

VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF HANOVER

STATE BOARD OF HEALTH

AND

M. NORMAN OLIVER, M.D., State Health Commissioner,  
In his official capacity,

Plaintiffs,

v.

Case No.:

CALABASH CORP. t/a CALABASH SEAFOOD

Serve:

R/A Dennis William Smith  
7514 Lee Davis Road  
Mechanicsville, Virginia 23111

AND

DENNIS W. SMITH

Serve:

7019 Old Reflection Circle  
Mechanicsville, Virginia 23111

AND

RICHARD A. SHEARIN

Serve:

7654 Walnut Grove Road  
Mechanicsville, Virginia 23111

Defendants.

**COMPLAINT**

The State Board of Health (“Board”) and M. Norman Oliver, M.D., State Health Commissioner (“the Commissioner”), in his official capacity (collectively, “Plaintiffs”), by counsel, complaining of Calabash Corporation, t/a Calabash Seafood (“Defendant Calabash”),

Dennis W. Smith (“Defendant Smith”), and Richard A. Shearin (“Defendant Shearin”) (collectively, “Defendants”) allege as follows:

### **Introduction**

1. The Plaintiffs seek a permanent injunction enjoining Defendants from operating Calabash Seafood restaurant at 7514 Lee-Davis Road, Mechanicsville, Virginia 23111 (“Calabash Seafood”), and ordering that the restaurant be closed until Defendant Calabash holds a current and valid restaurant license that is not under suspension, and ordering that Defendants shall immediately cease operating and close Calabash Seafood during the period of any future suspension of the restaurant license.

2. While adjudication of this matter is pending, the Plaintiffs ask that the Court enter a temporary injunction ordering that Defendants close the restaurant while the restaurant license is suspended, including closing the restaurant during the period of any future suspension of the restaurant license, until the matter is decided on the merits.

### **The Parties**

3. The Board consists of 15 residents of the Commonwealth, appointed by the Governor for four-year terms.

4. The Board and the Commissioner are charged by the General Assembly with “administer[ing] and provid[ing] a comprehensive program of...health services...and abat[ing] hazards and nuisances to the health and to the environment, both emergency and otherwise, thereby improving the quality of life in the Commonwealth.” Va. Code § 32.1-2.

5. The Commissioner is the executive officer of the Board and is charged, along with the Board, with enforcing Titles 32.1 and 35.1 of the Code of Virginia. The Commissioner supervises and manages the Virginia Department of Health (“VDH”).

6. The statutory authority to regulate restaurants, including the licensure thereof, lies in Title 35.1 of the Code of Virginia. Pursuant to this statutory authority, the Board has adopted regulations governing restaurants.

7. Upon information and belief, Defendant Calabash is a Virginia corporation, and was issued a restaurant license to operate Calabash Seafood. The restaurant license for Calabash Seafood is currently suspended.

8. Upon information and belief, Defendant Smith is a resident of Virginia, a corporate officer of Defendant Calabash, and operates and manages Calabash Seafood.

9. Upon information and belief, Defendant Shearin is a resident of Virginia, a corporate officer of Defendant Calabash, and operates and manages Calabash Seafood.

#### **Venue and Jurisdiction**

10. Code of Virginia §§ 32.1-27(B) and 35.1-7(B) state that a proceeding for an injunction may be brought by the Commissioner or the Board in an appropriate court against anyone who violates, or fails, neglects, or refuses to obey, any order of the Commissioner, any regulation of the Board, or any provision of Titles 32.1 or 35.1.

11. Pursuant to Code of Virginia § 8.01-620, the circuit courts have jurisdiction to award injunctions.

12. Pursuant to Code of Virginia § 8.01-328.1(A)(1), Defendants are subject to personal jurisdiction because, among other things, each resides in Virginia, and is transacting

business in the Commonwealth. Venue is proper because the restaurant in question is located in the County of Hanover.

### **Facts**

13. Defendant Calabash trades as Calabash Seafood, which is located at 7514 Lee-Davis Road, Mechanicsville, Virginia 23111.

14. Defendant Smith is the president and a director of Defendant Calabash; he operates and manages Calabash Seafood.

15. Defendant Shearin is a vice president of Defendant Calabash, and serves in a managerial role; he is a person in charge, as defined in 12 VAC 5-421-10 of the Food Regulations, at Calabash Seafood.

16. On or about February 21, 2020, Defendant Smith signed an application to renew a food establishment service permit for Calabash Seafood. The application lists Defendant Calabash as the owner of the establishment, with Defendant Smith identified as the legal owner. The application also lists Defendant Smith as the person directly responsible for the establishment, and Defendant Smith is identified as “President.” The application states that Calabash Seafood has an indoor seating capacity of 400 people, and an outdoor seating capacity of 50 people. [Ex. A - Application for a Department of Health Foodservice Establishment Permit].

17. The Hanover Health Department (“HHD”) issued to Defendant Calabash a permit/license (“license”) to operate a full service restaurant trading as Calabash Seafood. The license expires on March 31, 2021. [Ex. B - License].

The Commonwealth's Response to the COVID-19 Pandemic

18. On February 7, 2020, the Commissioner issued a Declaration of Public Health Threat due to the COVID-19 pandemic, declaring COVID-19 “a Communicable Disease of Public Health Threat.” [Ex. C].

19. On March 12, 2020, Virginia Governor Ralph S. Northam (“Governor”) issued Executive Order Number Fifty-One (2020), a Declaration of a State of Emergency Due to Novel Coronavirus (COVID-19) (“EO 51”). [Ex. D]. On May 26, 2020, the Governor extended the state of emergency and amended EO 51. [Ex. E].

20. On March 17, 2020, and amended on March 20, 2020, the Governor and Commissioner jointly issued Order of Public Health Emergency One. The order restricted the number of patrons in, among other places, restaurants to 10 or fewer in order to inhibit the spread of COVID-19. [Exhibit F - Order of Public Health Emergency One, amended].

21. On March 23, 2020, the Governor issued Executive Order 53, and twice extended the expiration date of its terms. [Ex. G - Executive Order Second Amended Number Fifty-Three (2020) (“EO 53”)]. EO 53, among other things, closed “all dining and congregation areas in restaurants” through the end of the day on May 14, 2020. *Id.* ¶ 3.

22. Later, the Governor announced a multi-phase process for easing restrictions over the course of many weeks. To accomplish this, the Governor and the Commissioner issued multiple joint orders under their statutorily granted emergency authority. These orders set forth restrictions on certain business and other activities in response to the COVID-19 pandemic.

23. Phase One of the multi-phase process for easing restrictions began with Executive Order Number Sixty-One (2020) and Order of Public Health Emergency Three (“EO 61”), which

became effective on May 15, 2020.<sup>1</sup> [Ex. H]. EO 61 explained that, because Virginians’ “efforts and sacrifices” had “slowed the spread of the virus,” it was appropriate to “ease some of the restrictions” imposed in prior orders. *Id.* at 2.<sup>2</sup> Accordingly, EO 61 substantially loosened restrictions on numerous organizations and activities. Subject to tailored requirements, restaurants were permitted to begin dine-in service on outdoor patios. *Id.* ¶ (A)(2). While restaurants were allowed as part of Phase One reopening to have outdoor dining, employees in customer-facing areas were required to wear face coverings. *Id.* ¶ (A)(2)(f). Additionally, restaurants were required to take further health precautions, such as by only using single-use disposable menus. *Id.* (Safer at Home: Phase One Guidelines, p. 6).

24. To minimize COVID-19 spread as businesses expanded operations in response to the relaxed restrictions and with more people coming into contact with each other, the Governor and the Commissioner directed people to wear face coverings over their nose and mouth while inside certain spaces. [Ex. I - Executive Order Number 63 (2020) Order of Public Health Emergency Five (“EO 63”)]. Effective May 29, 2020, patrons age 10 and older are required to wear face coverings when inside “[f]ood and beverage establishments, including but not limited to, restaurants...when [restaurants are] permitted to reopen for indoor dining.” Ex. I ¶ (A)(3). However, EO 63’s face coverings requirement does not apply while someone is eating or drinking. *Id.* ¶ (D)(1).

---

<sup>1</sup> Executive Order 61 [ex. H] has been amended three times, but the language applicable to restaurants has not changed.

<sup>2</sup> EO 61 [ex. H] incorporates by reference Safer at Home: Phase One Guidelines. The portion of the Guidelines that addresses restaurants is included with exhibit H.

25. On June 2, 2020, the Governor and the Commissioner issued Executive Order Number Sixty-Five (2020) and Order of Public Health Emergency Six (“EO 65”). [Ex J<sup>3</sup>]. EO 65 noted the Commonwealth “ha[s] made remarkable progress over the past several weeks,” and ordered that Virginia, other than the Northern Virginia region and the City of Richmond,<sup>4</sup> would enter Phase Two on June 5, 2020. Ex. J at 1 and 14. Under EO 65, and subject to occupancy, social distancing, and various hygiene requirements, restaurants could begin indoor dining service. *Id.* ¶ (A)(2).

26. On June 30, 2020, becoming effective the following day, the Governor and the Commissioner issued Executive Order Number Sixty-Seven (2020) and Order of Public Health Emergency Seven (“EO 67”), entering the Commonwealth into Phase Three of the reopening plan. [Ex. K<sup>5</sup>]. EO 67 sets forth several restrictions on the operation of restaurants, including requiring that “[a]ll parties must be separated by at least six feet, including in the bar area;” “[e]mployees working in customer-facing areas must wear face coverings over their nose and mouth at all times;” “[t]abletops, chairs, and credit card/bill folders must be cleaned in between patrons;” and “[b]ar seats and congregating areas of restaurants must be closed to patrons except for through-traffic.” Ex. K ¶¶ (A)(2)(a), (c), (d) and (e). If a restaurant cannot abide by the requirements of EO 67, “it must close.” *Id.* ¶ (A)(2)(f).

27. EO 67 confers upon VDH the authority to enforce section A of EO 67, which includes the requirements placed upon restaurants. Ex. K ¶ (A)(13). In addition to the possibility of criminal sanctions, EO 67 provides for the Commissioner to seek injunctive relief for a

---

<sup>3</sup> EO 65 [ex. J] incorporated by reference the Phase Two Guidelines. The portion of the Guidelines that addresses restaurants is included in exhibit J.

<sup>4</sup> EO 65 was amended to allow the Northern Virginia region and the City of Richmond to reopen under Phase Two the following week.

<sup>5</sup> EO 67 [ex. K] incorporated by reference the Phase Three Guidelines. The portion of the Guidelines that addresses restaurants is included with exhibit K.

violation of EO 67. *Id.* Additionally, “any agency with regulatory authority over a business listed in section A may enforce this Order as to that business to the extent permitted by law.” *Id.*

Defendants’ Violations of the Executive Orders

28. On May 14 and May 29, 2020, HHD received complaints that Calabash Seafood was open for indoor dining. [Ex. L ¶¶ 4-5 - (Ex. L is the Declaration of Carol A. Lien)]. From March 23, 2020 until June 5, 2020, indoor dining at restaurants was prohibited pursuant to the Governor’s and Commissioner’s orders.

29. On June 3, 2020, HHD investigated in response to a complaint that Calabash Seafood was allowing indoor dining. HHD staff was informed by the Calabash Seafood staff person in charge at the time that some indoor dining was being allowed. [Ex. M ¶ 6 -- (Ex. M is the Declaration of Christy C. Mason)].

30. HHD received a complaint that on June 6, 2020, employees in Calabash Seafood were not wearing face coverings as required by EO 65. [Ex. L ¶ 6].

31. HHD received a complaint that on June 20, 2020, neither staff nor customers were wearing face coverings. Additionally, the complaint stated that social distancing requirements were not being followed at the restaurant. [Ex. M ¶ 7].

32. On June 23, 2020, HHD received a complaint about the number of people at Calabash Seafood and that the people were using the dance floor. [Ex. L ¶ 7].

33. On June 24, 2020, HHD conducted an inspection of Calabash Seafood with respect to potential violations of Executive Orders. During the inspection, HHD staff observed two hostesses who were not wearing face coverings while actively seating customers, and a cashier who was not wearing a face covering. Additionally, four servers were not wearing face coverings while assisting customers. The manager on duty also did not have a face covering. Of



15 customers who entered the restaurant while HHD staff was present, only three entered wearing a face covering. A Calabash Seafood hostess disclosed to HHD staff that the restaurant was reusing menus. HHD staff spoke with Defendant Smith. Defendant Smith said that the health department could not tell him what to do. Defendant Smith said the servers did not need to wear face coverings. Defendant Smith said he did not see the need for face coverings, claiming that COVID-19 was pretty much over. HHD staff responded by informing Defendant Smith that wearing a face covering protects the person wearing the mask and others. HHD staff asked Defendant Smith if he should protect his patrons who are 65 or older. Defendant Smith responded that elderly people should stay home. HHD staff informed Defendant Smith that almost everyone who had come in appeared to be older than 65 years old, with some in a wheelchair. [Ex. M ¶ 8].

34. HHD received a complaint that on June 27, 2020, staff and customers in Calabash Seafood restaurant were not wearing face coverings. [Ex. L ¶ 8].

35. HHD received a complaint that on July 6, 2020, staff and customers in Calabash Seafood were not wearing face coverings, and that tables were not being disinfected prior to a new set of patrons being seated. [Ex. L ¶ 9].

36. On July 11, 2020, HHD received a complaint that Calabash Seafood's Midway Bar would be hosting a band that upcoming weekend, people attending the event were not planning to wear a face covering, and COVID-19 safety measures would not be followed. [Ex. L ¶ 10].

37. HHD received a complaint that on July 11, 2020, staff and customers in Calabash Seafood were not wearing face coverings, and that social distancing requirements were not being followed in the restaurant. [Ex. L ¶ 11].

38. On July 15, 2020, HHD received a complaint that servers and the host at Calabash Seafood were not wearing face coverings, and that it did not appear that other precautions or procedures were in place. [Ex. M ¶ 9].

39. HHD received multiple complaints that on July 15, 2020, Calabash Seafood was not in compliance with EO 67. Specifically, HHD received complaints that staff and customers were not wearing face coverings, social distancing requirements were not being followed, and the bar area was open with seating allowed in disregard of EO 67's requirements. [Ex. L ¶¶ 12-13].

40. HHD received a complaint that on July 17, 2020, staff and customers were not wearing face coverings and social distancing requirements were not being followed at Calabash Seafood. [Ex. L ¶ 14].

41. HHD received a complaint that on July 22, 2020, staff and customers were not wearing face coverings and social distancing requirements were not being followed at Calabash Seafood. [Ex. L ¶ 15].

42. HHD received another complaint that on July 22, 2020, staff and customers were not wearing face coverings and social distancing requirements were not being followed at Calabash Seafood. This included that bar seating was open, there were customers seated at the bar, and neither the bartender nor the customers wore face coverings. [Ex. L ¶ 16].

43. HHD received a complaint that on July 25, 2020, Calabash Seafood staff and customers were not wearing face coverings, social distancing requirements were not being followed, and customers were allowed to sit at the bar without social distancing requirements enforced. The complaint states that Calabash Seafood "does not even try to adhere to the principles of the executive order." [Ex. L ¶ 18].

44. HHD received a complaint that on July 25, 2020, Calabash Seafood customers were not wearing face coverings. [Ex. L ¶ 21].

45. On July 25, 2020, HHD staff, accompanied by two Hanover County Sheriff's Deputies, inspected Calabash Seafood in response to complaints. HHD staff observed that no restaurant staff or any patrons were wearing face coverings. This included a group of teenagers who, while in close proximity to one another, were not wearing face coverings and were not eating or drinking at the time. HHD staff explained the requirements in EO 67 to Defendant Smith. Defendant Smith said that he is aware of the Executive Orders, he does not believe they are lawful, and he will see HHD's staff in court. [Ex. L ¶ 17].

Summary Suspension of Restaurant License

46. On July 27, 2020, Thomas Franck, M.D., M.P.H., Director of the Chickahominy Health District, which includes HHD, issued a Notice of Food Establishment Operation Permit Summary Suspension ("Notice") pursuant to 12 VAC 5-421-3770 of the Food Regulations. [Ex. N].

47. The Notice states that the license to operate Calabash Seafood is immediately suspended due to inspections of the restaurant by HHD that "revealed substantial and imminent threats to public health," consisting of violations of EO 67. [Ex. N].

48. On July 27, 2020, HHD staff hand-delivered the Notice to Calabash Seafood restaurant, accompanied by two Hanover County Sheriff's Deputies and two Virginia Alcoholic Beverage Control Authority agents. HHD staff gave the Notice to Defendant Shearin, who identified himself as the person in charge of the establishment at the time. HHD staff explained to Defendant Shearin and to Defendant Smith that the summary suspension requires that the

restaurant close immediately. Defendant Smith said that the restaurant would not close unless ordered to do so by a court, and food and alcohol would continue to be served. [Ex. L ¶ 20].

#### Calabash Seafood Continues to Operate

49. HHD received complaints since the Notice was delivered stating that neither Calabash Seafood staff nor customers were wearing face coverings, the bar seating was occupied, and the bar/dance floor area was crowded. [Ex. L ¶ 24].

50. HHD staff observed that Calabash Seafood was open on July 28, July 29, July 30, July 31, August 1, August 3, and August 4, 2020. [Ex. L ¶ 23].

51. On August 13, 2020, Thomas Franck, M.D., M.P.H., Director of the Chickahominy Health District, issued a second Notice of Food Establishment Operation Permit Summary Suspension (“Second Notice”) pursuant to 12 VAC 5-421-3770 of the Food Regulations. The Second Notice states that the license to operate Calabash Seafood remains suspended, specifically identifying violations of EO 63 and EO 67, and citing additional factual information since the issuance of the original Notice. [Ex. O].

52. On August 13, 2020, HHD staff hand-delivered the Second Notice to Calabash Seafood. [Ex. L ¶ 26].

53. Calabash Seafood did not cease operations upon delivery of the Second Notice. [Ex. L ¶ 27].

54. Defendant Calabash has continued to own, and Defendants have continued to operate and manage, Calabash Seafood on a daily basis since the summary suspension of Defendant Calabash’s license to operate Calabash Seafood restaurant on July 27, 2020.

55. Defendants continue to disregard EO 63 and EO 67 in their operation and management of Calabash Seafood.

### **Count 1 – Owning, Operating and Managing of a Restaurant Without a License**

56. The Plaintiffs incorporate by reference the allegations contained in paragraphs 1 through 55 of the Complaint.

57. “The granting of an injunction is an extraordinary remedy and rests on the sound judicial discretion to be exercised upon consideration of the nature and circumstances of a particular case.” *Levisa Coal Co. v. Consolidation Coal Co.*, 276 Va. 44, 61 (2008). However, when the application for the injunction rests on the violation of a statute or regulation, “[a]ll that is required is proof that the statute or regulation has been violated.” *Virginia Beach S.P.C.A., Inc. v. South Hampton Rds. Veterinary Assoc.*, 229 Va. 349, 354 (1985). “When the General Assembly determines that certain conduct is inimical to the public interest, an injunction need not contain an allegation of irreparable injury.” *Carbaugh v. Solem*, 225 Va. 310, 315 (1983) (citing *WTAR Radio-TV v. Virginia Beach*, 216 Va. 892, 894 (1976)) (internal quotation marks omitted).

58. The Defendants have violated Virginia law and regulation by knowingly owning, operating, and managing a restaurant without a license or permit.

59. Code of Virginia § 35.1-18 states, in part, that “[n]o person shall own, establish, conduct, maintain, manage, or operate any...restaurant...in this Commonwealth unless the...restaurant...is licensed as provided in this chapter. The license shall be in the name of the owner or lessee.”

60. 12 VAC 5-421-10 of the Food Regulations defines a “permit” as “a license issued by the regulatory authority that authorizes a person to operate a food establishment.”

61. 12 VAC 5-421-10 of the Food Regulations includes a “restaurant” as an example of a “food establishment.”

62. 12 VAC 5-421-3660(A) of the Food Regulations states that “[n]o person shall own, establish, conduct, maintain, manage, or operate any food establishment in this Commonwealth unless the food establishment is permitted as provided in this section. All permits shall be in the name of the owner or lessee.”

63. Code of Virginia § 35.1-7(B) states that “[a]ny person violating, or failing, neglecting, or refusing to obey any lawful regulation or order of the Board or Commissioner, or any provision of this title, may be compelled in a proceeding instituted in an appropriate court by the Board or Commissioner to obey and comply with such regulation, order or provision of this title. The proceeding may be by injunction...or other appropriate remedy.”

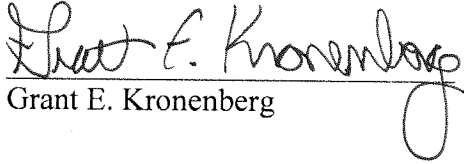
64. Defendants are in violation of Code of Virginia § 35.1-18 and 12 VAC 5-421-3660(A) of the Food Regulations because they own, establish, conduct, maintain, manage, and/or operate an establishment that meets the definition of a “restaurant” under the Code of Virginia, and the definition of a “food establishment” under the Food Regulations, without having a current and valid license to operate the restaurant.

#### **Prayer for Relief**

WHEREFORE, pursuant to Code of Virginia § 35.1-7(B) and 12 VAC 5-421-4010 of the Food Regulations, the Board and the Commissioner ask this court to enjoin and otherwise order the Defendants to cease operating, in any manner that provides service to the public, Calabash Seafood until such time as the summary suspension of its license is lifted, and that Defendants shall immediately cease operating and close Calabash Seafood during the period of any future suspension of the restaurant license. The Commissioner further asks that the Court retain jurisdiction over this matter until such time that the Governor deems the state of emergency over or the Board and Commissioner move this Court to dissolve the injunction.

RESPECTFULLY SUBMITTED,  
STATE BOARD OF HEALTH and  
M. NORMAN OLIVER, M.D.,  
State Health Commissioner,  
In his official capacity,

By Counsel

  
Grant E. Kronenberg

Mark R. Herring  
Attorney General

Donald D. Anderson  
Deputy Attorney General

Paul Kugelman, Jr.  
Senior Assistant Attorney General & Section Chief, Environmental

\*Grant E. Kronenberg (VSB No. 65647)  
Assistant Attorney General  
Counsel of Record

Office of the Attorney General  
Commonwealth of Virginia  
202 North 9<sup>th</sup> Street  
Richmond, Virginia 23219  
(804) 786-0085 – Telephone  
(804) 692-1647 – Facsimile  
[gkronenberg@oag.state.va.us](mailto:gkronenberg@oag.state.va.us)