IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

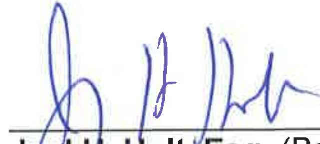
RYAN ALLEYNE, ENID V. ALLEYNE, MICHAEL BICETTE, MARCO BLACKMAN, ANISTIA JOHN, GEORGE JOHN, SUSIE SANES and ALICIA SANES, on behalf of themselves and all others similarly situated,	**Case No.:SX 2013-CV- 143**
Plaintiffs,	**CLASS ACTION**
v.	**JURY TRIAL DEMANDED**
DIAGEO USVI, INC. and CRUZAN VIRIL, LTD.	
Defendants.	

NOTICE OF SUPPLEMENTAL AUTHORITY RE DEFENDANTS' JOINT RULE 12(b)(6) MOTION TO DISMISS

The Defendants Cruzan VIRIL, Ltd. ("Cruzan") and Diageo USVI, Inc., ("Diageo USVI") hereby give notice of an opinion just issued by a Circuit Court in Kentucky on July 30, 2013, addressing the precise preemption issues raised by the Defendants in their joint Rule 12(b)(6) motion to dismiss filed on July 29, 2013. The opinion, a copy of which is attached as Exhibit 1 to this motion, held that the plaintiffs' claims seeking relief based upon ethanol emissions from a nearby distillery are preempted by the Clean Air Act, 42 U.S.C. §§ 7401, et seq. As such, that court dismissed the plaintiffs' claims pursuant to Rule 12(b)(6) with prejudice.

As the claims in that case are virtually identical to those being asserted in this case, as discussed in the opinion, the Defendants hereby submit this recent opinion as supplemental authority in support of their motion to dismiss the claims raised in this case.

Dated: August 2, 2013



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CERTIFICATE OF SERVICE

I hereby certify that on this 2 day of August, 2013, I filed the foregoing with the Clerk of the Court, and delivered as indicated to the following:

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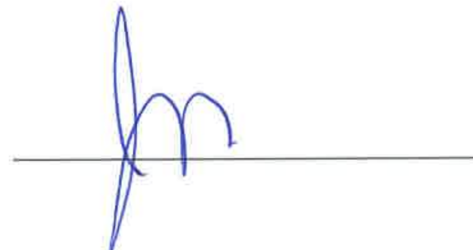


JEFFERSON CIRCUIT COURT
DIVISION NINE
JUDGE JUDITH E. McDONALD-BURKMAN
CASE NO. 12-CI-3382

BRUCE MERRICK, et al. **PLAINTIFFS**

v. **ORDER**

BROWN-FORMAN CORPORATION, et al. **DEFENDANTS**

*** *** ***

This matter comes before the Court on Motion to Dismiss filed by Defendants Brown-Forman Corporation ("Brown-Forman") and Heaven Hill Distillers, Inc. ("Heaven Hill")(collectively, "Defendants"). Plaintiffs Bruce Merrick, Dant Clayton Corporation, Arthur Milby, Rose Johnson, Samuel Johnson, Joseph M. Billy, Samantha G. Allen, by and through her Attorney-in-Fact Nancy L. Billy, Gregg M. Murray and George Miller (collectively, "Plaintiffs") have responded. A hearing was held March 4, 2013, and the matter is now submitted.

Defendants operate whiskey distilleries. Plaintiffs own real property in close proximity to Defendants' whisky-aging facilities. Ethanol is emitted during all stages of the whiskey-making process. Plaintiffs allege they have been plagued by the presence of a certain type of black fungus, referred to as "whiskey fungus," that germinates and proliferates in the presence of ethanol. This fungus causes a black film to cover essentially any surface. Although difficult, it can be removed through power washing and bleaching, which are expensive and time-consuming.

Defendants are regulated by the Environmental Protection Agency ("EPA"), Clean Air Act ("CAA"), state law, and the Louisville Metro Air Pollution Control District ("LMAPCD"). Air emissions, including ethanol, are covered by various

regulations. Plaintiffs allege that Defendants have a duty to minimize and prevent the ethanol emissions through the use of ethanol-capture technology and by not doing so, Defendants have been negligent, created a temporary and permanent nuisance, trespass, and Plaintiffs therefore also seek injunctive relief.

The law is well settled in Kentucky that when reviewing a motion to dismiss for failure to state a claim, a court should not dismiss unless it appears from the pleading that the plaintiff would not be entitled to relief under any state of facts which could be proved in support of his claim. See, Pari-Mutuel Clerk's Untion of Kentucky, Local 541, SEIU, AFL-CIO v. Kentucky Jockey Club, 551 S.W.2d 801 (Ky. 1977); Ewell v. Central City, 340 S.W.2d. 479 (Ky. 1960); Spencer v. Woods, 282 S.W.2d 851 (Ky. 1955). The Court is to construe the complaint in a light most favorable to the plaintiff and the allegations pled are to be taken as true. See, City of Louisville v. Stockyards Bank and Trust, 843 S.W.2d 327 (Ky. 1992); Gall v. Scroggy, 843 S.W.2d 327 (Ky. 1987). The Court is not to consider whether the plaintiff will be able to "prove its allegations or ultimately prevail." David V. Kramer and David W. Burleigh, 6 Ky. Prac. R. Civ. Proc. Ann. Rule 12.02 (6th ed. 2007). In their Motion, Defendants have requested the Court take judicial notice of certain public records, studies and reports. The Court does not believe the referenced items are necessary for the issues argued in the present motion, and are therefore excluded from the Court's consideration at this time.

While the mold spore that germinates into the black fungus covering Plaintiffs' properties is not emitted by the Defendants' facilities, the spores require ethanol, which is emitted by the Defendants. Ethanol emissions are regulated by the Clean Air Act ("CAA"), the Environmental Protection Agency, the Kentucky

Department for Environmental Protection, and the Louisville Metro Air Pollution Control District. Plaintiffs have not alleged that the Defendants are not in compliance with the myriad regulations of the governing agencies, but they nevertheless should be required to implement and use new emission control technology.

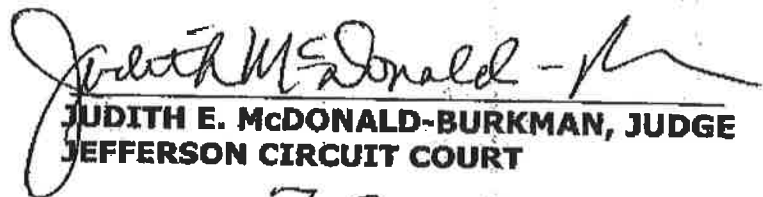
Since the Supreme Court ruled the Clean Air Act preempted federal common law claims and the agency was more suited than the Court to make the scientific, economic, and technological determinations necessary in implementing regulations in American Elec. Power Co., Inc. v. Connecticut, 131 S.Ct. 2527 (2011), several district court cases have decided the CAA also preempts state tort claims. *See*, Bell v. Cheswick Generating Station, 903 F.Supp.2d 314 (W.D. Penn. 2012); Comer v. Murphy Oil USA, Inc., 839 F.Supp.2d 849 (S.D. Miss. 2012); U.S. v. EME Homer City Generation L.P., 823 F.Supp.2d 274 (W.D. Penn. 2011). Plaintiffs have cited Her Majesty the Queen in the Right of the Province of Ontario v. City of Detroit, 874 F.Supp.2d 332 (6th Cir. 1989), which held the CAA did not preempt an action brought under the Michigan Environmental Protection Agency, and upheld a state's right to enact more stringent emission standards than those contained in the CAA. In that case, the Plaintiffs did not assert tort claims, but sought only enforcement of the emission standards based on the allegation a permit issued violated the Michigan Environmental Protection Agency. This is the type of state action permitted by the Savings Clause of the CAA and recent caselaw. Plaintiffs have not cited any authority decided since American Elec. Power that supports the argument that state tort claims are not preempted. In the present action, Plaintiffs are not asserting the Defendants are not in compliance with current regulations, but that

the Court should require the Defendants conform to a different or higher standard of acceptable practices that have not undergone the proper administrative rulemaking process.

Therefore, after a careful review of the record, applicable law, and the Court being otherwise sufficiently advised, **IT IS HEREBY ORDERED AND ADJUDGED** that the Motion to Dismiss filed by Defendants Brown-Forman and Heaven Hill Distillers, Inc. is **GRANTED**.

IT IS FURTHER ORDERED that the Complaint is **DISMISSED WITH PREJUDICE.**

This is a final and appealable order, there being no just cause for delay.



JUDITH E. McDONALD-BURKMAN, JUDGE
JEFFERSON CIRCUIT COURT

DATE: 7-30-13

Distribution to:

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