

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION**

BRUCE MERRICK, et al.)	
)	
Plaintiffs)	
)	Civil Action No.
v.)	3:12-CV-334-CRS
)	
DIAGEO AMERICAS SUPPLY, INC.)	
)	
Defendant)	

**MEMORANDUM OF DIAGEO AMERICAS SUPPLY, INC. IN SUPPORT
OF MOTION TO DISMISS PLAINTIFFS’ FIRST AMENDED COMPLAINT**

Defendant Diageo Americas Supply, Inc. (“Diageo”), by counsel, tenders this memorandum in support of its Motion to Dismiss Plaintiffs’ First Amended Complaint pursuant to Fed. R. Civ. P. 12(b)(6). As demonstrated below, Plaintiffs’ allegation that Diageo has failed to use emission control technology to reduce ethanol emissions from its whiskey aging warehouses is an essential element of all of their causes of action. But Plaintiffs do not allege a specific source for the alleged duty to use emission controls. And as the Court may determine by taking judicial notice of EPA decisions, agency actions from other jurisdictions, Diageo’s Jefferson County permits and other relevant public records, no such duty exists. Although Plaintiffs allege that Diageo has been “cited” by the Louisville Metro Air Pollution Control District with regard to a leased warehouse facility, the alleged citation is merely a Notice of Violation Letter, and not a final order of the agency; as such, it has no legal force or effect. Nor do Plaintiffs allege any factual basis for the relief they demand, *i.e.*, a mandatory permanent injunction requiring Diageo to use emission control technology in its Kentucky whiskey aging warehouses that carries a substantial risk of ruining the entire whiskey stock, including all of its currently aging Kentucky bourbon. Because Plaintiffs’ allegations are conclusory and

speculative, they must be disregarded, and the remaining factual allegations of the First Amended Complaint fail to state a claim upon which relief can be granted.

BACKGROUND

1. Nature of action.

This is a putative class action filed by seven plaintiffs who own, rent or lease real property located in the City of Shively, in Jefferson County, Kentucky. Plaintiffs allege that ethanol emissions from Diageo's whiskey aging warehouses have catalyzed the growth of an "unsightly mold" that allegedly blackens exterior surfaces on their property. Although Plaintiffs acknowledge the "mold" can be removed by high-pressure washing or with bleach (First Amended Complaint ¶ 33), they seek money damages, punitive damages and injunctive relief against Diageo. *Id.*, Prayer for Relief. Diageo is the sole defendant in this action.¹

Plaintiffs assert five causes of action, all of which are limited to claims for alleged property damage: (1) negligence/gross negligence, (2) temporary nuisance, (3) permanent nuisance, (4) trespass, and (5) injunctive relief. *See generally* Amended Complaint, ¶¶ 68-141.

2. Plaintiffs' allegations concerning emission control technology.

Plaintiffs claim that Diageo has breached a duty that it does not actually have, and seek a remedy that does not actually exist, to accomplish a goal that (even if Plaintiffs' arguments on causation were credited) could not be achieved without endangering or destroying Diageo's Kentucky whiskey business.

¹ Plaintiffs and several others have asserted identical claims against Brown-Forman Corporation and Heaven Hill Distillers, Inc. in a civil action filed in the Jefferson Circuit Court. *See Merrick, et al. v. Brown-Forman Corporation et al.*, Civil Action No. 12-CI-03382 (Jefferson Circuit Court, Division 9), and their counsel has asserted such claims on behalf of other plaintiffs in a civil action filed in the Franklin Circuit Court against Buffalo Trace Distillery, Inc. and Beam, Inc. *See Mills v. Buffalo Trace Distillery, Inc., et al.*, Civil Action No. 12-CI-00743 (Franklin Circuit Court, Division II).

Central to Plaintiffs' claims is the allegation that Diageo has breached an alleged duty to utilize "emission control technology to reduce the ethanol emitted during its alcoholic beverage production operations," including, in particular, the storage of whiskey in oak barrels in Diageo's aging warehouses. *See* First Amended Complaint, ¶ 23. In this regard, Plaintiffs allege:

18. Defendant is engaged in the commercial production of alcoholic beverages.

19. As a result of Defendant's alcoholic beverage production operations in Kentucky, including specifically during fermentation, distillation, aging/warehousing and bottling stages of alcoholic beverage production, significant, uncontrolled ethanol emissions occur.

20. During the aging process between 6 to 10 pounds of ethanol will evaporate from a 50-gallon charred oak barrel.

21. Because the Defendant fails to capture and control the ethanol it produces it discharges thousands of tons of ethanol into the atmosphere of the surrounding community.

* * *

23. Defendant has not adopted emission control technology to reduce the ethanol emitted during its alcoholic beverage production operations.

24. Reasonable and cost effective emissions control technology exists.

First Amended Complaint, ¶¶ 18-21, 23-24.

After alleging that Diageo has breached an alleged duty to utilize "emission control technology" in its whiskey aging warehouses, Plaintiffs demand that the Court issue a mandatory permanent injunction requiring Diageo to install and use emission control technology in its whiskey warehouses. *See* First Amended Complaint, ¶¶ 118-40. Indeed, Plaintiffs go so far as to ask that Diageo be ordered to use a particular emission control technology called regenerative thermal oxidizers ("RTO"). *Id.*, ¶¶ 118-37.

Tellingly, Plaintiffs do not (and cannot) allege the existence of any state or federal statute or regulation, local ordinance or other law requiring Diageo (or any other whiskey distiller in the United States) to capture and control ethanol emissions from its aging warehouses, much less to employ RTO technology. *Id.*; *see generally* First Amended Complaint, ¶¶ 18-24, 38-45, 69-79, 86-87, 90-91, 97, 106, 118-37 and 139-40. And even though Diageo operates in a highly regulated industry, with its Jefferson County, Kentucky operations governed by the terms of United States Environmental Protection Agency (“EPA”)-enforceable permits issued by the Louisville Metro Air Pollution Control District (“District”), *see* section 4, *infra*, Plaintiffs do not (and cannot) allege that any of Diageo’s permits require the capture and control of ethanol emissions from Diageo’s whiskey aging warehouses. *Id.*

Nor do Plaintiffs cite any decision of any court or administrative agency that has required Diageo or any other whiskey distiller to use emission control technology in its whiskey aging warehouses or that has required the use of RTO in whiskey aging warehouses. *Id.* Similarly, Plaintiffs do not allege that capture and control technologies have been used successfully in Diageo’s Kentucky whiskey aging warehouses or in any other whiskey aging warehouse. Nor do Plaintiffs allege that such technologies would successfully capture ethanol emissions in Diageo’s whiskey aging warehouses without changing such critical factors as natural air flow, temperature and humidity inside the warehouses and without adversely affecting the quality of the finished product. *Id.*

Instead of making specific factual allegations concerning emission capture and control technology (RTO or otherwise) in whiskey aging warehouses, Plaintiffs allege that certain brandy manufacturers in California capture ethanol from brandy warehouses and control them with RTO. *Id.*, ¶¶ 119–134. This leads Plaintiffs to conclude that “[t]he experience of the brandy

makers in California demonstrates that [RTO] technology is available, affordable, and effective.” *Id.*, ¶ 134. But Plaintiffs allege no facts regarding *whiskey aging* in support of this generalized proposition.

Thus, Plaintiffs seek to pursue a class action complaint on behalf of “hundreds” of class members, *Id.*, ¶ 63, seeking money damages (including punitive damages) and a mandatory permanent injunction requiring Diageo to use emission control technology in its whiskey aging warehouses, even though such technology has never been required or used for whiskey aging warehouses. Such technology would put Diageo’s entire Kentucky whiskey inventory at risk, including whiskey that has been aging for many years in the traditional warehouse environment. And Plaintiffs base this demand on nothing more than the unsupported, conclusory and speculative allegation that what may work for brandy manufacturers in California will necessarily work (without adversely affecting the final product) for whiskey aging warehouses in Jefferson County, Kentucky.

3. The EPA’s position regarding emissions from whiskey aging warehouses.

Plaintiffs’ allegations concerning RTO are not just merely conclusory and speculative; they are contrary to the position of the federal EPA and contrary to the position of the California agency on which they rely for their RTO claims. Although Plaintiffs allege that “[t]he experience of the *brandy* makers in California demonstrates that [RTO] technology is available, affordable, and effective,” *Id.*, ¶ 134 (emphasis added), they fail to disclose that the California agency expressly found that RTO technology was *not* applicable to *whiskey* aging. Like the EPA and other agencies for the past 35 years, the California agency recognized that whiskey making depends on the conditions (and most importantly, the natural air flow) surrounding oak aging barrels during the aging process, that capturing emissions changes those conditions, and that the

changes adversely affect the whiskey. *See infra*. The EPA and states long have recognized this fact and consistently have acknowledged that *no technology exists* for capturing and controlling ethanol emissions from whiskey aging without damaging or risking damage to the product. *Id.*

Ethanol is an emission regulated under the federal Clean Air Act, 42 U.S.C. §7401 *et. seq.*, and regulations promulgated by Kentucky and Louisville Metro.² Ethanol is grouped with other volatile organic compounds (“VOCs”) for regulation, and the EPA and all states where whiskey aging takes place have had to consider ethanol emissions from whiskey aging in two contexts. The first is in determining the type of air pollution control permit required to operate a whiskey aging warehouse. That turns on whether ethanol emissions from the warehouse are “fugitive emissions.” The second is in determining if reasonably available control technology exists for capturing and reducing some portion of those emissions. Both issues turn on the same question, namely, can any reasonably available technology actually capture and control ethanol emitted from oak barrels while whiskey is aging? As determined by every regulatory agency to date, the answer is no, because all technologies that have been tried actually damage the whiskey.

In one of several studies on the subject of emission controls in whiskey aging warehouses, the EPA noted:

In aging or maturation, the rate of extraction of wood constituents, transfer, and reaction depend on both ambient conditions such as temperature and humidity and the concentrations of various whisky constituents. For instance, higher temperatures increase the rate of extraction, transfer by diffusion, and reaction. Diurnal and seasonal temperature changes also cause convection currents in the liquid and pressure changes in the gas affecting transfer. The rate of diffusion will depend upon the difference in concentrations of constituents in the wood, liquid, and air blanketing the barrel. The

²*See* 401 KAR 50:010(135) (adopting by reference 40 CFR §51.100(s)) and Louisville Metro Air Pollution Control District Regulation 1.02, Section 1.74. Copies of authorities not available electronically are attached.

rates of reaction will increase or decrease with the concentration of constituents. *Thus, changes in the airflow around the barrel would change the alcohol concentration around the barrel and impact the diffusion rate. All of these variables are integral to a particular product brand which will have its own unique taste, color, and aroma. According to the 1978 EPA report, when ventilation was artificially increased, the quality of the product was greatly impaired.*

Emission Factor Documentation for AP-42, Section 9.12.3 Distilled Spirits, US Environmental Protection Agency, Office of Air Quality Planning and Standards (March 1997) p. 2-8 (emphasis added).³

The Clean Air Act requires permits for a number of activities that cause or increase certain emissions. Whether those permits are required often depends on whether the emissions are “fugitive emissions.” For example Title V, added as part of the Clean Air Act Amendments of 1990,⁴ requires any facility that is major source of certain emissions to obtain a federally enforceable operating permit.⁵ Whether a facility is a major source turns on its potential to emit such emissions, and when calculating that potential for this type of facility, the facility’s fugitive emissions are not included.⁶ Both federal and Louisville Metro Air Pollution Control District (“District”)⁷ regulations that specify which sources require a Title V permit⁸ define “fugitive

³ A court may properly take judicial notice of public records and government documents, FRE 201, and may consider this information without converting a motion to dismiss into a motion for summary judgment. *See Ashland, Inc. v. Oppenheimer & Co.*, 648 F.3d 461, 467 (6th Cir. 2011) (in addition to the allegations in the complaint, the court may also consider matters subject to judicial notice when considering motions to dismiss); *Bassett v. NCAA*, 528 F.3d 426, 430 (6th Cir. 2008) (same). *See also Papasan v. Allain*, 478 U.S. 265, 268 n.1, 106 S. Ct. 2932, 92 L.Ed.2d 209 (1986) (“Although this case comes to us on a motion to dismiss under Federal Rule of Civil Procedure 12(b), we are not precluded in our review of the complaint from taking notice of items in the public record . . .”). Copies of all public records cited herein are attached.

⁴P.L. 101-549, §§ 501-507 (Nov. 10, 1990).

⁵42 U.S.C. §7661- 7661f.

⁶*See e.g.*, Louisville Metro Air Pollution Control District Regulation 2.16, Section 1.25.2.

⁷The District is the air pollution control agency recognized by EPA as having responsibility and authority for

emissions” to mean “those emissions that could not reasonably pass through a stack, chimney, vent, or other functionally-equivalent opening,”⁹ *i.e.*, emissions that cannot be reasonably collected. While the District and the Kentucky Division of Air Quality readily accepted that whiskey-aging emissions are fugitive emissions,¹⁰ the question was litigated in the Indiana Office of Environmental Adjudication when Seagram & Sons appealed an Indiana Department for Environmental Management decision to subject ten Seagram whiskey aging warehouses in Ripley County to a Part 70 permit. *See In re: Objection to the Issuance of Part 70 Operating Permit No. T-137-6928-00011 for Joseph E. Seagram & Sons., Ripley County, Indiana*, 2004 OEA 58 (03-AZ-J-3003) (August 4, 2004). Holding that “whether the emissions can be reasonably *collected* is essential to the determination of whether the emissions are fugitive,” the OEA focused entirely on the question of reasonable collection. *In re: Joseph E. Seagram & Sons* at ¶ 9 (emphasis added). Finding that whiskey-aging emissions are fugitive, the OEA wrote:

Petitioner has presented extensive evidence regarding the whiskey aging process and the effect the collection of ethanol emissions would have on this process. The Petitioner has shown by a preponderance of the evidence that the collection of the ethanol emissions would negatively affect product quality. The Petitioner has also presented sufficient evidence to prove that such emissions are not collected at other facilities and that U.S. EPA has not identified any reasonably available control technology (RACT) for ethanol emissions from alcohol beverage aging warehouses.

Id. at ¶ 21. Thus, the OEA found that “emissions from [Seagram & Sons’ whiskey aging

implementing requirements within Louisville Metro that the Clean Air Act requires of states. *See* 40 CFR Part 52, Subpart S.

⁸ Title V permits are sometimes referred to as Part 70 Permits because EPA regulations that implement the Title V requirements are codified at 40 CFR Part 70.

⁹ 40 CFR §70.2 and Louisville Metro Air Pollution Control District Regulation 2.16, Section 1.20.

¹⁰*See* June 27, 1994 letter from Kentucky Division of Air Quality Director, John Hornback, and July 1, 1994 letter from District Chief Engineer, R.M. Everhart.

warehouses] are fugitive emissions” because they cannot reasonably be captured. *Id.* at ¶ 22.

Reasonably available control technology (“RACT”)¹¹ requirements in the Clean Air Act also have caused the EPA and states to assess whether whiskey or rum aging emissions can be captured and controlled. The Clean Air Act requires that states with nonattainment areas¹² impose on major sources within those areas a requirement to use, at a minimum, RACT to control their emissions.¹³ The EPA has looked at whiskey aging emissions for many years and has yet to identify any reasonably available control technology for those emissions, largely because capturing the emissions would impair the aging process. Indeed, as the OEA noted in *In re: Joseph E. Seagram & Sons, supra*, the EPA’s Deputy Assistant Administrator for Air and Radiation acknowledged this in an October 23, 2000 letter to Senator Robert Smith, Chairman of the Senate Committee on Environment and Public Works. *See In re: Joseph E. Seagram & Sons, supra*, ¶ 7(f).

The EPA also accepted this conclusion in 2001 when it approved Maryland’s proposed requirements on a Seagram & Sons rum production facility in the state. RACT obligations are imposed on a case-by-case basis through permits or by regulation, and in 2001 Maryland decided to adopt a regulation to define RACT requirements for distilled spirits facilities. The only facility affected by the Maryland rule is operated by Seagram & Sons to produce rum, a distilled spirit that, like whiskey, is aged in oak barrels. When formulating this RACT rule, Maryland recognized the fundamentals of aging distilled spirits, and how a requirement to change air flows

¹¹ The phrase “reasonably available control technology” is interpreted by the EPA to mean the lowest emission limitation that a particular source is capable of meeting by the application of control technology that is reasonably available considering technological and economic feasibility. 44 Fed. Reg. 53762 (Sept. 17, 1979).

¹² A “nonattainment area” is a geographic area identified through ambient air monitoring to have contaminant levels that exceed a national ambient air quality standard. 42 U.S.C. §§7501(2) and 7407(d).

¹³ 42 U.S.C. §§7502(c)(1) and 7511a(b)(2).

will damage the product. In its Technical Support Document developed to support this RACT rule the Maryland Department for the Environment noted:

The VOC from the aging operation is released as fugitive emissions and is caused by the breathing of the barrels. The reaction within the barrel and the breathing are part of the aging cycle. Interference with the breathing of the barrels or changing the airflow interfere with the product quality.

MDE Technical Support Document, Control of Volatile Organic Compounds from Distilled Spirits Facilities, COMAR 26.11.19.20, p.1.

Maryland sought to have the EPA approve this RACT rule as part of its State Implementation Plan (“SIP”).¹⁴ The regulation imposes good management practice requirements on barrel filling and emptying and on storing empty barrels, but imposes no requirement to capture and control emissions from aging warehouses. In its Federal Register notice accepting this regulation as a SIP amendment the EPA stated:

Neither the proposed nor adopted version of Maryland’s RACT to control VOC emissions from distilled spirits facilities requires that VOCs be controlled from the aging warehouses. The Maryland regulation is not to be construed to mean that the required good operating practices manual extends to the aging process at the affected facility in Maryland.

66 Fed. Reg. 56220 (November 7, 2001). It is quite apparent that the EPA would not have accepted the rule as part of Maryland’s SIP if the EPA had concluded that technology to capture and control aging emissions was reasonably available. Quite the opposite is true. Since at least 1978, the EPA has acknowledged that technologies capable of capturing and controlling VOC

¹⁴ The regulation is codified at COMAR 26.11.19.29. The Clean Air Act requires states to develop plans for implementing Clean Air Act requirements within the state, most of which consist of rules and regulations, and to submit those plans to EPA for approval. Those are known as State Implementation Plans (“SIP”). 42 U.S.C. §7410. In November of 2000 Maryland asked the EPA to approve a SIP amendment consisting of adding this and other RACT rules to its SIP. 66 Fed. Reg. 28058 (May 22, 2001).

emissions will not work for whiskey aging emissions because they damage the product.¹⁵

Plaintiffs allege generally that “regulatory *agencies* in other *states* have determined that many [ethanol-control technologies] were cost effective.” Amended Complaint, ¶ 126 (emphasis added). In contrast, they limit their specific allegations to a *single* agency in *California*. Yet, that agency, the San Joaquin Valley Unified Air Pollution Control District (“SJVUAPCD”), has required ethanol emission control technologies solely for brandy aging. Brandy is a much different product than whiskey because it is aged for a much shorter time and its consumer demanded taste (including smoothness and aroma) is not nearly as sensitive to the aging process. The SJVUAPCD expressly recognized this difference, stating in a staff report prepared while developing a rule to impose capture and control obligations on brandy aging facilities that “whiskey aging is not considered or included in this rule development process.”¹⁶

To summarize, Plaintiffs’ reliance on allegations concerning the brandy industry in California is contrary to the consistent position of the federal EPA over the past 35 years, contrary to the position of state and local agencies that have reviewed the issue of emission controls in whiskey aging warehouses, and even contrary to the express determination of the California agency on which Plaintiffs base the allegations of their complaint concerning the

¹⁵ Cost and Engineering Study – Control of Volatile Organic Emissions from Whiskey Warehousing, EPA-450/2-78-013 (April 1978), Emission Factor Documentation for AP-42, Section 9.12.3 (March 1997).

¹⁶ Final Draft Staff Report for New Draft Rule 4695 (Brandy Aging and Wine Aging Operations), September 17, 2009, p.3. The complete staff report statement on this is as follows:

The District staff understands that the nature of whiskey aging operations differs from wine and brandy aging. Specifically, the ambient conditions, such as storage temperature and humidity, as well as seasonal variations, are important factors in the whiskey aging process. All aging processes depends upon the interaction of product in oak barrels, whiskey aging operations strive for a particular blend of temperature, humidity, and ventilation, leading to different types of warehouse. (Source: EPA, Final report: Emission Factor Documentation for AP-42, Section 9.12.3, Distilled Spirits, p, 2-7 (March 1997)). Therefore, whiskey aging is not considered or included in this rule development process.

availability and effect of systems for controlling whiskey aging warehouse emissions.

4. Diageo's operation and permits.

Plaintiffs' allegations concerning emission control technology and their demand for a mandatory permanent injunction requiring Diageo to use this technology in its aging warehouses also ignores – and once again is directly contrary to – the terms of Diageo's air pollution control permits. Diageo has aged whiskey in Shively since before 2000, in a facility it owns at 3860 Fitzgerald Road where whiskey aging operations have continued without interruption from Derby Day 1935 when Stitzel-Weller Distillery Incorporated began making whiskey there. Beginning in 2008, Diageo leased two warehouses a few blocks away from the Fitzgerald Road facility and converted them for whiskey aging. They are located on Miller Lane in Shively.

a. The 2001 FEDOOP.

Diageo's whiskey aging operations at its Fitzgerald Road facility are governed by a Federally Enforceable District Origin Operating Permit (FEDOOP), which was issued by the District. The current FEDOOP was issued in 2001.

The 2001 FEDOOP permits Diageo to maintain “[e]ighteen (18) warehouse storage operations for aging whiskey in 55 gallon barrels.” *See* 2001 FEDOOP, Attachment 148-93. The 2001 FEDOOP permits Diageo to utilize the maximum storage capacity of each warehouse, which varies from a low of 12,600 barrels in seven of the warehouses to a high of 24,360 barrels in the three largest warehouses. *Id.*, p. 2. The maximum storage capacity for all eighteen warehouses is 312,200 barrels. *Id.*

The 2001 FEDOOP does not require Diageo to use any sort of control equipment to capture, collect or control ethanol emissions from its whiskey barrels. *See generally* 2001

FEDOOP. In this regard, the 2001 FEDOOP expressly states that “VOC emissions from this facility are fugitive emissions.” *Id.*, Attachment 148-93, p. 2.¹⁷

b. The Fitzgerald Road construction permit.

On March 31, 2006, Diageo received a permit to install a new state-of-the-art barrel emptying and filling operation at the Fitzgerald Road facility and to adapt one building for additional barrel aging of up to 150,000 barrels. *See* Permit No. 32-06-C. This construction permit limits VOC emissions from the barrel emptying and filling operation to 0.83 ton during any calendar month and ten tons during any consecutive 12-month period.¹⁸ *Id.* The permit does not require Diageo to use emission control equipment in its whiskey aging warehouses (where potential emissions were calculated by the District at 664 tons per year), because such emissions are considered fugitive emissions. *Id.*

c. The January 2008 Miller Lane permit.

In January 2008, the District issued a construction permit to Diageo, allowing it to construct or operate an additional whiskey aging warehouse with a 100,000 barrel capacity at its leased Miller Lane location. *See* Permit No. 75-08-C. The District projected potential ethanol emissions from the warehouse at 332 tons per year. *Id.*, p. 4. Again, the “storage of beverage alcohol in barrels” inside the warehouse is not subject to any emission control requirements because “[w]arehouse emissions are fugitive emissions.” *Id.*

¹⁷ The term “VOC emissions” is an abbreviation for “Volatile Organic Compounds.” Ethanol is a VOC. As noted in section 3, *supra*, a “fugitive emission” is one that cannot be reasonably collected.

¹⁸ The District further determined that the work practice standards coupled with a 10 ton per year VOC emission limit represents Best Available Control Technology (BACT) for the type of barrel filling and barrel emptying operations at this facility. *Id.*

d. The August 2008 Miller Lane permit.

In August 2008, the District issued a permit to Diageo that authorized the company to construct or operate a second whiskey-aging warehouse with a 130,000-barrel capacity at the leased Miller Lane site. *See* Permit No. 511-08-C. Consistent with Diageo's other permits, this permit does not require Diageo to use any type of control equipment to capture, collect or control ethanol emissions (which the District calculated at 493 tons per year) resulting from the storage and aging of whiskey in barrels stored inside the warehouse. *Id.* The District also confirmed, as it had done in the previous permits, that: "Warehouse emissions are fugitive emissions." *Id.*, p. 4.

So at all times relevant to the allegations of the amended complaint, Diageo has operated in Jefferson County pursuant to permits issued by the District. Consistent with EPA determinations, the permits recognize that Diageo stores large amounts of whiskey in barrels in its whiskey aging warehouses, that the whiskey stored in the aging warehouses will emit ethanol emissions as a natural result of the aging process, and that those emissions are fugitive emissions, *i.e.*, emissions that cannot be controlled. Diageo's permits do not require Diageo to use emission control technology, and, as the EPA and other agencies have found, there is no such technology that could capture ethanol emissions from Diageo's whiskey warehouses without damaging the product. *See* Section 3, *supra*.

5. The notice of violation letter.

In connection with their negligence claim (Count I of the First Amended Complaint), Plaintiffs allege that Diageo "breached [its] duty to the Plaintiffs when [it] violated Section 1.09 of the [District's] regulations." *See* First Amended Complaint, ¶ 79.

Section 1.09 of the District's regulations prohibits, *inter alia* "the emission of air pollutants which . . . cause injury or damage to . . . property." *See* Louisville Metro Air Pollution

Control District Regulation 1.09.

Plaintiffs quote extensively from an Incident/Violation Report prepared by District Investigator Nicholas Hart, who summarizes complaints allegedly received from unidentified residents (including one or more Plaintiffs) residing in the vicinity of Miller Lane. The alleged complaints are similar to those asserted in the First Amended Complaint. *See* Notice of Violation Letter 02425 and Incident/Violation Report. *Id.* The Incident/Violation Report references only Diageo's leased warehouses at Miller Lane. *Id.*

The Incident/Violation Report is not a final determination of the District, which by statute and by its own regulations may take official action only through an order of its Board. *See* KRS 77.310(3); Louisville Metro Air Pollution Control Regulation 1.08. The Board may issue an order finding a violation to have occurred only after holding a full administrative hearing before a qualified hearing officer. KRS 77.310. Plaintiffs do not and cannot allege that the Board has taken official action against Diageo, or issued a final order in this matter.

The Notice of Violation Letter is not a final order. It is merely an allegation of non-compliance, a fact the letter makes perfectly clear in its very first sentence (which Plaintiffs ignore in their Complaint): "The Louisville Metro Air Pollution Control District ("District") *alleges* that your company has violated certain District regulations." Notice of Violation Letter, *supra* (emphasis added). In essence, Plaintiffs are attempting to support the allegations of the First Amended Complaint with unproven and untested allegations asserted in the District's letter to Diageo.

ARGUMENT

1. The legal standard governing motions under rule 12(b)(6).

Diageo moves to dismiss with prejudice all five counts of Plaintiffs' First Amended Complaint for failure to state a claim upon which relief may be granted. Where the material allegations of a complaint are based on speculation and conjecture rather than allegations of fact supporting the elements of the cause or causes of action at issue, the complaint fails as a matter of law. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678-82, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2007); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555-56, 127 S.Ct. 1956, 167 L.Ed.2d 929 (2007). Moreover, the factual allegations of the complaint "must be enough to raise a right to relief above the speculative level." 550 U.S. at 555. A complaint that offers "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." *Id.* Nor does a complaint state a cause of action if it bases its material allegations on "naked assertions" devoid of "further factual enhancement." *Id.* at 557; *Iqbal, supra*, 556 U.S. at 678.

Similarly, a complaint fails to state a claim if its material allegations are based on legal conclusions rather than allegations of fact. *Iqbal, supra*, 556 U.S. at 678. When considering a motion to dismiss for failure to state a claim, courts "are not bound to accept as true a legal conclusion couched as a factual allegation." *Twombly, supra*, 475 U.S. at 555, quoting *Papasan v. Allain*, 478 U.S. 265, 286, 106 S.Ct. 2932, 92 L.Ed.2d 209 (1986). "[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Iqbal, supra*, 556 U.S. at 678. Rule 8 of the Federal Rules of Civil Procedure "marks a notable and generous departure from the hypertechnical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more

than conclusions.” *Id.* at 678-79. “While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations.” *Id.* at 679.

This gate-keeping requirement is of particular importance in cases involving complex claims and multiple parties, where discovery related to even a meritless claim would expose the defendant to “potentially enormous expense” in the discovery phase of the action. *Twombly, supra*, 550 U.S. at 558-60, quoting *Associated General Contractors of California, Inc. v. Carpenters*, 459 U.S. 519, 528 n. 17, 103 S.Ct. 897, 74 L.Ed.2d 723 (1983) (“[A] district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed.”).

In short, “only a complaint that states a plausible claim for relief survives a motion to dismiss.” *Iqbal, supra*, 556 U.S. at 679; *Twombly, supra*, 550 U.S. at 556. “Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.” *Iqbal, supra*, 556 U.S. at 679. Where the “well-pleaded facts” – i.e., factual allegations that are neither speculative nor conclusory – “do not permit the court to infer more than the mere possibility of misconduct,” the complaint fails to state a claim upon which relief can be granted. *Id.*

Following the dictates of *Iqbal* and *Twombly*, a court considering a motion to dismiss can “begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth.” *Iqbal, supra*, 556 U.S. at 679. For example, in an antitrust case, the plaintiff’s allegation that the defendants engaged in an unlawful agreement is a “legal conclusion” and thus, is not entitled to an assumption of truth. *Id.* at 680.

The court may use the same approach to disregard allegations that are speculative rather than factual, or that require the court to make “unwarranted” factual inferences. *Directv, Inc. v.*

Treesh, 487 F.3d 471 (6th Cir. 2007) (when ruling on a motion to dismiss for failure to state a claim, courts “need not accept as true *legal conclusions* or *unwarranted factual inferences*”), quoting *Gregory v. Shelby County, Tenn.*, 220 F.3d 433, 446 (6th Cir. 2000) (emphasis added); *Morgan v. Church’s Fried Chicken*, 829 F.2d 10, 12 (6th Cir. 1987) (same); *Westlake v. Lucas*, 537 F.2d 857, 858 (6th Cir. 1976) (same).

2. Plaintiffs’ claims fail as a matter of law.

Plaintiffs’ factually unsupportable emission control and RTO allegations are material to the essential elements of all five causes of action in their First Amended Complaint. Plaintiffs allege that Diageo “has not adopted emission control technology to reduce the ethanol emitted during its alcoholic beverage production operation,” that it “has a duty to minimize and prevent ethanol emissions from entering on Plaintiffs’ property” that its “ethanol emissions can be corrected or abated at reasonable expense,” that “[a] number of different ethanol-capture technologies have been developed since 2005 that are 99% efficient in eliminating ethanol releases from aging warehouses and regulatory agencies in other states have determined that many ... were cost effective,” and “[t]he experience of the brandy makers in California demonstrates that [RTO] technology is available, affordable, and effective.” Amended Complaint, ¶¶ 23, 71, 87, 126 and 134.

a. The negligence claim.

It is through these emission control and RTO allegations that Plaintiffs attempt to plead the elements of duty and breach of duty to support the negligence claim asserted in Count I of the First Amended Complaint. *See* First Amended Complaint, ¶¶ 70-71. *See generally* *Rockwell Int’l Corp. v. Wilhite*, 143 S.W.3d 604, 620 (Ky. App. 2003) (negligent trespass claim requires proof that defendant breached duty of care owed to plaintiff); *Mullins v. Commonwealth Life Ins. Co.*,

839 S.W.2d 245, 248 (Ky. 1992) (negligence claim requires proof that defendant breached duty owed to plaintiff).

Here, Plaintiffs assert that Diageo “has not adopted emission control technology to reduce the ethanol emitted during its alcoholic beverage production operations” (First Amended Complaint, ¶ 23), despite having an alleged “duty to minimize and prevent the ethanol emissions from entering on to Plaintiffs’ property and the property of others similarly situated” (*id.*, ¶ 71).” But as demonstrated above, neither the EPA nor the District require Diageo to use emission control technology, and no federal, state or local laws mandate its use in whiskey aging warehouses. Moreover, since the RTO technology that Plaintiffs demand Diageo be ordered to adopt has been attempted in brandy manufacturing in California, and not in whiskey aging warehouses in Kentucky, it is pure speculation to allege that RTO technology would reduce emissions from Diageo’s whiskey aging warehouses without adversely affecting Diageo’s entire whiskey aging process and its entire whiskey inventory warehoused in Jefferson County, Kentucky. Such allegations fail to state a claim under *Iqbal* and *Twombly*.¹⁹

Plaintiffs further allege that the District “cited” Diageo for a violation of District Regulation 1.09, inferring that the “citation” establishes a breach of a duty by Diageo. *See* First Amended Complaint, ¶ 79; Background, Section 5, *supra*. However, this alleged citation is nothing more than a letter expressing a view of District staff and does not represent any government agency determination. The District’s Notice of Violation Letter expressly provides that the District “alleges” that a violation has occurred, not that it has made a final determination

¹⁹To the extent it is based on alleged damage to real property, the negligence claim also fails as a matter of law because claims for negligent damage to real property sound in trespass. *See Mercer v. Rockwell Int’l Corp.*, 24 F.Supp 2d 735, 743 (W.D. Ky. 1998) (“[E]very negligent injury to real property sounds in trespass.”). *See also Dickens v. Oxy Vinyls, LP*, 631 F. Supp. 2d 859, 864 (W.D. Ky. 2009) (dismissing negligence and gross negligence claims for alleged damage to real property).

or issued a final order to that effect. *See* Notice of Violation Letter. Indeed, as the United States Supreme Court has noted, a notice of violation or even an administrative complaint issued by an agency without any further proceedings has no legal force or effect. *See FTC v. Standard Oil Co.*, 449 U.S. 232, 242, 101 S.Ct. 488, 66 L.Ed.2d 416 (1980) (administrative complaint was not final agency decision and had no legal force.)

It is clear on the face of the letter from the District and attached Report that it is based on unsubstantiated claims by neighbors and conclusions drawn using unscientific methods and untrained observers. *Id.* This alleged citation provides no greater evidence of a duty and a breach of a duty than would be provided by a complaint filed in a second lawsuit containing allegations similar to Plaintiffs' claims.

b. The nuisance claims.

In like manner, it is through these same emission control and RTO allegations that Plaintiffs seek to plead the necessary element of "unreasonable" conduct by Diageo to support the temporary (Count II) and permanent (Count III) nuisance claims in the First Amended Complaint. *See* First Amended Complaint, ¶¶ 86-87, 90-91. *See generally Smith v. Carbide & Chems.Corp.*, 507 F.3d 372, 379 (6th Cir. 2007) (under Kentucky law, a nuisance "arises from the unreasonable, unwarranted or unlawful use by a person of his own property"); *Louisville Ref. Co. v. Mudd*, 339 S.W.2d 181, 186 (Ky. 1960) (same).

It is through the allegation that "[r]easonable and cost effective emissions control technology exists" (First Amended Complaint, ¶ 24), and the allegation that "Defendant's ethanol emissions can be corrected or abated at reasonable expense to the Defendant" (*id.*, ¶ 87), that Plaintiffs attempt to plead unreasonable conduct by Diageo. Yet when these allegations are disregarded as speculative and conclusory, as they must under *Iqbal* and *Twombly*, there is no

factual basis alleged in the First Amended Complaint to support an inference of unreasonable conduct by Diageo. Therefore, the nuisance claims in Counts I and II of the First Amended Complaint fail as a matter of law.

c. The trespass claim.

Turning to Count IV of the First Amended Complaint, it is through these same allegations that Plaintiffs attempt to plead either a negligent trespass (based on Diageo's alleged breach of a claimed duty to use emission control technology in its aging warehouses) or an intentional trespass (based on operating a whiskey aging warehouse without using RTO or other "reasonable and cost effective" emission control technology). *See* First Amended Complaint, ¶¶ 24, 106. *See generally Rockwell Int'l Corp., supra*, 143 S.W.3d at 620 (negligent trespass claim requires proof that defendant breached duty of care owed to plaintiff); *Rudy v. Ellis*, 236 S.W.2d 466, 468 (Ky. 1951) (intentional trespass claim requires actual knowledge of wrongdoing by defendant); *Lebow v. Cameron*, 394 S.W.2d 773, 776 (Ky. 1965) ("A willful trespasser knows he is wrong.").

Again, however, the EPA and the District do not require Diageo to use emission control technology, and the use of such technology (including the RTO technology touted by Plaintiffs) is untested and unproven in whiskey-aging warehouses. Thus, Plaintiffs' allegations must be disregarded as conclusory and speculative, and when they are disregarded, there is no basis to allege either a negligent or intentional trespass by Diageo.

d. The claim for injunctive relief.

Finally, the allegations concerning "available, affordable and effective" emission control technology used by certain brandy manufacturers in California are pivotal to Plaintiffs' demand for a mandatory permanent injunction, asserted in Count V of the First Amended Complaint. *See*

First Amended Complaint, ¶¶ 118-136, 140. Indeed, Paragraph 140 of the First Amended Complaint expressly states: “The Defendant’s conduct creating the nuisance alleged herein can be corrected or abated at reasonable expense to the Defendant [by installing and using RTO technology], and since it can be abated or corrected, public policy requires the Court enter an order of permanent injunction to avoid a permanent nuisance.” *Id.*, ¶ 140. *See generally eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391, 126 S.Ct. 1837, 164 L.Ed. 2d 641 (2006) (plaintiff seeking permanent injunction must prove (1) that he or she has suffered irreparable injury, (2) that remedies available at law, such as monetary damages, are inadequate to compensate for the injury, (3) that the balance of hardships between the parties favors issuance of an injunction, and (4) that the public interest would not be disserved by a permanent injunction).

But, as with Plaintiffs’ other causes of action, Count V of the First Amended Complaint lacks an adequate factual basis for the proposed injunction when the RTO allegations are disregarded as conclusory and speculative – as they must, given that whiskey is not brandy, whiskey warehouses are not brandy warehouses, Kentucky is not California, and (most importantly) RTO technology has never been used in whiskey aging warehouses. It is inherently and grossly speculative to allege that a technology which disrupts the aging process and which has never been used in a whiskey-aging warehouse is “available, affordable and effective.” It is continuing speculation for Plaintiffs to allege that such a technology is “reasonable” or that “public policy requires” that it be imposed on Diageo through a mandatory permanent injunction. Plaintiffs’ claim for injunctive relief must be dismissed as a matter of law.

CONCLUSION

The First Amended Complaint seeks to impose liability – and a potentially draconian, product-harming injunction – on Diageo based on allegations concerning emission control technology and its applicability to whiskey-aging warehouses that are conclusory and speculative, that ignore 35 years of EPA review, that ignore the requirements of the EPA-approved permits issued to Diageo by the District, and that are contrary to the conclusion of the California agency on which Plaintiffs rely to support their RTO claims. For these reasons, and for all of the reasons stated above, the Court should enter an order granting Diageo’s motion to dismiss the First Amended Complaint with prejudice.

Dated: November 8, 2012

Respectfully submitted,

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