

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE

DIAGEO AMERICAS SUPPLY, INC. d/b/a
GEORGE A. DICKEL & CO.,

Plaintiff,

v.

KEITH BELL, in his official capacity as
Director of the Tennessee Alcoholic Beverage
Commission,

Defendant.

Civil Action No. _____

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

Plaintiff Diageo Americas Supply, Inc. d/b/a George A. Dickel & Co. (“Dickel”) files this Complaint for declaratory and injunctive relief pursuant to 42 U.S.C. § 1983 against Keith Bell, in his official capacity as Director of the Tennessee Alcoholic Beverage Commission, and alleges as follows:

NATURE OF ACTION

1. This civil rights action challenges the constitutionality of Section 57-2-104 of Tennessee Code (the “Storage Statute”). Defendant purports to interpret Section 57-2-104 as prohibiting manufacturers of *all types* of “alcoholic beverages” (“Distilled Spirits”) licensed in Tennessee, such as Dickel, from storing their Tennessee-manufactured Distilled Spirits *anywhere* but the Tennessee county in which those products were manufactured or an adjacent county.

2. Dickel seeks a declaratory judgment that the Storage Statute violates the Commerce Clause of the U.S. Constitution, art. I, § 8, cl. 3, and the Equal Protection Clause of the Fourteenth Amendment, amend. XIV, § 1, and that Dickel has been deprived under color of state law of its constitutional rights and privileges to engage in interstate commerce and to equal protection of the laws.

3. Dickel further seeks a permanent injunction barring Defendant from enforcing the Storage Statute and requiring Defendant to permit Distilled Spirit manufacturers to store their Tennessee-manufactured products anywhere inside or outside of Tennessee.

PLAINTIFF

4. Diageo Americas Supply, Inc. d/b/a George A. Dickel & Co. is a New York corporation with its principal place of business in Norwalk, Connecticut.

5. Dickel owns and operates the George Dickel Distillery, which has manufactured George Dickel® Tennessee Whisky products in Tullahoma, Tennessee (Coffee County) for more than 130 years. The George Dickel Distillery also manufactures other Distilled Spirits in addition to its signature line of George Dickel® Tennessee Whisky products.

DEFENDANT

6. Defendant Bell is sued in his official capacity as the Director of the Tennessee Alcoholic Beverage Commission, which has general authority for licensing and regulating the manufacture of alcohol beverages in the state, and for enforcing the state alcohol beverage laws, including the Storage Statute.

7. Defendant is acting under color of state law when he enforces or supervises the enforcement of the Tennessee alcohol beverage laws, including the Storage Statute.

JURISDICTION AND VENUE

8. This action arises under the Commerce Clause of the United States Constitution, the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, and 42 U.S.C. § 1983.

9. This Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 1343(a)(3), and 1367, and may issue declaratory, injunctive, and further relief under 28 U.S.C. §§ 2201 and 2202.

10. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b) because it is the District in which Defendant resides.

LEGAL BACKGROUND

11. The Storage Statute provides as follows:

It is lawful for the holder of a license issued pursuant to § 57-2-102, or the authorized agent of such licensee, to possess, store or transport the products of the manufacturing plant within, over and across the state; provided, that any alcoholic beverages or wine produced at a plant located within this state shall be stored by the licensee only within the county authorizing the operation or in a county adjacent to the county authorizing the manufacturing operation, and such possession shall be limited to storage facilities of such manufacturer; and further provided, that such licensee may also possess such alcoholic beverages or wine while being transported, whether within or outside of the state. It is lawful for common carriers to transport the products of such manufacturing plant only pursuant to an agreement or contract with a licensee under this title.

Tenn. Code Ann. § 57-2-104 (emphasis added).

12. The Storage Statute was enacted in 1937 and was most recently amended in 2013. The 2013 amendment expanded the geographic scope of permissible storage locations to include not just the Tennessee county authorizing the manufacturing operation, but also “adjacent” counties.

13. As used in the Storage Statute, the phrase “holder of a license issued pursuant to § 57-2-102” refers to the holder of a license to operate a business manufacturing Distilled Spirits (or wine) if that license is “issued by the [Tennessee] department of revenue and by the county legislative body of such county as authorizes the operation of the manufacturing business within the boundaries of such county.” Tenn. Code Ann. § 57-2-102.

14. Dickel has at all relevant times held “a license issued pursuant to § 57-2-102” that authorizes Dickel to operate the George Dickel Distillery in Coffee County, Tennessee.

15. Dickel manufactures various Distilled Spirits at the George Dickel Distillery, and each of those Distilled Spirits meets the definition of an “alcoholic beverage” under the Tennessee Code.

16. On March 20, 2014, Defendant Bell, in his official capacity as Director of the Tennessee Alcoholic Beverage Commission, sent the following email to Dickel Licensing Specialist Tina Anderson:

Subject: Storage of product

Ms. Anderson:

It has come to our attention that George A. Dickel & Company (manufacturer’s permit no. 7) located at 1950 Cascade Hollow Road, Tullahoma (Coffee County) Tennessee 37388 is storing product (manufactured/distilled alcoholic beverages) produced at its Tullahoma, Tennessee distillery in warehouses located in Louisville, Kentucky in violation of T.C.A. Section 57-2-104.

57-2-104. Possession, storage or transportation by manufacturer lawful -- Rights limited.

It is lawful for the holder of a license issued pursuant to § 57-2-102, or the authorized agent of such licensee, to possess, store or transport the products of the manufacturing plant within, over and across the state; *provided, that any alcoholic beverages or wine produced at a plant located within this state shall be stored by the licensee only within the county authorizing the operation or in a county adjacent to the county authorizing the manufacturing operation, and such possession shall be limited to storage facilities of such manufacturer*; and further provided, that such licensee may also possess such alcoholic beverages or wine while being transported, whether within or outside of the state. It is lawful for common carriers to transport the products of such manufacturing plant only pursuant to an agreement or contract with a licensee under this title.

HISTORY: Acts 1937, ch. 193, § 3; C. Supp. 1950, § 6648.3; T.C.A. (orig. ed.), § 57-104; Acts 2011, ch. 448, § 4; 2013, ch. 341, § 2.

We would appreciate you looking into this matter and responding not later than 4:00 pm cdt on Friday, March 28, 2014.

Thank you,

E. Keith Bell, Attorney at Law
BPR#009896
Director
Tennessee Alcoholic Beverage Commission
Davy Crockett Tower
500 James Robertson Pkwy, 3rd Floor
Nashville, TN 37243
(615) 741-7620

(Emphasis in original.)

17. On information and belief, the State of Tennessee has never before sought to enforce the geographic limitations of the Storage Statute against any “holder of a license issued pursuant to § 57-2-102.”

FACTUAL BACKGROUND

18. Dickel stores most Distilled Spirits manufactured at its George Dickel Distillery on site (*i.e.*, in Coffee County, Tennessee). This currently includes all products sold as George Dickel® Tennessee Whisky.

19. Dickel has transported some Distilled Spirits manufactured at its George Dickel Distillery (other than George Dickel® Tennessee Whisky) to a company-owned distillery in Kentucky and stores those Distilled Spirits there.

20. Based on a variety of economic factors, Dickel may in the future want to store Distilled Spirits manufactured at its George Dickel Distillery (other than George Dickel® Tennessee Whisky) in other out-of-state facilities owned by Dickel, like the Kentucky distillery, in out-of-state facilities owned by an affiliate, or in out-of-state facilities owned by other entities

with whom Dickel might contract for storage of Distilled Spirits (collectively, “Out-of-State Facilities”).

21. By its terms, and as interpreted by Defendant in his notice to Dickel of March 20, 2014 (*see* ¶ 16 above), the Storage Statute prohibits Dickel from storing at its Kentucky distillery—or at any Out-of-State Facility—any Distilled Spirits that it manufactures at its George Dickel Distillery.

22. In order fully to comply with the Storage Statute, as interpreted by Defendant, Dickel would have to incur the cost of moving the Distilled Spirits stored in Kentucky back to Tennessee.

23. Moreover, depending on future demand, compliance with the Storage Statute would force Dickel to use only its own storage capacity in Tennessee, perhaps requiring construction of additional storage capacity in Tennessee; to contract only with other entities who have storage capacity in Tennessee; to reduce the manufacturing output of the George Dickel Distillery; and/or to move production of Distilled Spirits (other than George Dickel® Tennessee Whisky) to out-of-state distilleries.

24. Reducing the manufacturing output of the George Dickel Distillery or moving production of Distilled Spirits (other than George Dickel® Tennessee Whisky) to out-of-state distilleries would most likely come at the cost of Tennessee jobs.

25. By precluding Dickel from storing any Distilled Spirits it manufactures at the George Dickel Distillery in Out-of-State Facilities, the Storage Statute prevents Dickel from transporting its products out-of-state for storage and accordingly prevents the movement of commercial goods in interstate commerce.

26. Enforcement of the Storage Statute by Defendant against Dickel would constitute a deprivation of the rights, privileges, and immunities secured to Dickel by the United States Constitution.

27. The allegations of this Complaint set forth an actual controversy between Dickel and Defendant for which Dickel has no adequate remedy at law.

**COUNT 1
(COMMERCE CLAUSE)**

28. Dickel incorporates by reference paragraphs 1-27 of this Complaint.

29. The Storage Statute treats the interstate transportation and storage of Distilled Spirits manufactured in Tennessee differently than the intra-state transportation and storage of such products, discriminates against Out-of-State Facilities and storage services, provides economic protection to in-state storage services, forces manufacturers to store their products in-state, and regulates transactions occurring out of state, all in violation of the Commerce Clause of the U.S. Constitution, art. I, § 8, cl. 3.

30. The Storage Statute also restricts the storage of Distilled Spirits even within the State of Tennessee to the county of manufacture or an adjacent county. Because most Distilled Spirits manufactured in Tennessee are ultimately sold in interstate commerce, this in-state restriction also violates the Commerce Clause.

31. These violations of the Commerce Clause injure Dickel, including by restricting Dickel's ability to transport and store its products in interstate commerce and by forcing Dickel either to incur the otherwise unnecessary expense to move the Distilled Spirits stored in Kentucky. In the future this violation of the Commerce Clause could force Dickel to choose among acquiring or building additional storage capacity *only* in Tennessee, reducing production at the George Dickel Distillery, moving production of Distilled Spirits (other than George

Dickel® Tennessee Whisky) to out-of-state distilleries, or risking civil and/or administrative penalties for violating the unconstitutional Storage Statute.

32. Under 42 U.S.C. § 1983, Defendant is liable to Dickel for the Storage Statute's violation of the Commerce Clause, and are subject to declaratory and injunctive relief.

COUNT 2 (EQUAL PROTECTION)

33. Dickel incorporates by reference paragraphs 1-32 of this Complaint.

34. By its terms, and as interpreted by Defendant, the Storage Statute treats similarly-situated persons differently.

35. The Storage Statute mandates differential treatment of similarly-situated licensees who manufacture alcohol beverages in Tennessee by preventing those who have capacity in Out-of-State Facilities from utilizing such capacity to store their Tennessee-manufactured products free from the threat of civil and/or administrative penalties.

36. The Storage Statute also treats out-of-state providers of storage services differently than in-state providers by excluding Out-of-State Facilities from the market for storage of Distilled Spirits manufactured in Tennessee, even though in-state and out-of-state providers are similarly situated. But for the Storage Statute, in-state and out-of-state providers would compete in an interstate market to provide storage services to Dickel and other Tennessee manufacturers.

37. The Storage Statute also mandates differential treatment of storage facilities within Tennessee, favoring those that are in the same county as or a county adjacent to the site of manufacture over storage facilities located elsewhere in the State.

38. The discrimination mandated by the Storage Statute—and enforced by Defendant acting under color of state law—is not rationally related to a legitimate state interest and violates

Dickel's rights as secured by the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

39. Under 42 U.S.C. § 1983, Defendant is liable to Dickel for this violation of Dickel's right to equal protection of the laws, and are subject to declaratory and injunctive relief.

PRAYER FOR RELIEF

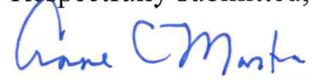
WHEREFORE, Dickel prays that this Court:

- A. Declare the Storage Statute, Tenn. Code Ann. § 57-2-104, unconstitutional insofar as it prohibits interstate transportation and storage of Distilled Spirits manufactured within the State of Tennessee;
- B. Preliminarily and permanently enjoin Defendant from enforcing the Storage Statute against Dickel;
- C. Award Dickel the costs of this action, including attorneys' fees; and
- D. Grant such other and further relief as the Court deems just and proper.

Dated: March 28, 2014

Bobby R. Burchfield (*pro hac* pending)
Marc E. Sorini (*pro hac* pending)
McDERMOTT WILL & EMERY LLP
500 North Capitol Street NW
Washington, DC 20001
(202) 756-8000
(202) 756-8087 fax

Respectfully submitted,



John P. Branham (TN Bar #2552)
Anne C. Martin (TN Bar #15536)
William T. Cheek (TN Bar #14787)
BONE MCALLESTER NORTON PLLC
511 Union Street, Suite 1600
Nashville, TN 37219
(615) 238-6318
(615) 687-2765 fax

Counsel for Plaintiff Diageo Americas Supply, Inc. d/b/a George A. Dickel & Co.