

SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. CROIX

IN RE: RED DUST CLAIMS

MASTER CASE NO. SX-15-CV-620

**MOTION TO PERMIT USE OF PRIOR DEPOSITIONS PURSUANT TO V.I. R. CIV. P.
32(A)(8)**

Plaintiffs, by and through undersigned counsel, move this Court for an Order permitting the use of depositions taken in the *Henry v. St. Croix Alumina*, 1999-cv-0036, matter as evidence in the individual actions of the Plaintiffs in *the In re Red Dust Claims* pursuant to V.I. R. Civ. P. 32(a)(8).

PROCEDURAL POSTURE

When this matter was originally filed, it was filed as a class action as *Henry v. St. Croix Alumina*, 1999-cv-0036. The Defendants were St. Croix Alumina, LLC, Alcoa, Inc., Glencore, LTD, f/k/a Clarendon, LTD. The class included residents of neighborhoods in the area near St. Croix Alumina that were affected by the negligent and intentional acts of the Defendants. The members of the class were too numerous to be named at that time. The class was certified by the District Court in 1999 under the case *Josephat Henry v. St. Croix Alumina*, LLC, 1999-cv-0036.

After the class was certified, discovery commenced. As part of the discovery, depositions were taken. Approximately eighty-four (84) depositions in total were taken including twenty eight noticed by Plaintiffs, thirty seven noticed by Defendants, one doctor deposition noticed by Plaintiffs and eighteen doctor depositions noticed by Defendants. Of those depositions, several were taken of Defendant St. Croix Alumina employees.

Defendant St. Croix Alumina was represented by counsel and their counsel was present at every deposition. Counsel for Defendant St. Croix Alumina had the opportunity and in fact did cross examine the deponents at the depositions.

After extended litigation and discovery which in the *Henry* case, the class was ultimately decertified in 2008. Following the decertification, the federal court lost jurisdiction which resulted in the former members of the *Henry* class filing a single complaint in the Superior Court of the Virgin Islands in 2009. That complaint named approximately 2800 Plaintiffs. What followed next is a complex history that is expertly detailed in Judge Brady's Memorandum Opinion in *Abednego v. St. Croix Alumina, LLC*, SX-09-CV-571, dated August 10, 2015 (*Abednego Order*).

The *Abednego Order* is what led to the creation of the *In re Red Dust Master Case*. The Court first dealt with the issue of whether the District Court had discretion to dismiss 198 Plaintiffs and Defendant SCRG from the action. *Abednego, et. al, v. St. Croix Alumina, et. al*, 63 V.I. 153, 173. The Court held that the District Court did not have discretion to dismiss the 198 plaintiffs from the action if the dismissal meant that those plaintiff's statute of limitations had run. *Id.*, at 179. The Court opined that the District Court should have realized that by dismissing the 198 plaintiffs in 2010, whose claims were filed in 1999 as a class action, then refiled after decertification in 2009, that the statute of limitations on any of their claims would have run. *Id.* at 181. The Court stated that the result was a dismissal with prejudice because the 198 dismissed plaintiffs' statutes of limitation had run and their rights to refile were foreclosed. *Id.* at 182. The Court set aside the District Court's order dismissing the 198 plaintiffs and allowed those former plaintiffs to rejoin the action. *Id.* at

184.

Next the Court addressed the motions to dismiss filed by Defendants Alumina and Century Aluminum for failure to state a claim. *Abednego*, at 184. Both Defendants argued that the plaintiffs' complaint must be dismissed because the statute of limitations had run on all their claims. *Id.*, at 185. However, Plaintiffs clearly plead within their complaint that they were "**former members of the original class in Henry**". *Id.* at 186 (our emphasis). The Court did not find Defendants' argument persuasive and dismissed the motions to dismiss without prejudice. *Id.* at 188.

Defendants next argued that the complaint should be dismissed because it failed to state plausible claims for relief based on lack of individual specificity as to each individual plaintiff. *Abednego*, at 188. Plaintiffs argued that they must merely show enough factual allegations to raise a right to relief above the speculative level. *Id.* at 189. The Court agreed that the combining of all plaintiffs into a single complaint was problematic, *Id.* at 190, and determined that the proper course was to sever the claims. *Id.* at 193. The Court ordered the Plaintiffs to refile individual complaints that pled with specificity and plausibility whether they were former class members and that each complaint be verified once refiled. *Id.* The refiling was done with those plaintiffs that could be located and each refiled complaint is verified as containing "former members of the Henry class that did not opt out of the class."

The issues and parties in the *Henry* case brought by the class representatives are the same as the cases involved in this *In re Red Dust Claims* and therefore any depositions taken in the earlier action may be used in this action pursuant to V.I. R. Civ. P. 32(a)(8).

ARGUMENT

Virgin Islands Rule of Civil Procedure 32(a)(8) states when a deposition taken in an earlier action may be used. V.I.R. Civ.P. 32(a)(8). It states in pertinent part:

A deposition lawfully taken, and if required, filed in any federal- or Virgin Islands court action may be used in a later action involving the same subject matter between the same parties, or their representatives or successors in interest, to the same extent as if taken in the later action. V.I.R. Civ.P. 32(a)(8).

In his Order of August 10, 2015, Judge Brady, by allowing Plaintiffs to refile individual complaints and denying Defendants' motions to dismiss ruled that the plaintiffs in *Abedengo* and *Abraham* (now the *In re Red Dust* Plaintiffs) were former members of the class in the *Henry* litigation.

Here, the parties and remaining issues are the same as they were in *Henry*¹. Plaintiffs are members of the former *Henry* class which was decertified. Upon decertification, plaintiffs a new complaint in a mass action and then ultimately were ordered to file individual complaints after the Superior Court's order of August 10, 2015. The Defendants are the same as they were in *Henry*. Significant discovery was performed between 1999 and 2008 when the class was certified. For two years, Plaintiffs and Defendants in *Henry* exchanged voluminous amounts of discovery, and then for five years thereafter, traveled the country obtaining depositions of plaintiffs and defendants (and/or their representatives). Defendants were always represented by counsel and noticed more

¹The issues are actually less complicated as Plaintiffs no longer claim any long-term exposure effects, medical monitoring claims, or asbestos related claims.

than thirty depositions.

This case is even more compelling than the case of *Clark v. Prudential Ins. Co. of America*, 289 F.R.D. 144 (2013). *Clark* involved a very complicated class action suit against Prudential Insurance Company regarding the decision to stop selling an insurance policy to previous customers. In *Clark*, Plaintiffs sought to exclude deposition testimony taken in a civil action twenty years prior to the litigation. *Clark*, at 175. The Court however held that the deposition evidence was admissible because the “plaintiff therein was a successor in interest and the testimony involves the same subject matter pursuant to Fed.R.Civ.P. 32(a)(8).” *Id.*

In *Clark*, even though the plaintiffs of the new class action were not the same plaintiffs in the litigation twenty years prior, the Court found the depositions taken in the prior case admissible under Fed.R.Civ.P. 32(a)(8) because the subject matter was related and the predecessor in interest had an “opportunity and similar motive to develop it by direct, cross-, or redirect examination.” *Id.*

Here, Defendants are the same as they were in *Henry*. Defendants were represented by counsel at all the prior depositions and did in fact examine, cross, and/or re-direct witnesses in every deposition taken. The subject matter is the same and admittedly less complex than the subject matter explored in *Henry*.

As such, Plaintiffs request an order of this Court permitting the use of all depositions taken in the prior action of *Henry v. St. Croix Alumina, et. al.*, 1999-cv-0036.

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RESPECTFULLY SUBMITTED
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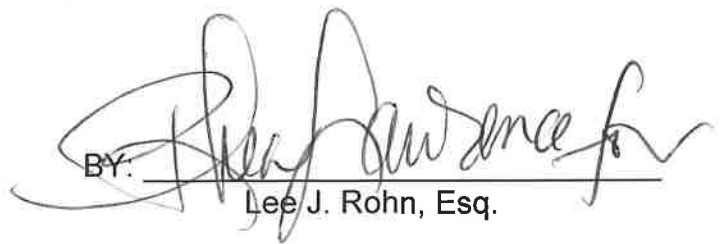
DATED: February 15, 2019

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CERTIFICATE OF WORD/PAGE COUNT

This document complies with the page or word limitation set forth in Rule 6-1 (e).

BY: 
Lee J. Rohn, Esq.

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on this 15 day of FEBRUARY, 2019, I caused a true and correct copy of the foregoing **MOTION TO PERMIT USE OF PRIOR DEPOSITIONS PURSUANT TO V.I.R. 32(a)(8)** to be served via ELECTRONIC MAIL upon:

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ORDER

THIS MATTER having come before the Court on Plaintiffs' Motion to Permit Use of Prior Depositions Pursuant to V.I.R 36(a)(8) dated January 29, 2019, and the Court having been advised in its premises, it is;

ORDERED that Plaintiff's Motion is **GRANTED**, and further;

SO ORDERED this _____ day of _____ 2019.

Robert A. Molloy
Judge of the Superior Court

ATTEST:
Ms. Estrella George
CLERK OF THE COURT

By: _____
Court Clerk Supervisor

Date: _____