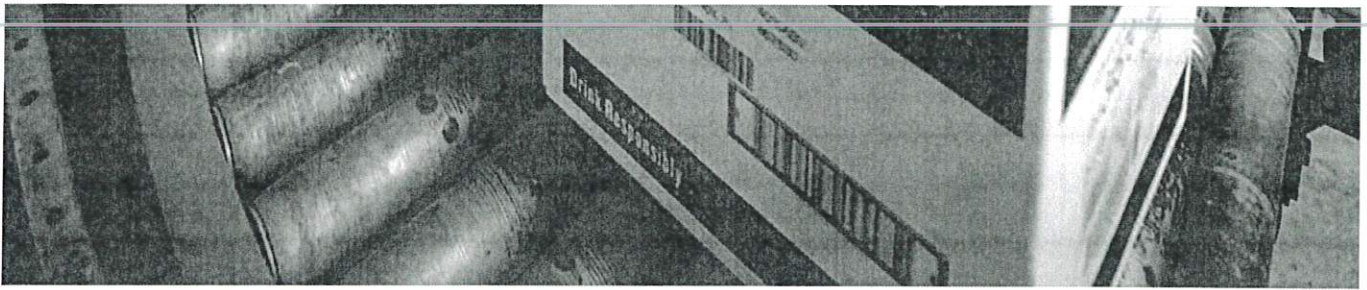
PHOTOS: Virginia ABC warehouse



Keith Thomas prepares a order in the Virginia ABC warehouse at 2901 Hermitage Road Tuesday, August 13, 2019.

ALEXA WELCH EDLUND





Boxes of liquor are prepared for orders in the Virginia ABC warehouse at 2901 Hermitage Road Tuesday, August 13, 2019.

ALEXA WELCH EDLUND



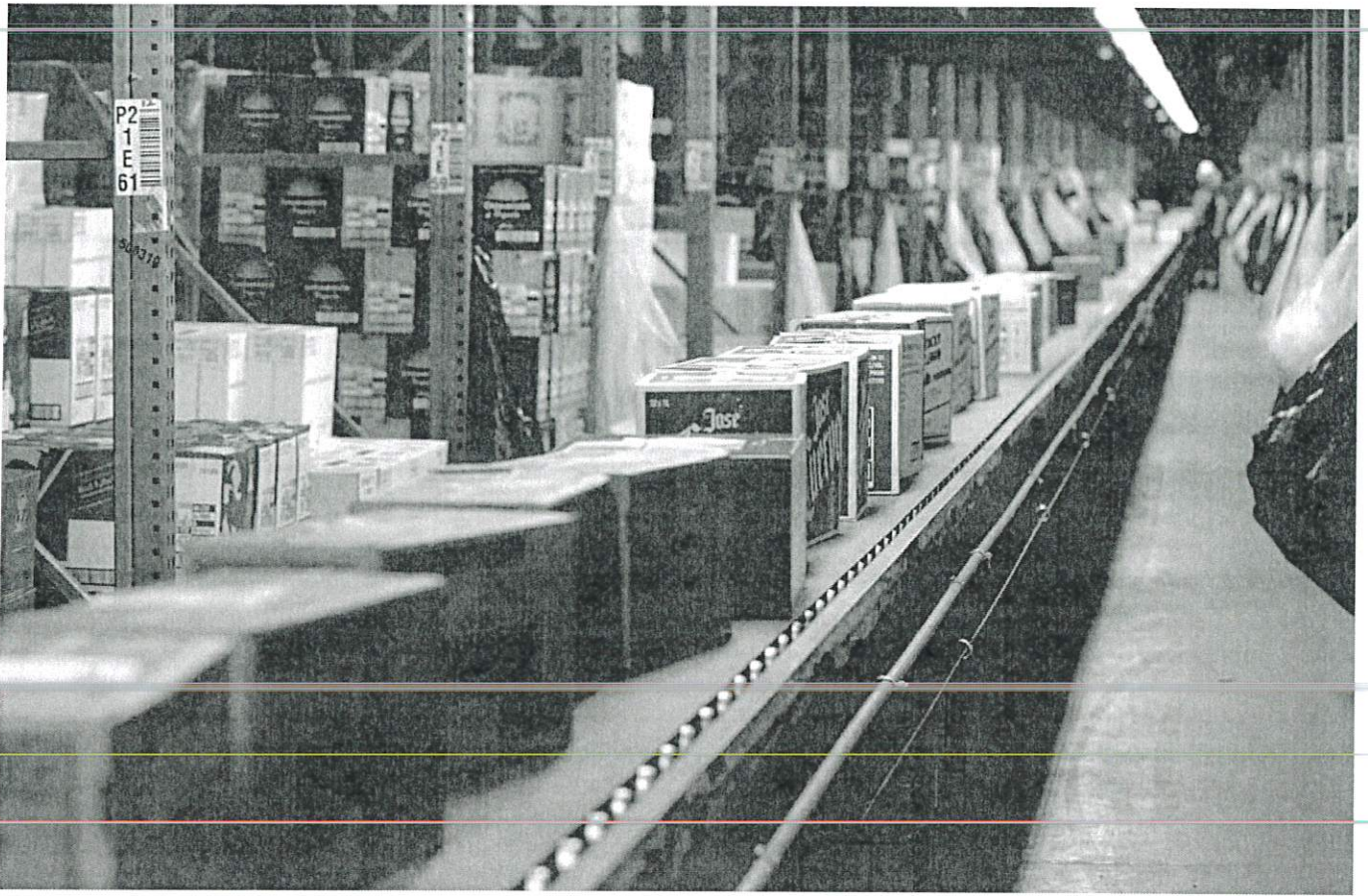
Boxes of liquor are shrink-wrapped in the Virginia ABC warehouse at 2901 Hermitage Road Tuesday, August 13, 2019.

ALEXA WELCH EDLUND



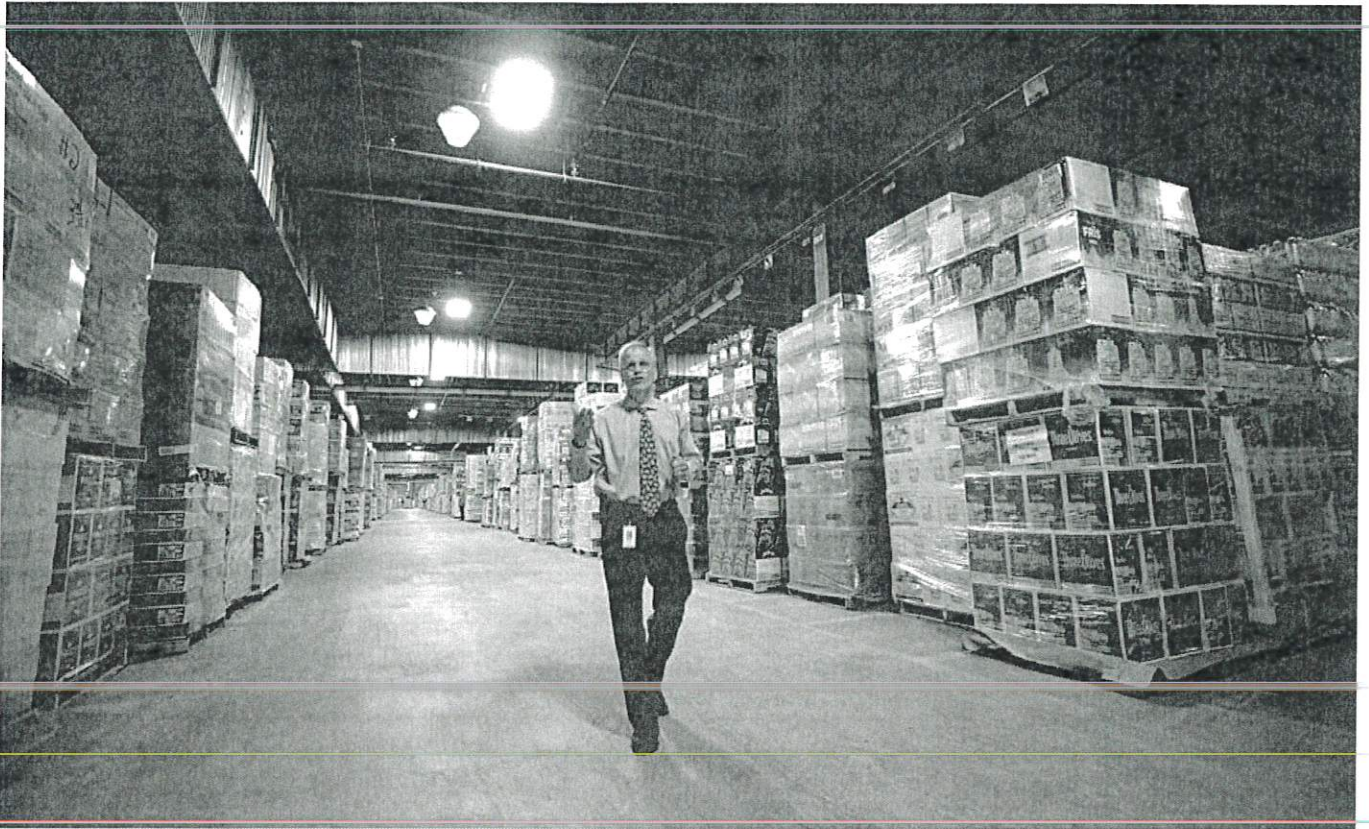
Boxes of liquor are unloaded from trucks in the Virginia ABC warehouse at 2901 Hermitage Road Tuesday, August 13, 2019.

ALEXA WELCH EDLUND



Boxes of liquor are prepared for orders in the Virginia ABC warehouse at 2901 Hermitage Road Tuesday, August 13, 2019.

ALEXA WELCH EDLUND



Mark Dunham, director of logistics at Virginia Department of Alcoholic Beverage Control, gives a tour of the ABC warehouse at 2901 Hermitage Road Tuesday, August 13, 2019.

ALEXA WELCH EDLUND



Boxes of liquor are stored in the Virginia ABC warehouse at 2901 Hermitage Road Tuesday, August 13, 2019.

ALEXA WELCH EDLUND



Employees fill orders at the Virginia ABC warehouse at 2901 Hermitage Road Tuesday, August 13, 2019.
ALEXA WELCH EDLUND



In this August 2019 image, Keith Thomas prepares an order in the Virginia ABC warehouse at 2901 Hermitage Road.

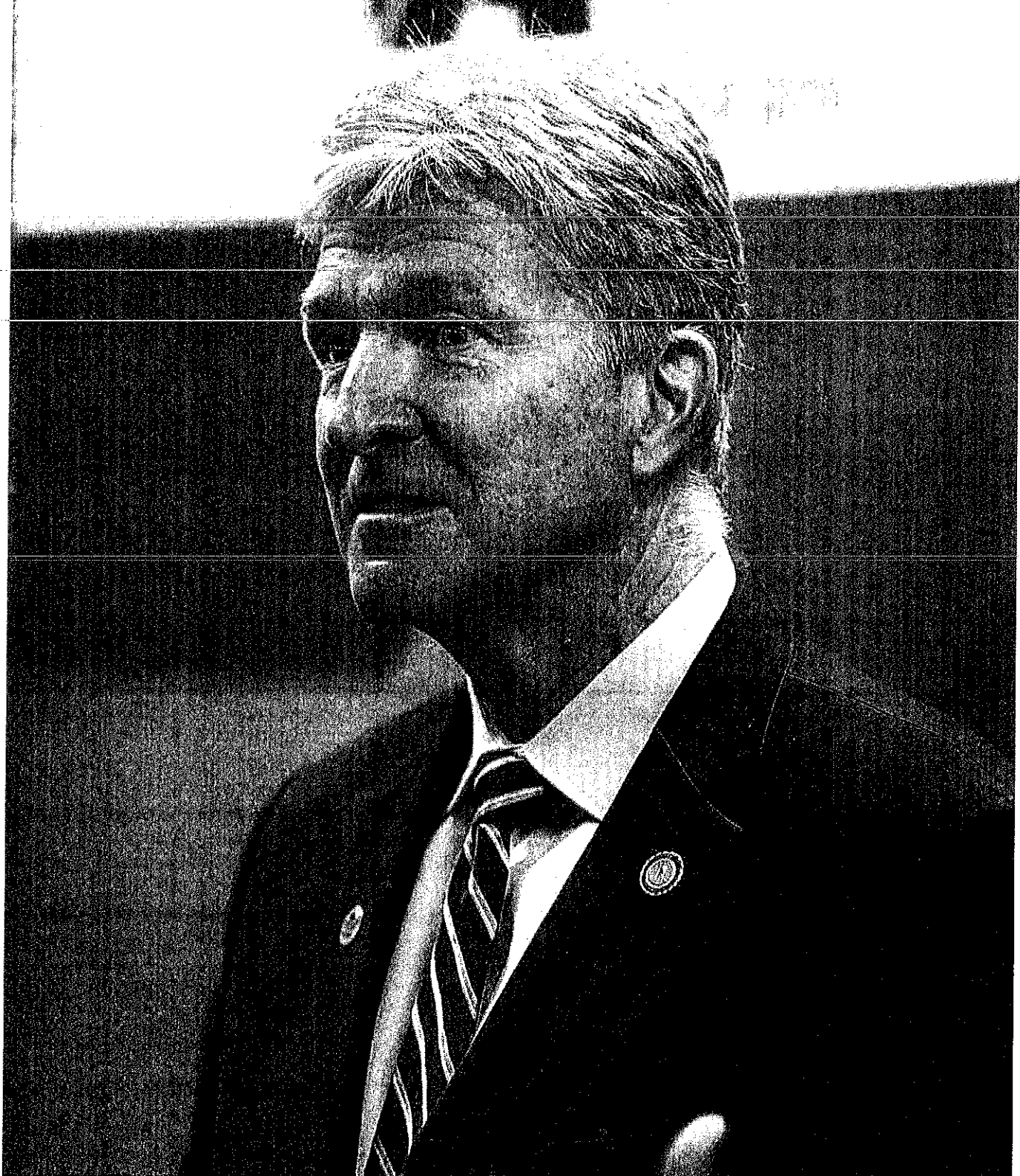
ALEXA WELCH EDLUND

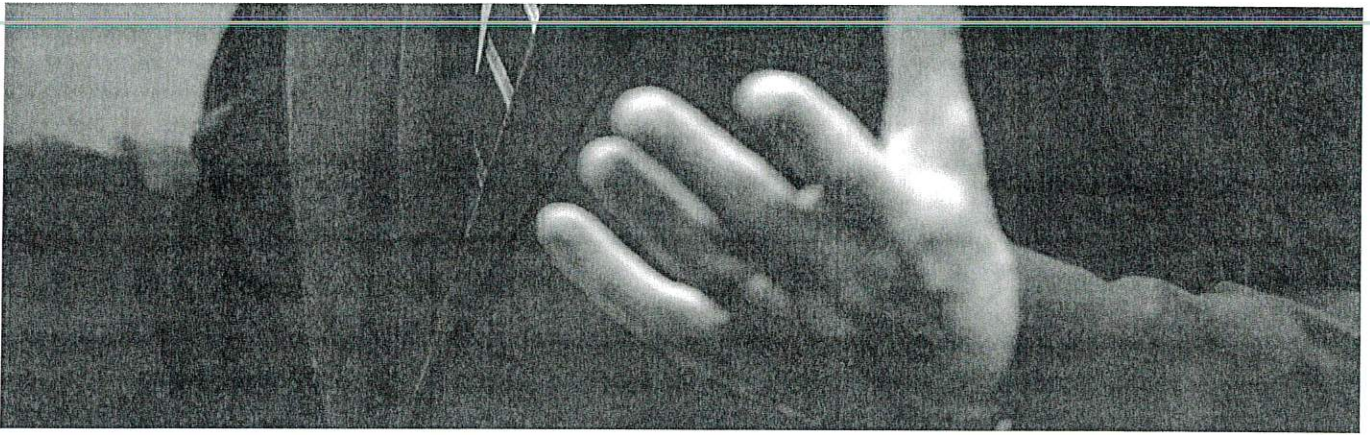


Boxes of liquor are stored in the Virginia ABC warehouse at 2901 Hermitage Road Tuesday, August 13, 2019.

ALEXA WELCH EDLUND

WABC





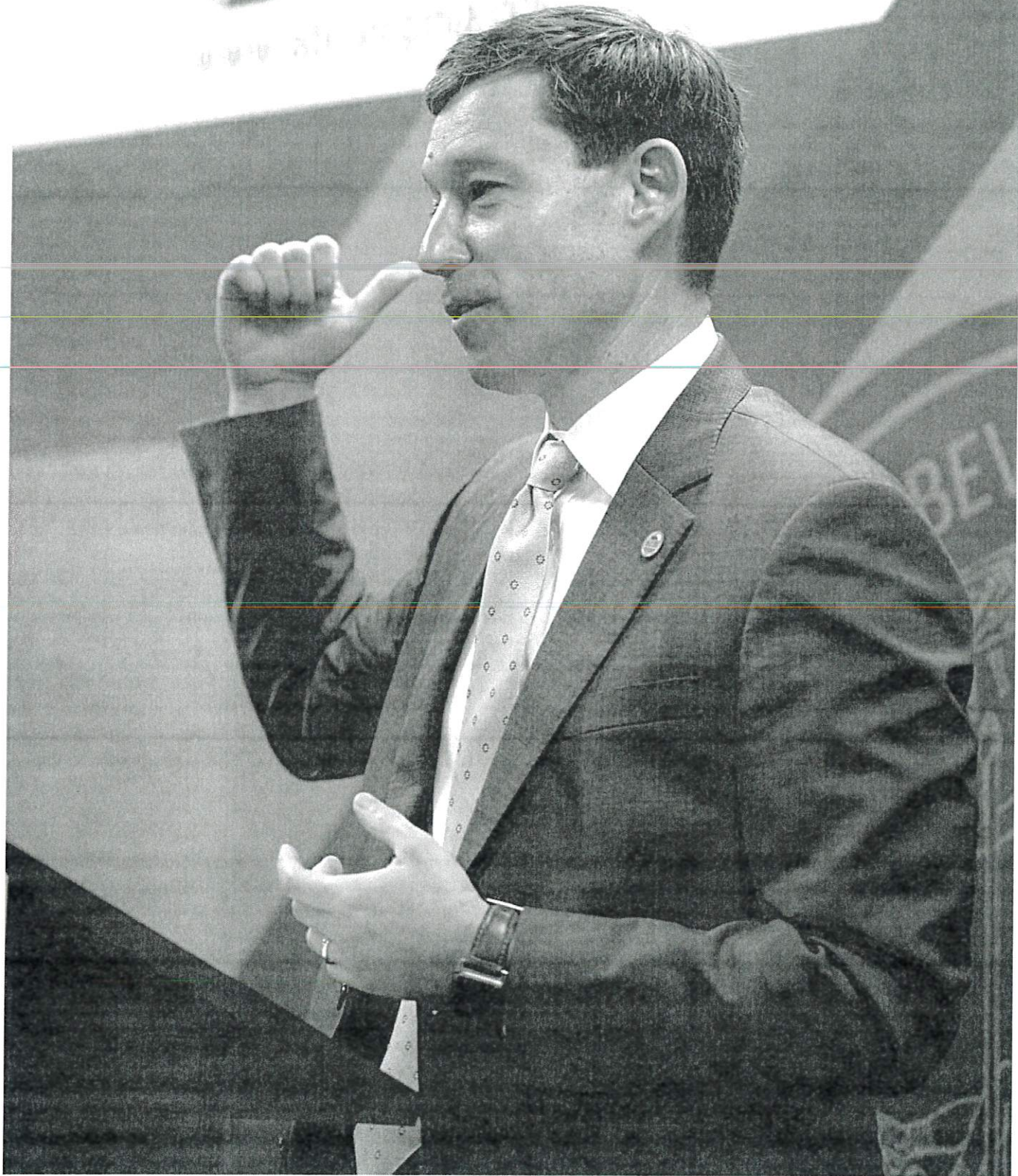
Brian Moran, secretary of Public Safety and homeland Security, speaks at Virginia ABC, 2901 Hermitage Road Tuesday, August 13, 2019.

ALEXA WELCH EDLUND

WABC

www.wabc.com

BEL



Travis Hill, CEO of Virginia ABC, announces sales results for the last fiscal year. Photo was taken on Tuesday, August 13, 2019.

ALEXA WELCH EDLUND

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By Michael Martz

State Politics Reporter
