

**UNITED STATE DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION**

CHEF GEOFF'S, and GEOFF TRACY,

Case No. _____

Plaintiffs,

v.

The VIRGINIA ALCOHOLIC BEVERAGE CONTROL AUTHORITY, the VIRGINIA DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, TRAVIS HILL, in his official capacity as the Chief Executive Officer of the Alcoholic Beverage Control Authority, JEFFREY PAINTER, in his official capacity as the Chair of the Virginia Alcoholic Beverage Control Authority Board, MARIA J. K. EVERETT, in her official capacity as a member of the Virginia Alcoholic Beverage Control Authority Board, BETH HUNGATE-NOLAND, in her official capacity as a member of the Virginia Alcoholic Beverage Control Authority Board, MARK RUBIN, in his official capacity as a member of the Virginia Alcoholic Beverage Control Authority Board, and KATIE KELLY, in her official capacity as the Senior Special Agent for the Virginia Alcoholic Beverage Control Authority,

Defendants.

COMPLAINT

INTRODUCTION

1. In Virginia, it's perfectly legal for businesses to offer happy hour—it's just not legal for them to talk about it. The state's happy hour advertising restrictions, 3 Va. Admin. Code § 5-50-160, prohibit businesses from communicating entirely truthful and non-misleading information to their customers on the theory that censorship, when it pertains to alcohol, is for the consumer's own good. These outdated and paternalistic notions cannot justify the state's unconstitutional burdens on speech.

2. Virginia's happy hour advertising restrictions affect business owners like Chef Geoff Tracy, an entrepreneur, cookbook author, and owner of three restaurants in the Washington, D.C., metropolitan area—including Chef Geoff's-Tyson's Corner. Geoff currently owns and operates two eponymous "Chef Geoff's," restaurants, one in Vienna, Virginia, and one in Washington, D.C., as well as Lia's Restaurant, located in Chevy Chase, Maryland.

3. One of the ways in which Chef Geoff¹ tries to beat the competition and attract new customers is by offering happy hour specials in a town well-known for its love of happy hour. Geoff attributes part of his restaurants' success to his popular happy hour offerings, and his restaurants' mission statement, "Great food, libation, merriment," reflects that. To that end, he advertises his happy hour specials in various mediums, including direct mail campaigns, signs outside his restaurants, his restaurants' website and Facebook pages, and his personal Twitter account. But Virginia's happy hour advertising restrictions makes it a crime for him to make those statements, because it prohibits, among other things, advertising the discount offered or the price of any happy hour drink, and it forbids restaurants from using any term to describe its offerings other than the generic "happy hour" or "drink specials." This means that Geoff cannot advertise

¹ For ease of reference, Plaintiffs are hereby collectively referred to as "Chef Geoff."

“\$7.50 cocktails,” or “Wine down Wednesday.” It also essentially renders happy hour advertisements uninformative to consumers.

4. Chef Geoff does not seek to advertise to children, or to promote illegal activity, or to encourage excessive drinking. Instead he seeks to communicate truthful information about his legal business practices to the public. There is no “vice” exception to the First Amendment, and the Constitution thus guarantees Chef Geoff’s right to talk about happy hour. He therefore brings this civil-rights lawsuit pursuant to 42 U.S.C. § 1983 to vindicate his right to speak freely.

JURISDICTION AND VENUE

5. Plaintiffs bring this civil rights lawsuit pursuant to 42 U.S.C. § 1983, for the violation of rights secured by the First Amendment to the United States Constitution, as applied to the states by the Fourteenth Amendment.

6. This Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 (federal question), 1343 (civil rights), and 2201-2202 (Declaratory Judgment Act).

7. Venue is proper under 28 U.S.C. §1391(b), on the ground that all or a substantial part of the acts giving rise to Plaintiffs’ claims occur in the Eastern District of Virginia, and on the ground that some or all of the Defendants reside in the Eastern District of Virginia.

PARTIES

Plaintiffs

8. Geoff Tracy is a chef and restaurateur, and owner of Chef Geoff’s-Tyson’s Corner. He opened his first two restaurants, in the words of his wife, “through sheer force of will,” before the age of 30. His restaurants now serve hundreds of thousands of patrons each year and employ over 100 people. Geoff is an active member of the DC-metropolitan community, having served

as chairman of the executive board of the Restaurant Association of Metropolitan Washington, and has earned multiple awards for his restaurants and philanthropic work in the community.

9. Chef Geoff's-Tyson's Corner is one of Geoff's three restaurants. It is an S-Corp organized as CG4, Inc. under the laws of Virginia. In 2011, it won the RAMMY award for "Hottest Restaurant Bar Scene."

Defendants

10. Virginia Alcoholic Beverage Control Authority (Authority) is an independent political subdivision of the State of Virginia tasked with enforcing the state's liquor laws. Historically, that power has been wielded by Department of Alcoholic Beverage Control (ABC), which is in the process of converting to the Authority. At present, both the Authority and ABC are dually operating and full conversion is expected in July, 2018. The Authority and ABC can be sued under Va. Stat. § 4.1-103(1).

11. Travis Hill is the Chief Executive Officer of the Authority. Jeffrey Painter is the former chair of the ABC Board and current chair of the Authority. Maria Everett is the Chair of the ABC Board and a board member of the Authority. Beth Hungate-Noland is a board member of both the ABC and the Authority. Mark Rubin is a board member of the Authority. As members of the Board, they are responsible for enforcing the happy hour restrictions and disciplining those who do not comply. In all of their actions and omissions alleged herein, Defendants were acting under the color of state law and are being sued only in their official capacity pursuant to *Ex parte Young*, 209 U.S. 123 (1908).

12. Katie Kelley is Senior Special Agent for the ABC and Authority. Ms. Kelley, in her official capacity, is authorized to and responsible for citing and enforcing the happy hour restrictions. In all of her actions and omissions alleged herein, Ms. Kelley was acting under the

color of state law and is being sued only in her official capacity pursuant to *Ex parte Young*, 209 U.S. 123 (1908).

FACTUAL ALLEGATIONS

Plaintiffs Free Speech Interests

13. As at his other locations, Geoff Tracy offers happy hour at Chef Geoff's-Tyson's Corner on Wednesdays through Sundays, 3pm-7pm, and all day Monday and Tuesday until 9pm. As part of the happy hour specials, Chef Geoff's-Tyson's Corner sells discounted cocktails, beers, and wines, as well as discounted food offerings, like pizza, half price burgers, \$11 "pasta madness," tacos, and dessert. On Wednesday, the restaurant offers "Wednesday Wine Night," where bottles of wine are half-priced.

14. Chef Geoff fully complies with all Virginia rules and regulations pertaining to serving and selling drinks at happy hour. That is, he abides by the state's prohibition on giving away free drinks, or permitting patrons to have more than two drinks at any one time under 3 VAC § 5-50-160.

15. To attract consumers to the restaurant, Chef Geoff advertises his happy hour specials. Competition is rampant in the restaurant industry, and one way to gain an advantage is to compete based on price. Chef Geoff believes that his popular happy hour pricing and particular drink offerings are among the reasons his business is successful.

16. Chef Geoff advertises in many forms. One way in which he advertises is through physical advertisements outside of his restaurant, including displaying the happy hour menu. He also conducts direct mail campaigns, and has historically placed ads in newspapers.

17. Chef Geoff also advertises online through social media.

18. Chef Geoff does not seek to advertise anything illegal. Rather, he seeks only to advertise the drink specials he offers, which are fully compliant with Virginia law.

Virginia's Happy Hour Speech Code

19. Virginia law permits businesses to offer happy hour specials, but restricts what they may say about them under the state's happy hour advertising restrictions. 3 Va. Admin. Code § 5-50-160.

20. For example, while restaurants may advertise that they have "drink specials," they cannot advertise the price of any drink, or what the special is.

21. In addition, they may not use any term to describe their specials other than the generic terms "happy hour" or "drink specials." This means that terms like "Turn Down for What Tuesday," "Wednesday Wine Night," "Thirsty Thursday," "Sunday Funday," and even simply "discounted drinks," are prohibited.

22. While businesses may legally offer half-price drinks, they are prohibited from offering "two-for-one" specials.

23. The happy hour advertising restrictions mean that businesses are essentially limited to saying "Happy Hour," the time of the specials, and the names of the discounted drinks, rendering the advertisement largely unhelpful to both consumers and businesses.

24. A first time violator of any of these restrictions is subject to a penalty of \$500, or they may suffer a 7-day suspension of their liquor license—effectively shutting them down for a week.

25. Defendants regularly enforce the happy hour advertising restrictions by citing offenders and imposing penalties.

26. Because of Virginia’s happy hour advertising restrictions, and only because of those restrictions, Chef Geoff is prohibited from communicating entirely truthful information about his business practices to the public. That law prevents Chef Geoff from speaking as he would like to speak, and from making the same statements in Virginia that he makes in Maryland and Washington, D.C.

27. But for Virginia’s happy hour advertising restrictions, Chef Geoff would advertise prices, discounts, and use festive terms like “Wednesday Wine Night” to promote his restaurant.

28. Chef Geoff seeks to be free of Virginia’s unconstitutional gag rule on free speech so that he can advertise without fear of penalty.

CLAIMS FOR RELIEF

Count I: Virginia’s Ban on Truthful, Non-Misleading

Communications Is an Unconstitutional Content-Based

Restrictions on Speech That Violates the First Amendment

29. Chef Geoff incorporates and re-alleges each and every allegation contained in the preceding paragraphs of this Complaint.

30. Chef Geoff seeks to advertise truthful, non-misleading information about his legal business practices, including the specials and price of drinks offered during happy hour. He also seeks to promote his happy hour specials in creative, non-generic terms, including puns, exclamations, and allusions.

31. Virginia law prohibits him from making these statements, on penalty of fines and suspension of his license. He therefore suffers harm due to Defendants’ enforcement of the challenged laws.

32. The happy hour advertising restrictions apply to Chef Geoff because of the content of his speech. That is, the laws apply to him solely when discussing happy hour specials. By contrast, it is legal for him to discuss prices for non-happy hour related items.

33. The happy hour restrictions do not directly advance any substantial government interest.

34. The happy hour restrictions are not narrowly tailored to any compelling state interest.

35. Sheltering consumers from truthful, non-misleading speech “for their own good” is not a substantial, nor compelling, state interest.

36. Restricting speech related to happy hour specials does not reduce alcohol consumption.

37. Defendants have alternative means, other than restricting speech, to achieve their goals. If Defendants are concerned with promoting temperance, for example, they could engage in educational campaigns about the purported benefits of temperance.

38. The First Amendment protects Chef Geoff’s right to express himself in ways banned by the happy hour advertising restrictions. There is no “vice” exception to the First Amendment.

39. By enforcing Virginia’s happy hour advertising restrictions, Defendants, acting under color of state law, are depriving Chef Geoff of his constitutional right to speak freely under the First Amendment.

40. Chef Geoff is suffering and will continue to suffer substantial and irreparable harm unless Virginia’s happy hour advertising restrictions are declared unlawful and enjoined by this Court.

41. There exists a present controversy between the parties as to their respective legal rights and duties. Chef Geoff contends that Defendants are violating the First Amendment; Defendants, by enforcing the happy hour advertising restrictions, dispute that contention. Therefore, there exists a present controversy between the parties concerning the constitutionality of the statute by which Chef Geoff is being directly, adversely, and irreparably harmed by Defendants' enforcement.

42. A judicial determination of rights and responsibilities arising from this actual controversy is therefore necessary and appropriate.

Count II: Virginia's Ban on "Two-for-One" Specials Is an Unconstitutional Restriction on Speech Under the First Amendment

43. Chef Geoff reincorporates and re-alleges each and every allegation contained in the preceding paragraphs of the Complaint.

44. Under Virginia law, it is perfectly legal to offer two drinks during happy hour for the price ordinarily charged for one, so long as the special is expressed as "half-price."

45. However, it is illegal to offer the same special if expressed as a "two-for-one."

46. The only difference between offering two drinks, each for half-price, and offering two-for-one, is how the offer is described.

47. The ban on two-for-one specials is therefore a restriction on speech.

48. The ban on two-for-one specials deprives establishments from offering a special in the most effective way.

49. That restriction does not directly advance any substantial government interest.

50. That restriction is not narrowly tailored to any compelling state interest.

51. By enforcing this restriction on speech, Defendants, acting under color of state law, are depriving Chef Geoff of his constitutional right to speak freely under the First Amendment.

52. Chef Geoff is suffering and will continue to suffer substantial and irreparable harm unless Virginia's happy hour advertising restrictions are declared unlawful and enjoined by this Court.

53. There exists a present controversy between the parties as to their respective legal rights and duties. Chef Geoff contends that Defendants are violating the First Amendment; Defendants, by enforcing the happy hour advertising restrictions, dispute that contention. Therefore, there exists a present controversy between the parties concerning the constitutionality of the statute by which Chef Geoff is being directly, adversely, and irreparably harmed by Defendants' enforcement.

54. A judicial determination of rights and responsibilities arising from this actual controversy is therefore necessary and appropriate.

REQUESTED RELIEF

Plaintiffs respectfully request that the Court:

A. Declare the happy hour speech code, 3 VAC § 5-50-160, facially and as applied to Plaintiffs, unconstitutional under the First Amendment.

B. Enjoin Defendants, their employees, agents, successors and assigns, and all persons acting in concert with them, from continuing to enforce the happy hour speech code, as well as any and all implementing administrative rules and regulations, and the practices and policies by which Defendants enforce these provisions; against Plaintiffs or any other person.

C. Award Plaintiffs their costs and reasonable attorney fees pursuant to 42 U.S.C. § 1988.

D. Grant such other relief that this Court deems just and proper.

DATED: March 28, 2018.

Respectfully Submitted,

/s/ Thomas A. Berry

THOMAS A. BERRY, Va. Bar No. 90555

E-Mail: TBerry@pacificlegal.org

ANASTASIA P. BODEN, Cal. Bar No. 281911*

E-Mail: ABoden@pacificlegal.org

Pacific Legal Foundation

930 G Street

Sacramento, CA 95814

Telephone: (916) 419-7111

Facsimile: (916) 419-7747

Counsel for Plaintiffs

Chef Geoff's and Geoff Tracy

**Pro Hac Vice Pending*