IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. CROIX

IN RE: RED DUST CLAIMS	MASTER CASE NO. SX-15-CV-620 COMPLEX LITIGATION DIVISION

RESPONSE OF DEFENDANTS ALCOA INC. N/K/A ARCONIC INC., ST. CROIX ALUMINA, LLC, AND GLENCORE LTD. TO PLAINTIFFS' MOTION TO PERMIT USE OF PRIOR DEPOSITIONS PURSUANT TO V.I. R. CIV. P. 32(a)(8)

Defendants Alcoa Inc. n/k/a Arconic Inc., St. Croix Alumina, LLC, and Glencore Ltd. (collectively, "Defendants") respectfully respond to Plaintiffs' Motion to Permit Use of Prior Depositions Pursuant to V.I. R. Civ. P. 32(a)(8) ("Motion") as follows.

INTRODUCTION

Because it is unclear what relief Plaintiffs seek by their Motion, Defendants request that it be denied without prejudice at this point. Plaintiffs ask the Court to order that the parties (or possibly just Plaintiffs) may "use" some, or perhaps all, of the deposition testimony taken in the class action litigation, *Henry, et al. v. St. Croix Alumina, LLC, et al.*, U.S. District Court of the Virgin Islands, Civil No.

0036/1999. Plaintiffs do not (and cannot) ask the Court to rule that they may "admit into evidence" any deposition testimony. *See* Motion at p.1 (Plaintiffs "move this Court for an Order permitting *the use* of depositions taken in the *Henry*" action) (emphasis added); *id.* at p.5 ("Plaintiffs request an order of this Court permitting *the use* of all deposition taken in the prior action of *Henry v. St. Croix Alumina*") (emphasis added). Plaintiffs, however, fail to explain what they mean by "use." Nowhere in their Motion do Plaintiffs request that any (or even all) of the deposition testimony taken in the *Henry* case be deemed "admissible" at the trial of this action or any of the individual matters. Nor could they, inasmuch as that is a question that the Court must evaluate on a case-by-case basis for each specific passage of testimony requested to be admitted. Thus, it remains unclear what relief is even at issue by Plaintiffs' Motion.

Second, Plaintiffs' Motion also seeks an improper advisory opinion. Unlike the single case on which they rely, *Clark v. Prudential Ins. Co. of Amer.*, 289 F.R.D. 144 (2013), Plaintiffs do not identify any specific deposition testimony they want to "use." They do not even specify by name a single one of the *Henry* deponents whose testimony they want to "use." Neither the Court nor the defendant parties have been provided with the information needed to consider, much less make a determination of, the appropriate factors concerning the "use" of evidence; instead, Plaintiffs have merely asked the court to make such a

determination in the abstract, without considering the specific evidence under consideration.

Finally, Plaintiffs' reliance on Virgin Islands Rule of Civil Procedure 32(a)(8) is misplaced because it is not clear that this action involves the "same parties" as the *Henry* action. There unquestionably were fewer defendants in the *Henry* action than in the Red Dust cases, and the Court has not made a determination—contrary to Plaintiffs' assertion—that any individual plaintiff in the *In re Red Dust Claims* action was an absent member of the class that was briefly certified in the *Henry* litigation.

ARGUMENT

A. Plaintiffs' Motion is vague in that Plaintiffs ask only to "use" unidentified deposition testimony taken in the *Henry* action, without explaining what they mean by "use"; Plaintiffs do not ask to have any specific testimony admitted into evidence.

It is unclear what relief Plaintiffs seek by their Motion. They do not, and cannot, ask the Court *admit into evidence* any specific deposition testimony taken in the *Henry* action. Instead, they ask the Court to issue an advisory opinion that the parties (or possibly just Plaintiffs) may "use" the deposition testimony taken in that class action litigation.

Plaintiffs do not explain what they mean by "use". Plaintiffs do not ask that all of the deposition testimony taken in the *Henry* case be deemed "admissible" at

the trial of this action or any of the individual matters. Nor could they, inasmuch as the Court needs to evaluate, on a testimony-by-testimony basis, whether the testimony requested to be admitted is relevant to the issues in these matters and otherwise admissible. Even if certain testimony is relevant, the Court likewise must evaluate whether its probative value is outweighed by the risk of prejudice, confusion, etc. The Court further must rule on any objections to the admissibility of the testimony that were raised in the deposition, or that otherwise are reserved for trial, such as hearsay, foundation/personal knowledge, etc.

B. Plaintiffs fail to identify any of the deposition testimony they want to "use" in this action, and thus seek an improper advisory opinion.

Plaintiffs also do not identify any specific deposition testimony they seek to "use" in the instant action. Plaintiffs make an inappropriate request that the Court issue an advisory opinion, sight unseen, that *all* of the unidentified testimony of all of the unnamed witnesses who were deposed in the *Henry* case can be "used" (whatever that means—but certainly means something less than "is admissible") in the instant *Red Dust Claims*. As the Court noted in *People of the V.I. v. Powell*, No. ST-12-CR-320, 2013 V.I. LEXIS 7, at *1 (Super. Ct. Jan. 8, 2013) (the Hon. Michael C. Dunston, presiding), "this Court may not render advisory opinions." *See also Beachside Assocs., LLC v. Bayside Resort, Inc.*, No. 07-CV-626, 2013 V.I. LEXIS 26, at *2 (Super. Ct. May 15, 2013) (the Hon. Michael C. Dunston,

presiding) ("[T]he Court may not issue an advisory opinion based on a hypothetical set of facts."). *Cf. Gov't of the V.I. v. Southland Gaming of the V.I., Inc.,* 54 V.I. 143, 149 (Super. Ct. 2010) (the Hon. James S. Carroll III, presiding) ("The ripeness doctrine considers whether a particular controversy presented to the Court is ready for judicial consideration. Its purpose is to 'conserve judicial machinery for problems which are real and present or imminent, not to squander it on abstract or hypothetical or remote problems.'").

This reason for this is simple. The Court does not have before it the necessary information to consider, much less make a determination of, the appropriate factors in the abstract, without specific examples as to the evidence under consideration. This principle is codified in Rule 103(a) of the Virgin Islands Rules of Evidence, which provides that error may not be predicated upon a ruling excluding evidence unless the court was informed "of its substance by an offer of proof, unless the substance was apparent from the context" within which questions were asked. V.I.R.E 103(a).

Plaintiffs do not identify a single deponent whose testimony is at issue in their Motion or whose testimony they seek to "use" in the Red Dust cases. In fact, Plaintiffs reference only categories of witnesses deposed in the *Henry* case, specifically, "doctors" and "Defendant St. Croix Alumina employees" (Motion at p.1), and "plaintiffs and defendants (and/or their representatives)." (Motion at p.4).

By "doctors," Plaintiffs presumably refer to the treating physicians and other health care providers who treated the 17 individual named plaintiffs in the *Henry* litigation. These included, among others, Dr. Mohammed Ahmed, Dr. Francisca Alonso, Dr. Rizalina R. Batenga, Dr. Frank Bishop, Dr. Robert Bucher, Dr. Alejandro Cebedo, Dr. Antonio Dizon, Dr. Lloyd Henry, Dr. Raul Justiniano, Dr. Krishna Mahabir, Dr. Suren Mody, Dr. Arakere Prasad, Dr. Fletcher Robinson, and Dr. Balkaran Shivnauth. The health care providers were deposed in the *Henry* case about the medical histories and conditions of the 17 individual plaintiffs in that case, the diagnoses of the 17 individual plaintiffs, and the doctor's treatment of the 17 individual plaintiffs, both immediately after Hurricane Georges (for the few plaintiffs who sought any medical attention following the hurricane), and for several years before and after the hurricane. The doctors' testimony cover sensitive, confidential medical information about these 17 individuals' health claims. Inasmuch as summary judgment was entered in favor of Defendants on all 17 plaintiffs' personal injury claims in the *Henry* case and affirmed after appeal to the Third Circuit, the deposition testimony of the doctors taken in the *Henry* case, with possible limited exceptions, generally should not be relevant in this action.

Moreover, many—if not most—of the depositions taken in the *Henry* litigation were of expert witnesses and consultants who testified on a number of different issues specific to *that litigation*, in which Plaintiffs specifically alleged

that they were injured, and at risk of further injury, from purported exposure to two distinct substances in the bauxite residue (commonly referred to as "red mud"): silica and hexavalent chromium ("chrome six"). Among Defendants' experts were Dr. Phillip Guzelian, a medical toxicologist who examined and took histories from the individual adult plaintiffs in the *Henry* case, Dr. Mavis Matthew, a pediatrician who examined the minor plaintiffs in *Henry*, and Dr. Walter Larsen, a dermatologist who opined about the claimed skin ailments of the *Henry* plaintiffs. Each of these experts was deposed. For the same reasons discussed above, their testimony regarding the 17 individual *Henry* plaintiffs is confidential information that likely is not relevant to this action.

Defendants also designated several medical experts—each of whom was deposed—on the subjects of silica toxicology, chrome six toxicology, epidemiological studies of the alleged link between chrome six exposures and lung cancer, risk assessment and the purported increased risk of lung cancer alleged by the *Henry* plaintiffs, medical screening programs, and the use of low dose CT scans to screen for lung cancer and the medical monitoring services recommended by Plaintiffs' medical expert, among other subjects. These deponents include Dr. Philip Cole, Dr. Peter Valberg, Dr. Steven Haber, Dr. Joshua Hamilton, Dr. Silvio De Flora, Dr. Steven R. Patierno, Dr. Leonard S. Levy, Dr. Robert McCunney, and Dr. Jeffrey Reich. Until Plaintiffs identify, more specifically, the bases for their

claims in these matters, including whether they are claiming harm from chrome six and/or silica, it cannot be determined whether any, much less all, of this testimony is even relevant to the instant action.

While there may be some experts, or defense representatives, who offered deposition testimony that may be relevant to this action, this is not something that can be evaluated in the abstract, without considering the testimony at issue. In the only case on which Plaintiffs rely, *Clark v. Prudential Ins. Co. of America*, 289 F.R.D. 144 (2013), the defendant sought "introduction of *several excerpts* of deposition testimony" taken in civil actions twenty years prior. *Id.* at 175 (emphasis added). The defendant did not seek a blanket order from the court that any and all deposition testimony from those cases could be "used" (much less be admitted into evidence), sight unseen. The *Clark* court was able to evaluate the specific "deposition evidence" and "deposition testimony" (*id.*) that was the subject of the defendant's request in evaluating whether it met the requirements for admission in that case. *See id.*

Here, however, Plaintiffs' Motion is the functional equivalent of a reverse *in limine* motion, seeking the blanket adoption of "all deposition testimony" from the *Henry* case in advance of trial, without identifying the testimony at issue. If Defendants made a motion right now seeking an order preventing Plaintiffs from using any of the testimony from the *Henry* case, the Court would surely deny the

motion unless Defendants identified the specific testimony to be excluded, along with the reasons for its exclusion. *See Samuel v. United Corp.*, No. ST-12-CV-457, 2015 V.I. LEXIS 17, at *4 (Super. Ct. Mar. 2, 2015) ("A court should deny a motion *in limine* when it is vague, ambiguous, and fails to establish a basis for excluding the specific evidence."). The Court should deny Plaintiffs' motion for the same reasons, including that it is seeking an advisory opinion.

C. Virgin Islands Rule of Civil Procedure 32(a)(8) may not be applicable because this action may not involve the "same parties" as the *Henry* action.

Plaintiffs' reliance on Virgin Islands Rule of Civil Procedure 32(a)(8) is misplaced because it is not clear that this action involves the "same parties" as the *Henry* action. Rule 32(a)(8) provides that "[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. Rule 32(a)(8) (emphasis added).

Contrary to Plaintiffs' representation to the Court that "[h]ere, Defendants are the same as they were in *Henry*" (Motion at p.5), there were fewer defendants in the *Henry* case than there are in the instant case. That is, there were only three defendants in *Henry*: Alcoa Inc., St. Croix Alumina, LLC, and Glencore Ltd.

Defendant St. Croix Renaissance Group, LLLP, for example, was not a party to the *Henry* class action, but is a defendant in the *In re Red Dust* matters.

Likewise, it is by no means clear that any of the *In re Red Dust* Plaintiffs are the "same" plaintiffs in the *Henry* litigation, *i.e.,* were putative members of the class asserting claims in the *Henry* litigation. Plaintiffs have made no showing to establish this fact. Plaintiffs unquestionably are wrong when they claim that "Judge Brady, by allowing Plaintiffs to refile individual complaints and denying Defendants' motions to dismiss[,] ruled that the plaintiffs in *Abednego* and *Abraham* (now the *In re Red Dust* Plaintiffs) were former members of the class in the *Henry* litigation." (Motion at p.4). Judge Brady did not have the benefit of any evidence in issuing his ruling, and expressly did *not* make factual determinations as to whether any individual plaintiff was or was not a member of the *Henry* class. The Court could not—and did not—do anything more than acknowledge, or accept as true for purposes of the Order requiring individual complaints, that the Plaintiffs *alleged* that they were former members of the *Henry* class. *See* August 10, 2015 Memorandum Opinion at p.3 ("the Court cannot tell from the current complaint which plaintiffs were formerly members of a federal class action lawsuit"); *id*. at p. 32 ("the Court is unable to determine at present whether any individual plaintiffs claim would be subject to dismissal under the statute of limitations because the complaint, in its present form, concludes that 'Plaintiffs herein are former members

of the original class in *Henry*.'"); *id*. at pp.32-33 ("But because the complaint does not give any information about any individual plaintiff and whether they were, in fact, members of the class, it is unreasonable to ask the Court—but more importantly the defendants—to simply trust them when they allege, not show, that they are 'former members of the original class in *Henry,* in that, as of September 21, 1998, they either resided and/or worked and/or owned property in one of the six communities' 'adjacent to and downwind from the St. Croix Alumina Refinery Plant.'").

Nor have Plaintiffs made any showing that the parties to this litigation are the "successors in interest" to the parties in the *Henry* litigation. As Plaintiffs correctly note, courts construing Federal Rule of Civil Procedure 32(a)(8) (which is identical to V.I. R. Civ. P. Rule 32(a)(8)), have held that "[a] party to a prior action is a predecessor in interest of a party in a pending action 'if it appears that in the former suit a party having a like motive to cross-examine about the same matters as the present party would have, was accorded an adequate opportunity for such examination.'" *Clark*, 289 F.R.D. at 175.

As the Court summarized in *Gerald v. R.J. Reynolds Tobacco Co.,* Nos. ST-10-CV-631, ST-10-CV-692, 2016 V.I. LEXIS 144 (Super. Ct. Sep. 23, 2016):

> "The similar-motive requirement assures that 'the earlier treatment of the witness is the rough equivalent of what the party against whom the statement is offered would do … if the witness were available to be

> examined by that party.'" Therefore, "[t]he way to determine whether or not motives are similar is to look at the similarity of the issues and the context in which the opportunity for examination previously arose."

Id. at *32 (Footnotes and citations omitted).

"The 'similar motive' requirement *is inherently factual and depends, at least in part, on the operative facts and legal issues and on the context of the proceeding.*" *Gerald v. R.J. Reynolds Tobacco Co.*, Nos. ST-10-CV-631, ST-10-CV-692, 2016 V.I. LEXIS 144, at *36 (Super. Ct. Sep. 23, 2016) (Footnote and citation omitted; emphasis added).

Here, as noted above, Plaintiffs have not identified the deposition testimony from the *Henry* litigation they propose be used in this case, much less the specific issue upon which such testimony will be used. Nor have Plaintiffs identified the "operative facts and legal issues" for which the witnesses in the *Henry* litigation were deposed. Accordingly, Plaintiffs have failed to make any showing that would establish that either they or the newly named defendants are "successors in interest" under Rule 32(a)(8). *See Ward v. Allis-Chalmers Pumps, Inc.*, No. MDL 875, 2010 U.S. Dist. LEXIS 143813, at *2 n.1 (E.D. Pa. Dec. 23, 2010) (Plaintiff could not present testimony from prior action under Fed. R. Evid. 804; such testimony was inadmissible hearsay because "Plaintiff has presented no evidence that any Defendant present at the deposition had this same motive").

It thus is premature at this time to issue a blanket ruling, in the abstract, on the applicability of Virgin Islands Rule of Civil Procedure 32(a)(8), in the absence of any showing by Plaintiffs as to which deposition testimony Plaintiffs (or any one of them) seek to "use," as well as the relevance of such testimony to the issues in this case. At this stage of the proceedings, it is up to Plaintiffs to decide who, if anyone, they wish to re-depose. Like any other litigant, Plaintiffs can determine whether they will be able to get any testimony they want admitted pursuant to the Virgin Islands Rules of Civil Procedure, and then decide what further depositions, if any, they want to take. It is not for the Court to make a sweeping ruling now, in the abstract.

CONCLUSION

For all of these reasons, Defendants respectfully request that the Court deny Plaintiffs' Motion in its entirety.

March 13, 2019

Respectfully submitted,

____

ANDREW C. SIMPSON
VI Bar No. 451
Andrew C. Simpson P.C.
2191 Church St., Ste. 5
Christiansted, St. Croix
U.S. Virgin Islands 00820
(340)719-3900
asimpson@coralbrief.com

Attorney for Defendants St. Croix Alumina, LLC and Alcoa, Inc.

RICHARD H. HUNTER
V.I. Bar No. 332
Hunter & Cole
1138 King Street, Suite 301
Christiansted, V.I. 00820
Tel: (340) 773-3535
Fax: (340) 778-8241
E-mail: rhunter@huntercolevi.com

Attorney for Defendant Glencore Ltd.

CERTIFICATE OF SERVICE

I hereby certify that on March 13, 2019, I served a copy of the foregoing by email on:

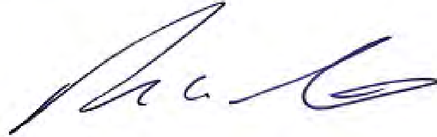
Lee J. Rohn, Esq.
Rhea Lawrence, Esq.
Lee J. Rohn & Associates
1101 King Street
St. Croix, V.I. 00820
Tel: (340) 778-8855
Fax: (340) 773-2953
Email: lee@rohnlaw.com
rhea@rohnlaw.com
Attorneys for Plaintiffs

René P. Tatro, Esq.
Juliet A. Markowitz, Esq.
Tatro Tekosky Sadwick LLP
333 S. Grand Ave, Ste. 4270
Los Angeles, CA 90071
Tel: (213) 225-7171
Fax: (213) 225-7151
Email: renetatro@ttsmlaw.com
jmarkowitz@ttsmlaw.com
Attorneys for Defendant Glencore Ltd.

Joel H. Holt, Esq.
Carl J. Hartmann, III, Esq.
c/o Law Offices of Joel H. Holt
2132 Company Street
Christiansted, V.I. 00820
Tel: (340) 773-8709
Email: holtvi.scrg@gmail.com
Attorneys for St. Croix Renaissance Group LLLP

Will Ellis, Esq.
Hawkins Parnell & Young LLP
303 Peachtree St NE # 4000
Atlanta, GA 30308
Tel: 404-614-7400
wellis@hptylaw.com
rthackston@hptylaw.com
Attorneys for Defendants St. Croix Alumina, LLC and Alcoa, Inc.

Richard H. Hunter, Esq.
Warren Bruce Cole, Esq.
Hunter & Cole
1138 King Street, Suite 301
Christiansted, V.I. 00820
Telephone: (340) 773-3535
E-mail: rhunter@huntercolevi.com
wbcole@huntercolevi.com
Attorneys for Defendant Glencore Ltd.



____