IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. CROIX

LAURIE ET. AL., ABEDNEGO	**Plaintiff**)	CASE NO. SX-09-CV-0000571
	)	
	)	ACTION FOR: DAMAGES - CIVIL
	)	
vs	)	
	)	
ST. CROIX AUMINA LLC,	)	
ALCOA	)	
GLENCORE, LTD.	)	

Defendant

NOTICE OF ENTRY OF MEMORANDUM OPINION AND ORDER

TO: LEE ROHN,ESQ.; ANDREW SIMPSON,ESQ.
WILLIE ELLIS,JR.ESQ.; JOEL HOLT,ESQ.
RICHARD HUNTER,ESQ.; RENE PATRO,ESQ.
JULIET MARKOWITZ,ESQ; JAMES HYMES III,ESQ.
CARL HARTMANN III, ESQ.
SUPERIOR COURT JUDGES AND MAGISTRATES
LAW CLERKS, LAW LIBRARY, IT, RECORD BOOK

Please take notice that on July 07, 2017 a(n) MEMORANDUM OPINION AND ORDER dated July 07, 2017 was entered by the Clerk in the above-entitled matter.

Dated: July 07, 2017

Estrella H. George
Clerk of the Court

IRIS D. CINTRON
COURT CLERK II

SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

LAURIE L.A. ABEDNEGO, et al., Plaintiffs, v. ST. CROIX ALUMINA, LLC; GLENCORE INTERNATIONAL AG; ALCOA, INC.; GLENCORE, LTD F/K/A CLARENDON, LTD; and CENTURY ALUMINUM COMPANY, Defendants.	)	**CASE NO. SX-09-CV-571** ACTION FOR DAMAGES (JURY)

ORDER

AND NOW, consistent with the accompanying Memorandum Opinion, it is hereby

ORDERED that the Response to Court Order Regarding Refiled Complaint, filed by Plaintiff Laurie L.A. Abednego, through counsel, on September 14, 2016 is CONSTRUED as a motion and DENIED as moot. Within twenty-one (21) days from the date of entry of this Order, Plaintiff Laurie L.A. Abednego shall serve and file his verified, amended complaint. Failure to comply will result in dismissal. It is further

ORDERED that a copy of this Order and the accompany Memorandum Opinion shall be served on Lee J. Rohn, Esq., Andrew C. Simpson, Esq., Willie C. Ellis, Jr., Esq., Richard H. Hunter, Esq., Rene P. Tatro, Esq., Juliet A. Markowitz, Esq., Joel H. Holt, Esq., Carl J. Hartman, III, Esq., and James L. Hymes, III, Esq.

Dated: July 7, 2017.

DOUGLAS A. BRADY
Judge of the Superior Court

ATTEST:
ESTRELLA M. GEORGE
Clerk of the Court
By: _____
Court Clerk Supervisor
7/7/17

SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

IN RE: RED DUST CLAIMS.	**MASTER CASE NO. SX-15-CV-620**
This Opinion Pertains to All of the Individual Cases to be Coordinated Under this Master Case	
LAURIE L.A. ABEDNEGO, et al., Plaintiffs, v. ST. CROIX ALUMINA, LLC; GLENCORE INTERNATIONAL AG; ALCOA, INC.; GLENCORE, LTD F/K/A CLARENDON, LTD; and CENTURY ALUMINUM COMPANY, Defendants.	**CASE NO. SX-09-CV-571** ACTION FOR DAMAGES (JURY)
PHILLIP ABRAHAM, et al., Plaintiffs, v. ST. CROIX ALUMINA, LLC, GLENCORE INTERNATIONAL AG, ALCOA, INC., GLENCORE LTD F/K/A CLARENDON, LTD., and CENTURY ALUMINUM COMPANY, Defendants.	**CASE NO. SX-11-CV-163** ACTION FOR DAMAGES (JURY)

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BRADY, DOUGLAS A., Judge

MEMORANDUM OPINION

BEFORE THE COURT are the following: (1) Motion for Extension of Time to Move, Answer, or Otherwise Respond filed by Defendant Century Aluminum Company ("Century") on January 13, 2016, and joined by Defendant St. Croix Renaissance Group, LLLP ("SCRG") on January 19, 2016; (2) Second Motion for Extension of Time to File Individual Verified Complaints filed by certain unnamed Plaintiffs ("Co-Plaintiffs") on May 2, 2016; (3) Motion for Brief Extension of Time filed by Co-Plaintiffs on June 2, 2016; (4) Response to Court Order Regarding Phillip Abraham Refiled

* Admitted *pro hac vice*.

Complaint filed by Phillip and Andrea Abraham ("the Abrahams") on September 13, 2016; and (5) Response to Court Order Regarding Refiled Complaint filed by Laurie L.A. Abednego ("Abednego") on September 14, 2016. For the reasons that follow, the Court will grant the first two motions, deny the third motion as moot, and construe both responses as motions and grant the first and deny the second as moot.

Background and Arguments

The parties are already familiar with the overall history of this litigation, which the Court summarized in its prior opinion. *See generally Abednego v. St. Croix Alumina, LLC*, 63 V.I. 153 (Super. Ct. 2015). Additional background is unnecessary here except to note that, for the reasons previously stated, Plaintiffs in *Abraham* were allowed to rejoin Plaintiffs in *Abednego*, but all other Plaintiffs, numbering nearly 3,000, were dropped from *Abednego* and their claims severed. Each plaintiff except Abednego and Abraham had to file an individual complaint and pay the necessary filing fees.

In the order accompanying the Court's prior opinion, the Court set December 28, 2015 as the deadline for all Plaintiffs to file individual complaints and for Abednego and Abraham to amend their complaints. "The purpose," the Court explained, for giving all Plaintiffs "a date certain" was both "to ensure that the new case numbers that [would] be given to each complaint [would] run sequentially and also to reduce the likelihood of unrelated cases being filed at the same time." (Order 2, entered Aug. 11, 2015, in *Abednego*, SX-09-CV-571.) Plaintiffs "who are also immediate family members (i.e., parents and children, husbands and wives)" were allowed "to join together in refiling individual, verified complaints," but "neighbors, coworkers, former spouses" and so forth could not. *Id.* at 3. Because each plaintiff had approximately four months to refile an individual or an amended complaint, the August 11, 2015 order stressed that "additional time . . . WILL NOT BE GRANTED." *Id.*

Nevertheless, Plaintiffs asked for more time. Their first motion for an extension of time, filed December 15, 2015, came approximately two weeks before the December 28, 2015 deadline. And despite warning that additional time would not be given, the Court found good cause and gave more time. Plaintiffs' counsel had

> detailed, in an Affirmation attached to the Motion, the steps taken to comply. . . . In particular, counsel explained that so far 31 complaints for 86 Plaintiffs (presumably immediate family members joining together) have been completed . . . . Another 425 Plaintiffs have been identified, but because they cannot be reached by phone, counsel needs more time—sixteen weeks, or until Friday, April 29, 2016—to meet with them and file individual complaints as ordered.

(Order 2, entered Dec. 18, 2015, in *Abednego*, SX-09-CV-571, and *Abraham*, SX-11-CV-163.) Because their counsel was clearly attempting to comply with the Court's prior orders, the Court granted Plaintiffs' request for more time, admittedly before Defendants' time to respond had passed. The December 28, 2015 deadline would have passed if the Court had waited to rule until the motion had been fully briefed.

Regarding two of the reasons Plaintiffs' counsel asserted in support of seeking more time—verifying each complaint and paying the filing fees—the Court stated that

> the filing fee cannot be waived (as it is required by statute and would have been assessed had each Plaintiff filed individually). Yet, the Clerk's Office does issue notices and, in effect, grant additional time to correct deficiencies with a newly filed case, such as omitting the filing fee. So, to the extent that more individual complaints would be ready for filing . . . but for the filing fee, the Clerk's Office can issue a deficiency notice and give a date certain to correct the deficiency. Presumably, the Court can also, on motion, grant additional time to pay the filing fee if necessary.
>
> Also, while the Court—in its discretion and in light of the concerns raised . . . regarding counsel's authority to act on behalf of all Plaintiffs—ordered that all individual complaints be verified when filed, verification can, if necessary, be added by amendment. So, to the extent individual complaints are completed and can be filed . . . but for the verification requirement, the Court can allow omitted verifications to be added by amendment on motion within a reasonable time after filing.

Id. at 3 n.1 (citing *Rivera-Morena v. Gov't of the V.I.*, 61 V.I. 279, 301 (2014)). In the event that a few more complaints might be ready by year's end, the Court extended the December 28, 2015 to December 31, 2015 and gave other Plaintiffs who could not meet that deadline until April 29, 2016 to file their individual or amended complaints.

Because the December 18, 2015 order also gave the Clerk's Office a few more days to prepare, the Court directed the Clerk, in anticipation of the December 31, 2015 deadline, to open a master case file and docket under the caption *In re: Red Dust Claims* and to assign the master case and the individual cases to the undersigned judge,[1] subject to the approval of the Presiding Judge.[2] Twenty-one individual complaints were filed by the December 31, 2015 deadline.[3]

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[1] All Plaintiffs were directed to indicate "Red Dust Docket" on their complaints to alert the Clerk's Office that the case was being refiled per the orders issued in *Abednego* and *Abraham* and the Clerk was directed to open the master case first and then number all of the individual cases sequentially, even for cases filed after December 31, 2015. As the caption depicts, the Clerk's Office opened case number SX-15-CV-620 as the master case and numbered the individual cases sequentially thereafter.

[2] By order dated April 15 2016 and entered April 21, 2016, the Presiding Judge ratified and approved the order directing the Clerk's Office to open a master case and assign all of the individual cases to the undersigned judge.

[3] The phrase "individual complaints" is used broadly here because Plaintiffs were allowed to join together in filing individual complaints. So, the number of individual cases does not correlate to the total number of Plaintiffs.

Two weeks later, on January 13, 2016, Century filed a motion, requesting "an order extending and permitting it to move, answer, or otherwise respond to the individual Verified Complaints ordered to be filed herein, until such time as all of said . . . [c]omplaints have been filed . . . and served on this defendant." (Def. Century's Mot. for Extension of Time 1, filed Jan. 13, 2016.[4]) This is the first motion before the Court ("January 13, 2016 motion"). In an accompanying memorandum, Century asked for "a period of time no less than 120 days from the last date on which service of process is effected . . . of all of the individual Verified Complaints ordered to be filed." (Def. Century's Mem. in Supp. of Mot. 1, filed Jan. 13, 2016.) Century argued that, since "the attorney for the Plaintiffs [had] almost eight (8) months to file her complaints," the court should "also give this defendant an extended period of time to receive, evaluate, compare, and contrast the contents and allegations of the Verified Complaints." *Id.* at 2. Century's counsel did acknowledge receiving timely copies of the first twenty-one complaints, but concluded, without citation to any authority, that service on counsel by mail "does not constitute valid service of process" since he was "not an authorized agent for service of process" on Century. *Id.* So, "under the rules of pleading, the time to answer has not yet commenced to run," Century concluded. *Id.* Further, cost and time would be saved, Century argued, if it could "respond to all of the individually filed complaints with a single dispositive motion," which might also "moot the necessity of filing answers and results in judicial economy and significant costs savings." *Id.* at 3. Roughly a week later, on January 19, 2016, SCRG joined Century's motion. On February 1, 2016, Plaintiffs filed a notice of no objection to Century's motion or SCRG's joinder.

Prior to the April 29, 2016 deadline, a total of sixty complaints were filed: twenty-eight on March 9th,[5] eight on April 4th, ten on April 20th, eleven on April 27th, and three on April 28th. On April 29th itself, twenty-two complaints were filed. Three days later, on May 2, 2016, Co-Plaintiffs, or those persons who did not or could not meet the second deadline, filed another motion for an extension of time. This is the second motion before the Court (hereinafter "May 2, 2016 motion"). Co-Plaintiffs asked to have "up to and including August 30, 2016 to [c]omply with this Court's *sua sponte*

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[4] Century filed this motion in *Abednego*. But, because the motion concerned all of the individual cases that were filed and that would be filed, the Court subsequently issued a standing order, dated and entered August 29, 2016, ordering the parties to file "all subsequent filings, including but not limited to motions, responses in oppositions, replies, joinders, and notices, that concern more than one of the individual cases refiled in compliance with the *Abednego* and *Abraham* orders" in the master case and directed the Clerk's Office to copy all filings, starting with Century's motion, from *Abednego* or *Abraham* and add them to the master docket *nunc pro tunc*. (Order 1, entered Aug. 29, 2016.) So, even though certain papers were filed originally in *Abraham* or *Abednego*, all citations are to the copies added to the master docket.

[5] Because the Clerk's Office does not deem a complaint or other pleading to be filed until the filing fee is paid, some of the complaints were deemed filed on March 16, 2016, even though all twenty-eight were received and stamped in by the Clerk's Office on March 9, 2016.

Order dated August 10, 2015 requiring individual, verified [c]omplaints." (Pls' Second Mot. for Extension of Time 2, filed May 2, 2016.) They explained:

> As of today's date, April 29, 2016, 113 Complaints have been filed representing approximately 565 Plaintiffs. Another 245 Complaints representing another 864 Plaintiffs are in the process of being drafted. To date, the total number of Plaintiffs that either have or will soon have complaints on file is 1429 (565 already filed + 864 to be filed). Plaintiffs request an extension of time up to and including August 30, 2016 to complete the 245 Complaints that are currently being drafted. . . . As to the 565 Plaintiffs that currently have Complaints on file, this Court can designate these Plaintiffs as Red Dust Docket Group A and [enter] a scheduling order . . . so that the [p]arties may proceed to discovery. The remaining 864 Plaintiffs with Complaints that will be on file by August 30, 2016, this Court can designate as Red Dust Docket Group B and [enter] a second scheduling order . . . . The remaining Plaintiffs who are still either being contacted or additional investigation required to locate can be designated Groups C and D with a scheduling order entered as to those Plaintiffs at a later date.
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> . . . .
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> The length of the delay is *de minimis* and the impact on these proceedings is negligible when one considers the entire scope of these proceedings and the fact that this matter remained dormant for years as the parties awaited the Court's rulings on several outstanding motions. Defendants will suffer no prejudice as Red Dust Docket Group A, consisting of well over 500 Plaintiffs is ready to proceed and Plaintiffs have acted in good faith in attempting to meet this Court's deadline for refiling individual, verified Complaints.

Id. at 2-3. In support, Co-Plaintiffs submitted an affirmation from their counsel, dated May 2, 2016, which detailed counsel and her staff's further efforts to contact Co-Plaintiffs and meet generally with all Plaintiffs to prepare, review, and verify individual complaints.

On May 6, 2016, St. Croix Alumina, Alcoa, and Glencore jointly filed a response in opposition to the May 2, 2016 motion. Echoing the District Court's admonition when *Abednego* was before that court on removal from the Superior Court, namely that Plaintiffs' counsel had "a history of non-compliance" with deadlines, Defendants spotlighted yet another failure: that "Plaintiffs' counsel waited until ***after*** the already once-extended deadline for compliance had passed before even applying for a further extension." (Def.'s Opp'n to Pls.' Second Motion for Extension of Time 1, filed May 6, 2016.) After briefly summarizing the history of this litigation—and noting that the December 18, 2015 order had "directed counsel for Plaintiffs to file an affirmation by May 31, 2016 identifying those Plaintiffs who had been contacted and had decided not to proceed with their cases, and those Plaintiffs who could not be reached," *id.* at 4—Defendants then did "the math."

> Last December [2015], Attorney Rohn indicated that her office had communicated with all but 425 Plaintiffs. With Approximately 2800 original Plaintiffs, that presumably meant that Attorney Rohn had contacted approximately 2375 Plaintiffs. Yet, more than

> four months later, she now indicates that the total Plaintiffs for whom she proposes to [re]file lawsuits by August 30, 2016 (more than a year after this Court's original Order), is 1414. Adding in the 425 with whom there had been no contact [according to the affirmation Attorney Rohn submitted in support of the December 15, 2015 motion for more time], it would seem that there are still approximately 961 unaccounted for Plaintiffs. And, despite being under a May 30, 2016 deadline to inform the Court of the efforts she has made to contact those Plaintiffs for whom she has no contact information, Attorney Rohn still has not attempted a mass [approach] such as a newspaper advertisement.
>
> There were 263 days between August 10, 2015 and April 29, 2016. If Attorney Rohn's representation that she has filed 113 complaints is correct, then she has averaged the completion of one complaint every 2.3 days. While the Plaintiffs must file complaints that are specific to their claims, most portions of the [individually-filed] complaints . . . are comprised of cookie cutter boilerplate allegations. Two of the complaints . . . illustrate this point. In each . . . the initial paragraphs introducing the Plaintiffs are unique. However, the next 60 paragraphs of each complaint are the same, followed by the insertion of [approximately 15] paragraphs . . . that are specific to the particular Plaintiffs. The remaining allegations and the seven (7) counts in the complaints are the same.
>
> In her December 14, 2015, affirmation, Plaintiffs' counsel represented that the information needed for the unique aspects of each plaintiff's case was compiled in a questionnaire. Given the standardized nature of the allegations and the "plug and play" nature of the changes that must be made to incorporate the information that is unique to each plaintiff, there is simply no excuse for not completing complaints far more quickly than once every 2.3 days.

Id. at 5-7. After arguing case law applying Federal Rule of Civil Procedure 6(b)(1), not Superior Court Rule 10, St. Croix Alumina, Alcoa, and Glencore argued that the Court should find that Co-Plaintiffs "have not . . . shown *excusable* neglect." *Id.* at 8. The May 2, 2016 motion should be denied, they concluded.

SCRG also responded in opposition. In its response, SCRG remarked that "this Court has bent over backwards to protect the purported Plaintiffs from the inability of their counsel to identify who really intended to pursue claims against SCRG and those who never agreed to file a new a claim . . . ." (Def. St. Croix Renaissance Group's Opp'n to Pls.' Mot. 1-2, filed May 11, 2016.) Eight months was "enough time," SCRG concluded, "for a lawyer to find her clients" and file approximately two thousand complaints. *Id.* at 2. And to "the Plaintiffs' proposal"—that the individual complaints could continue to trickle in while those cases already opened "becom[e] a sub-[group] so discovery can commence"—SCRG countered that it was "unduly prejudicial." *Id.*

> SCRG is entitled to know the identity of all persons who seek damages against it and the factual basis of each claim, so SCRG can figure out how to rationally proceed to address all of these claims. This Court has given the Plaintiffs ample time to organize

> and file these claims, so the time has come to bring some semblance of finality to this phase of this process.

Id. at 2-3.

Century responded as well and adopted the arguments of its co-Defendants. In its brief joinder, Century further "assert[ed] that it [too] would be prejudiced by being required to engage in piecemeal discovery without knowing the nature and extent of all of the claims yet to be filed against it." (Def. Century's Joinder of Opp'n to Pls' Second Mot. 1, filed May 12, 2016.)

Co-Plaintiffs did not file a reply to Defendants' responses and joinders. Instead, Co-Plaintiffs filed another motion on June 2, 2016, again asking for more time. This is the third motion before the Court ("June 2, 2016 motion").

In their June 2, 2016 motion—not in a sworn affidavit or affirmation attached to it—counsel for Co-Plaintiffs attempted to explain why she needed more time to file a reply to the Defendants' responses: she was "preparing for trial in a matter pending in the Superior Court . . . [that] settled after jury selection on June 1, 2016" and also "preparing for a three-week trial in a 60+ plaintiff case pending in the District Court," which was "scheduled to commence on June 6, 2016 and last, conservatively, until June 18, 2016." (Pls' Mot. for Br. Extension of Time 2-3, filed June 2, 2016.) Counsel emphasized the "significant progress" she and her office had made "in complying with this Court's order that all Plaintiffs must refile individual complaints." *Id.* at 3. "There are hundreds of Plaintiffs with their Complaints on file," she noted, "and close to 900 more whose complaints are currently being drafted." *Id.* In closing, she argued that Plaintiffs all "have been waiting years to have their day in [c]ourt and Plaintiffs' [c]ounsel is working tirelessly to get the Complaints refiled." *Id.* Co-Plaintiffs then asked to have until June 21, 2016 to file their reply.

SCRG responded to the June 2, 2016 motion, but only to say that it did not oppose it. But St. Croix Alumina, Alcoa, and Glencore did. In their response, St. Croix Alumina, Alcoa, and Glencore countered that

> [Attorney] Rohn's request is not based on good cause. Being too busy and putting other priorities ahead of this Court's deadlines are both deliberate decisions—not "excusable neglect." As with her untimely request for more time to file complaints—which was made after the deadline already had passed—counsel's latest request again comes after (not before) the court deadline from which she seeks relief had expired. The Court, not the fiat of Plaintiffs' counsel, controls the [deadlines] in this matter.

(Defs.' St. Croix Alumina, Alcoa, and Glencore's Opp'n to Pls' Untimely Mot for Extension of Time to File Reply 1-2, filed June 16, 2016.) "Further delay upon prior delay does not do justice," they argued. *Id.* at 2. So, the June 2, 2016 motion should be denied.

Co-Plaintiffs did not file a reply in support of their June 2, 2016 motion. They also did not assume that leave would be granted and file their reply in support of their May 2, 2016 motion. Instead, and technically before either motion was fully briefed, eighty-six individual complaints were filed on August 15th, followed by another on August 18th, fourteen on September 12th, and two on September 28th. After each set was filed, Counsel for Plaintiffs filed a notice, listing the dates and the complaints that were served on Defendants' counsel and whether service was by hand or by mail.

After the complaints on August 15th were filed, but before the remaining complaints had come in, the Court issued a standing order on August 29, 2016, directing the parties to file all subsequent papers relating to all of the cases in the *Red Dust Claims* master case, not in *Abednego* or *Abraham* unless the paper concerned Laurie Abednego or Phillip Abraham. A second order, issued the same day, also directed all counsel to file a notice of appearance in the master case for administrative purposes. And because neither Abednego nor Abraham had amended their complaints to remove other Plaintiffs, the Court issued an order in each case on September 2, 2016, directing both to show cause why their complaints should not be dismissed for failure to comply with the Court's prior orders. Each order noted that, while Co-Plaintiffs "have moved for additional time and—though their request still remains pending—proceeded to refile individual complaints as though the motion had been granted," neither Abednego nor Abraham had yet filed an amended complaint. (Order 1, entered Sept. 2, 2016, *Abednego*, SX-09-CV-571; Order 1, entered Sept 2, 2016, *Abraham*, SX-11-CV-163.) Both were given ten days to explain why their cases should not be dismissed.

Phillip Abraham responded by filing, on September 12, 2016, an amended complaint, but with his wife, Andrea Abraham. The next day, they filed a response, apologizing for the delay and explaining that they "share the same counsel as the other over 2,000 Plaintiffs in the *In Re Red Dust' Claims* master case. (Resp. to Ct. Order 1, filed Sept. 13, 2016, Abraham, SX-11-CV-163.) They asked the Court to "accept the refiled [sic] Complaint and permit their fellow Plaintiffs . . . sufficient time to comply and have their Complaints refiled." *Id.* The Abrahams failed to acknowledge, however, that while both of them were Plaintiffs in *Abednego*, only Phillip Abraham was a party to that case after the District Court dismissed him (and nearly two hundred others) from *Abednego*. *See Abednego*, 63 V.I. at 165-71 (explaining how *Abraham* became a spin-off of *Abednego*). In other words, Andrea Abraham was not among those persons who joined together in the same complaint that became *Abraham*.

To date, Abednego has not amended his complaint. But he did respond to the show cause order on September 14, 2016. His counsel explained:

> Abednego is one of several hundred Plaintiffs that Plaintiff's [sic] Counsel is attempting to get in contact with in order to [c]omply with this Court's *sua sponte* order that the Plaintiffs refile their Complaints. The current contact information on file for Abednego is no longer working and the investigator has located Plaintiff Abednego's sister who is now attempting to get in contact with him. If that avenue is unsuccessful, Plaintiff Abednego is on the list of individuals whose information will be shortly placed in a full page ad in the Daily News and the St. Croix Avis.

(Pl.'s Resp. 1, filed Sept. 14, 2016, *Abednego, et al. v. St. Croix Alumina, LLC, et al.*, SX-09-CV-571.) Through counsel, Abednego asked for "additional time" to amend his complaint and asserted that "the delay in complying with this Court's procedural order . . . should not serve as the basis for dismissing [his] entire case that has been pending for several years." *Id.* Because both Abraham's September 13, 2016 response and Abednego's September 14, 2016 response ask the Court for some relief—excuse the delay for Abraham and grant more time for Abednego—both responses must be construed as motions. "Any application — whether orally or in writing — made to a court or judge for the purpose of obtaining a ruling or order directing some act to be done in favor of the applicant in a pending case is a motion." *Der Weer v. Hess Oil V.I. Corp.*, 64 V.I. 107, 128-29 (Super. Ct. 2016).

To date, nothing further has been filed in *Abednego*, *Abraham*, or the *Red Dust* master case.

Discussion

All the motions before the Court seek the same relief: more time to act. But different standards apply based on when each motion was filed. Superior Court Rule 10, which governed at the time,[6] provides that "[t]he court for cause shown may at any time in its discretion . . . order the period enlarged if application . . . is made before" the specified period has passed. Super. Ct. R. 10(a)(1). If the request comes after the specified period has passed, then the court can only "permit the act to be done . . . if the failure to act was the result of excusable neglect." Super. Ct. R. 10(a)(2). In other words, only cause has to be shown when requests come before the time to act has expired. If the request comes late, then good cause must be shown.

Co-Plaintiffs' June 2, 2016 Motion for Extension of Time to File Their Reply

Addressing the third motion first, Co-Plaintiffs' request for more time to file their reply brief will be denied. Co-Plaintiffs filed their motion for more time to file individual complaints on May 2, 2016. Defendants had fourteen days to respond. St. Croix Alumina, Alcoa, and Glencore responded

[6] Virgin Islands Rule of Civil Procedure 6(b)(1) governs requests for more time. However, the Court will apply Superior Court Rule 10 as that rule was in effect when the motions and requests were filed. *Accord Edwards v. Hess Oil V.I. Corp.*, SX-15-CV-382, 2017 V.I. LEXIS 94, *5 n.3 (V.I. Super. Ct. June 28, 2017) ("Because applying Virgin Islands Rule of Civil Procedure 6(b)(1) retroactively might be unjust—by changing the movant's burden after the motion was filed the Court will apply Superior Court Rule 10.").

on May 6, 2016. SCRG responded on May 11, 2016. Century joined their responses on May 12, 2016. Pursuant to the Rule 7.1 of the Local Rules of Civil Procedure of the District Court of the Virgin Islands, which governed at the time through Superior Court Rule 7, Co-Plaintiffs had "fourteen (14) days after service of the response" to "file a reply, if any." LRCi 7.1(e)(2). "Only a motion, a response in opposition, and a reply" were authorized under the rules. LRCi 7.1(a). Joinders are not referenced in the rules. Assuming, for argument's sake, that a joinder in another other party's response is a response, then Co-Plaintiffs had at most until Thursday, May 26, 2016 to file their reply or to ask for an extension of time to file it. Instead, a full week passed after that date before the request was made. The only reasons Co-Plaintiffs offered for having more time to file their reply to their May 2, 2016 motion concerned the merits of that motion. Counsel for Co-Plaintiffs first cited her busy schedule: "preparing for trial in a matter pending in the Superior Court . . . [and] preparing for a three-week trial in a 60+ plaintiff case pending in the District Court." (Pls.' Mot. for Br. Ext. of Time 2, filed June 2, 2016.) Counsel then discussed the "significant progress" and "significant time and expense" she had made and then in conclusion, noting that "Plaintiffs have been waiting for years to have their day in Court." *Id.* at 3. None of this is good cause.

Courts can exercise their discretion and grant parties (or their counsel) more time after a deadline has passed, but only on motion and only if cause is shown and excusable neglect found. "The Supreme Court of the Virgin Islands has established that in this jurisdiction excusable neglect is essentially synonymous with good cause." *McGary v. J.S. Carambola, L.L.P.*, SX-13-CV-289, 2016 V.I. LEXIS 166, *4 (Super. Ct. Oct. 7, 2016) (citing *Fuller v. Browne*, 59 V.I. 948, 955 (2013)).

> While the determination of excusable neglect is at bottom an equitable one, where the court should take into account all relevant circumstances, courts in the Virgin Islands have consistently held that a busy schedule of counsel, by itself, does not establish excusable neglect. A moving party must show more than merely being too busy to have responded. . . . [T]he fact that an attorney is busy on other matters may qualify as cause shown . . . [but] . . . does not fall within the definition of excusable neglect.

Edwards v. Hess Oil V.I. Corp., SX-13-CV-382, 2017 V.I. LEXIS 94, *7 (V.I. Super. Ct. June 28, 2017) (quotation marks, brackets, and citations omitted).

Here, Co-Plaintiffs' counsel's busy schedule is not sufficient to show good cause, a point underscored by the fact that the June 2, 2016 motion was not signed by Co-Plaintiffs' counsel, Lee J. Rohn, Esq., but by an associate in her office. If another attorney in the same office can file a motion for more time, that other attorney can file the same motion before the deadline passes. No reason was proffered why that other attorney could not have filed the reply by the originally-prescribed deadline, rather than ask for more time. This Court too must "remind[] Plaintiffs attorney that 'a moving party

must show more than merely being "too busy" to have responded.'" *Hills v. Whitecap Invest. Corp.*, ST-12-CV-395, 2016 V.I. LEXIS 11, *6 (Super. Ct. Feb. 8, 2016) (brackets, footnoted citation, and scrivener's error omitted). Because Co-Plaintiffs did not show good cause and the Court does not find excusable neglect, the June 2, 2016 Motion must be denied.

Century's January 13, 2016 Motion and Co-Plaintiffs' May 2, 2016 Motion

The remaining motions, except Abednego's response, raise another question: must the party who requests more time wait for a decision on that request before acting or should the moving party go ahead and take action out of time even though permission has not been granted and ultimately could be denied. Ironing out this wrinkle in the law presents both practical and legal consequences here because Century and SCRG have waited for the Court to rule on their January 13, 2016 motion while some Co-Plaintiffs went ahead and assumed that their motion would be granted and filed their individual complaints. The Clerk's Office also accepted their complaints, opened new cases under the red dust docket, and processed the filings fees.

Recently, the Court touched on the same concern in another case. There, the Court noted that

> [c]ourts in the Virgin Islands have not yet considered whether a moving party, faced with a pending motion for an extension of time or for leave to act out-of-time, should proceed as if the motion were granted. Courts in other jurisdictions strongly disapprove of the practice. But our courts must ask what is the soundest rule for the Virgin Islands. Considering the number of cases pending in the Superior Court, and given the number of judicial officers, five Superior Court judges and two Superior Court magistrate judges in each district, it may be more sound if Virgin Islands courts did not fault attorneys who proceed as though they will be granted additional time, recognizing that, if good cause is not found, courts can still deny their motions and strike any late-filed papers.

Edwards, 2017 V.I. LEXIS 94 at *8 n.4 (citations omitted). In *Edwards*, the Court concluded that it did not have to decide this question because the result in that case ultimately would have been the same. *See id.* (striking answers filed before court ruled on motion for more time would be wasteful because defendants had shown cause and would probably refile their answers). In this case, however, the Court must answer the question because the result here would not be the same. If the Court were to find that Co-Plaintiffs have not shown good cause for extending their time to file individual complaints, it would mean dismissing every complaint filed after the April 26, 2016 deadline.

The overall background to this litigation makes ruling on Century's motion and Co-Plaintiffs' motion especially difficult here. Century (and SCRG by joining Century's motion) only had to show cause for an extension of time—that is, at least for the first twenty-one individual complaints filed on December 31, 2015—because its January 13, 2016 motion was filed before the deadline passed. *See*

Super. Ct. R. 32(a) ("The defendant may defend by entering his appearance before the clerk or by filing an answer with the clerk within 20 days after service of the summons and complaint"), *repealed by In re: Amendments to the Rules Gov. Super. Ct. of the V.I.*, ST-17-MC-019, 2017 V.I. LEXIS 60, *1 (Super. Ct. Apr. 6, 2017), *approved by* Prom. No. 2017-006, 2017 V.I. Supreme LEXIS 23, *1 (V.I. Apr. 7, 2016). Assuming that answers to claims severed from an existing case and ordered refiled follow the same general rules that govern the filing of pleadings, then Century and SCRG have shown cause.

Century explained that it "may respond to all of the individually filed Verified Complaints with a single motion to dismiss . . . . However, a single motion to dismiss all complaints cannot be filed without an individual assessment of all of the individually filed complaints once they are received." (Def. Century Aluminum Co.'s Mot for Ext. of Time to Answer 2, filed Jan. 13, 2016.) Century also pointed out that "a single dispositive motion . . . may moot the necessity of filing answers and result in judicial economy and significant cost savings." *Id.* at 3. Of course, Century assumes this Court will allow it to file "a single dispositive motion" in an attempt to dismiss hundreds of cases in one fell swoop, even though the Court and counsel have not discussed yet how to manage this litigation Nevertheless, the Court finds cause here. Century's reasons for extending its time to answer or respond are sound. For that matter, so are the reasons Co-Plaintiffs offered, notwithstanding that their burden is higher.

In the May 2, 2016 motion, counsel for Co-Plaintiffs states that she and her office have made steady progress in complying with the Court's directives. That much is shown by the fact that some Co-Plaintiffs went ahead and filed their complaints late, even though the Court had not granted their motion. So, clearly, this is not an instance where the movant did nothing before the deadline, waited until after the deadline passed to ask for more time, and then, after moving for more time, did nothing while awaiting a ruling. Here, Plaintiffs (through their counsel) have tried to comply with this Court's orders. While Defendants are correct that Co-Plaintiffs did not acknowledge outright that they filed the motion late, they implied as much by arguing that they "meet the standard of good cause and excusable neglect under Virgin Islands Supreme Court preceden[t]" (Pls' Second Mot. 2.) Good cause did not have to be shown under Superior Court Rule 10 if a motion was filed before the time expired, only if filed after.

"The determination of excusable neglect is at bottom an equitable one, where the court should take into account all relevant circumstances,'" but "[t]he general preference 'is to decide cases on their merits' and accordingly, 'any doubts should be resolved in favor this preference.'" *Chiverton v. World Fresh Market, LLC*, 2017 V.I. LEXIS 85, *2-3 (Super Ct. Mar. 10, 2017) (quoting *Fuller*, 59 V.I. at

955)). Here, one of the most important factors is the fact that none of the parties has been following the rules and everyone has taken action without first obtaining leave. So, the equitable decision for all involved is simply to wipe the slate clean. Some Co-Plaintiffs filed individual complaints, even though the Court had not granted their May 2, 2016 motion. On the other hand, neither Century nor SCRG filed answers or otherwise responded to any of the individual complaints, awaiting the Court's action on their January 13, 2016 motion, even though filing a motion for an extension time does not automatically extend the movant's time to act. *Accord Mitchell v. Gen. Eng'g Corp.*, SX-07-CV-504, 2017 V.I. LEXIS 32, *25 (Super. Ct. Feb. 23, 2017) ("[F]iling a motion does not stay discovery, suspend deadlines, or automatically excuse the movant from complying with prior court orders." (citations omitted). If filing a motion for more time could excuse the movant from acting timely, then ruling on a motion after the time to act has passed would be futile.

Further support here is shown by the actions of the other defendants. St. Croix Alumina, Alcoa, and Glencore have also not filed answers or responded to any of the individual complaints (whether filed before or after the second deadline) even though SCRG was the only defendant who joined Century's January 13, 2016 motion. Instead, St. Croix Alumina, Alcoa, and Glencore conclude—without citation to any authority—that summons must issue in every individual case and that they must be served with process. *But see Alexander v. HOVIC*, Civ. No. 323/1997 et seq., 1998 V.I. LEXIS 36, *4 n.1 (V.I. Terr. Ct. Jan. 23, 1998) ("The court points out that severance does not require the filing of an amended complaint. Plaintiffs are therefore required only to refile complaints individually as ordered and thereafter *give notice* of new filings to all interested parties." (emphasis added) (citing internally *Gonzalez v. Fireman's Fund Ins. Co.*, 385 F. Supp. 140 (D.P.R. 1974)). So, both sides have done (or not done) what they asked for more time to do. As the Court noted in *Edwards*, "[w]hen a trial court takes actions that exceed the scope of its jurisdiction the decision to deny those proceedings legal effect is grounded not in metaphysical notions but on practical considerations concerning efficient judicial administration. The same considerations are in play when the parties (or their attorneys) take action without leave of court." *Edwards*, 2017 V.I. LEXIS 94 at *3 n.4 (quotation marks, ellipses, and citations omitted).

The Court finds that Century has shown cause (and by extension SCRG) and further that Co-Plaintiffs have shown good cause. Both motions for more time will be granted. In addition, even though Alcoa, St. Croix Alumina, and Glencore have not yet moved for more time or answered any of the individual complaints, the Court will *sua sponte* excuse their delay too. That said, Defendants' overall concern about when the "re-pleading" phase will end has not gone unheard. To bring some finality to this phase and get this litigation on track, the Court will, by separate orders, deem the complaints filed

after April 26, 2016 timely, set a final deadline for any remaining complaints still to be filed and a deadline for Defendants to file their individual pleadings or responses, group the individual cases under the master case for pretrial purposes, and issue a tentative case management order in advance of the first status conference.

Abraham's September 13, 2016 Response and Abednego's September 14, 2016 Response

Concerning the response Abednego filed September 14, 2016, the Court will deny his request for more time as moot. Abednego's request was encompassed within Co-Plaintiffs' May 2, 2016 motion. Like his former Co-Plaintiffs, Abednego too will be given a final extension of time to file (in his case) an amended complaint.

Similarly, for the reasons above, the Court will also grant Abraham's request and excuse his delay in filing an amended complaint. Although Abraham's September 13, 2016 response was untimely and his request to excuse the delay was not made in a formal motion,[7] the Court cannot find prejudice here. Defendants did not respond in opposition. Abraham was ordered to amend his complaint in 2015 to amend his complaint to remove all other plaintiffs. That task should not have taken his attorney nine months, five of which were after the April 26, 2016 deadline had already passed. Nonetheless, there is no danger of prejudice here because the changes Abraham made were technical, not substantive. Further, any delay on judicial proceedings was minimal.

However, both responses raise a further point that bears mentioning. The complaint filed in the Superior Court of the Virgin Islands on December 3, 2009, which became *Laurie L.A. Abednego, et al. v. St. Croix Alumina, LLC, et al.*, case number SX-09-CV-571, is the universe of Plaintiffs here. That complaint was amended on December 9, 2009, removed to the District Court of the Virgin Islands where it was further amended, until it was remanded to the Superior Court because federal jurisdiction was lacking. Before remand, a number of Plaintiffs were dismissed. They joined together on April 4, 2011 and filed a complaint in the Superior Court of the Virgin Islands, which became *Phillip Abraham, et al. v. St. Croix Alumina, LLC, et al.*, case number SX-11-CV-163. In vacating the District Court's dismissal order and allowing the *Abraham* Plaintiffs to rejoin the *Abednego* Plaintiffs, this Court further severed all claims from *Abednego* except Abednego's claims, and ordered all Plaintiffs except Abednego and Abraham to file individual complaints. Abednego and Abraham were allowed to keep their respective cases for administrative purposes. They each had already paid the filing fees and case

[7] The "motions" within each response could be denied because of the manner by which they were presented. *Cf. Der Weer*, 2016 V.I. LEXIS 21 at *32 ("[M]otions should be filed separately and not be embedded within other . . . papers. . . [and if] improperly presented, it could be denied on that basis alone."). Courts and counsel should be able to trust that a document's title correlates with its content. A response should respond, not also incorporate a request or a motion.

files were already open in the Superior Court. Ordering Abednego and Abraham to file an individual complaint like the other plaintiffs was unnecessary because an amended complaint would suffice.

However, when Abraham filed his amended complaint, he also included his wife, Andrea, as a party plaintiff. The *Abraham* Plaintiffs were allowed to rejoin the *Abednego* Plaintiffs. But Andrea has now done the opposite because she was always a party plaintiff in *Abednego*, not in *Abraham*. *See Abednego*, 63 V.I. at 153 (listing Andrea Abraham in the caption following Laurie L.A. Abednego). Again, the concern is administrative, not substantive, at least at this point in the litigation. *But cf. id.* at 181-82 (noting the applicable statutes of limitation for claims initially asserted in 1999 as a class action and later as a group complaint in 2009 following decertification). The more appropriate course here was to alert the Court and the other parties that Andrea was joining her husband's case, rather than assume that she could do so. While the Court did allow immediate family members to join together in refiling individual, verified complaints, the Court did not permit anyone other than Abraham (the plaintiff) to remain in *Abraham* (the case).

Once everyone but Abraham was dropped from *Abraham*, and everyone but Abednego dropped from *Abednego*, the universe of Plaintiffs will be Abraham (now with his wife), Abednego (assuming counsel can locate him and he files a verified, amended complaint), and those Plaintiffs who already filed or who will soon file individual complaints before the last deadline. The claims of any other person named as a party plaintiff in the December 2, 2009 complaint, but who has not filed an individual complaint before the last extension of time runs out will be dismissed and, therefore, final and appealable as to any such individual. Ultimately, it might include Abednego if he does not file an amended complaint. Because the statute of limitations is looming in the background, the questions of which Plaintiffs refile amended complaints and when they refile are significant.

Abednego's response will be denied as moot. Abraham's response will be granted. His September 12, 2016 amended complaint will be deemed timely and his wife's joinder in that complaint permitted. But the Court will not further accommodate Plaintiffs or their counsel. This litigation is complex, nuanced, and may soon get even more complicated. The Court will not continue to shepherd the parties or their counsel along the way.

Conclusion

For the reasons stated above, the Court will grant Century's January 13, 2016 motion for extension of time to move, answer, or otherwise respond, grant Co-Plaintiffs' May 2, 2016 second motion for extension of time to file individual verified complaints, and deny Co-Plaintiffs' June 2, 2016 motion for brief extension of time. The Court will construe Abraham's September 13, 2016

response to court order and Abednego's September 14, 2016 response to court order as motions and grant the first and deny the second as moot. Orders consistent with this opinion follow.

Dated: July 7, 2017.

DOUGLAS A. BRADY
Judge of the Superior Court

ATTEST:
ESTRELLA H. GEORGE
Clerk of the Court
By:
Court Clerk Supervisor 7/7/17