IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

ELEANOR ABRAHAM, *et. al.*, Plaintiffs, v. ST. CROIX RENAISSANCE GROUP, LLLP, Defendant.	Case No.: SX - 2011-CV-550 COMPLEX LITIGATION DIVISION

SCRG'S MOTION FOR RECONSIDERATION

SCRG hereby moves for reconsideration of this Court's Order dated February 3, 2020. The claims asserted against SCRG were severed from the similar damage claims being asserted by the same individual Plaintiffs against the other co-Defendants in the Red Dust Docket of the Complex Litigation Division, the "Alcoa" and "Glencore" Defendants (hereinafter referred to as the "Red Dust Defendants"). This motion is filed pursuant to V.I.R.Civ.P. 6-4 (b)(3), and asks the Court to correct a clear error of law, based on the following three issues:

1) Did this Court err as a matter of law in severing the 434 cases filed against SCRG by finding the claims against SCRG are separate and distinct from the claims against the other multiple defendants in the Red Dust Docket?

2) Alternatively, if the Court correctly found that the allegations in the 434 Red Dust cases against SCRG involved different claims and sought distinct relief, did it err as a matter of law in not requiring the Plaintiffs amend their new filings to only include allegations of specific events and temporal damages resulting therefrom?

3) Did this Court err as a matter of law in not dismissing the Plaintiffs who failed to file new complaints by the Court imposed deadline?

It is respectfully submitted that reconsideration of these issues is required to not only avoid manifest injustice, but to put these cases into a manageable framework.

I. This Court's February 3rd Ruling

On February 19, 2019, this Court ordered the parties to brief a specific issue—whether certain Plaintiffs who failed to file new suits as previously directed by this Court should have their claims dismissed—or whether they should still be allowed to file new complaints in the Red Dust Master Case, despite the expiration of the deadline set by the prior judge to do so. While the parties briefed these two options, the Court did not apply either option it directed the parties to brief, as it (1) neither dismissed the old cases, (2) nor ordered the Plaintiffs to file new complaints under the Red Dust Docket.

Instead, this Court took an approach as to which the parties had not been able to inform the Court of the particulars, summarily concluding that the 434 pending claims against SCRG are distinctly different from the claims against the other Red Dust Defendants. The Court did so, even though the Court's February 19, 2019, Order did not raise this issue—or ask the parties to brief *anything* about the 434 cases that had previously been filed pursuant to the Court's instructions.

The Court reached this conclusion by assuming (incorrectly) that the claims stated in the 434 complaints in the Red Dust Docket can be separated into (1) claims prior to 1999 against certain Red Dust Defendants and (2) claims that solely arose after 2002 against SCRG when it bought the property, stating in its February 3rd opinion (p. 13-14):

> *Henry* was filed in February 1999, *see id.* at 92-93, three years before SCRG acquired the refinery. SCRG was not a party to *Henry*. . . . Assuming the truth of the Plaintiffs' assertion, that SCRG did not own the refinery until 2002, what is more likely is that the *Henry-Abednego-Phillip Abraham* cases concern exposure to red dust and other toxic substances **prior to 1999**, *while Eleanor Abraham* (and SCRG's alleged liability) concerns ongoing exposure to red dust and other toxic substances **from 2002 forward**.

With this analysis in mind, it is now appropriate to address the errors raised herein.

II. It was clear error to find the claims asserted against SCRG are distinct from those filed against the other Red Dust defendants.

The finding that the claims against SCRG in the 434 Red Dust cases are distinct from those asserted against the other Red Dust Defendants constitutes "clear error." As the Court noted, the Plaintiff is the master of his or her own complaint. The 434 cases under the Red Dust Docket are inter-related based on the express averments of the individual complaints in that docket, both as to the Counts alleged and the damages being sought.

In this regard, after being ordered by this Court to refile multiple cases under the Red Dust Docket, the Plaintiffs filed 434 complaints that each pursued multiple claims against SCRG and the other Red Dust Defendants. A look at a sample complaint confirms that, although SCRG originally disagreed, the allegations allege *a continuous stream of conduct* related to the bauxite residue piles at the old alumina processing site. A review of one sample complaint (representative of all of these complaints) confirms this fact, as all of the complaints contain the same allegations of a continues stream of both conduct and injuries related to all defendants that occur in *both of these time periods*. The Court can confirm this by looking at any (or all) of the 434 pending cases.

Attached as **Exhibit 1** is the "Lugo" complaint. At the outset, the Lugo complaint notes as follows at ¶17:

> For about thirty years, an alumina refinery located near thousands of homes on the south shore of the island of St. Croix was owned and/or operated by a number of entities. The facility refined a red ore called bauxite into alumina, creating enormous mounds of the by-product, bauxite residue, red mud, or red dust.

The Complaint then goes through the ownership history of the property, which explains how each named Defendant became involved in the property. See ¶18 to ¶32. It also

explains how bauxite is processed into alumina and why its residue, red mud, is then placed in piles on the property, which allegedly generates red dust from time to time. See ¶33 to ¶37. The Complaint then alleges interrelatedness of both wrongs and damages over the entire time period as to each Defendant as follows:

38. The Glencore Defendants failed to correctly control the storage and containment of the bauxite while they owned and operated the alumina refinery. The Glencore Defendants also failed to properly store, contain and/or remove the asbestos, red dust and/or red mud, coal dust, and other particulates prior to the sale of the refinery to the Alcoa Defendants. Instead Glencore left the red dust, coal dust, and other particulates in open uncovered piles on the property and failed to remove or properly contain the friable, unencapsulated and/or uncovered asbestos that was there.

39. Defendants ALCOA and St. Croix Alumina continued to fail to correctly control the storage and containment of the bauxite, red mud, coal dust, and other particulates.

40. In 1995, Defendants ALCOA and St. Croix Alumina estimated the cost of asbestos removal to be "in the range of $20 million" and continued to fail to correctly control the storage and containment of friable, unencapsulated and/or uncovered asbestos.

41. Defendants ALCOA and St. Croix Alumina added red dust, coal dust and other particulates to the materials left behind by the Glencore Defendants and continued to stack and store them in hugeuncovered piles.

42. The Alcoa Defendants failed to properly store, contain and/or remove the asbestos, red dust and/or red mud, coal dust, and other particulates, prior to the sale of the refinery to SCRG. Instead, the Alcoa Defendants left the red dust, coal dust, and other particulates, in uncovered piles on the property. In 1995, Alcoa estimated the future costs to close the red dust disposal areas at $3.7 to $15 million and the total projected cost to clean up major environmental issues on shut down at $30 to $45 million.

43. At all relevant times, Defendants knew about the risk of dust emissions from the alumina refinery. . . .

The Complaint then described problems with Red Dust leaving the property during Hurricane Georges in 1995, affecting the Lugo plaintiffs. See ¶33 to ¶37. The Complaint then went into the history of the property after Hurricane Georges, alleging as follows:

73. Alcoa and SCA retained responsibility for red mud or bauxite releases during Hurricane Georges and were required to continue post-closing remediation of certain areas of the alumina refinery premises to the satisfaction of the DPNR.

74. The refinery ceased operations in approximately 2002.

75. Upon information, in 2001 the Alcoa Defendants sought indemnification from the Glencore Defendants, pursuant to the Acquisition Agreement between Alcoa and Glencore, for the investigation and cleanup of the refinery prior to closure.

76. In January 2003, SCA entered into a consent order with DPNR to remediate releases from the red mud piles that occurred in 2002 and to construct a control system to prevent or minimize future releases from the red mud piles into the environment.

77. Defendant SCRG has also granted "DPNR, SCA and VIALCO and the contractors, subcontractors, and other agents of DPNR, SCA and/or VIALCO access to the Alumina Facility reasonably necessary to effectuate any and all remediation of the red mud piles and red mud releases, which may be (a) ordered by a court, (b) ordered and/or approved by DPNR, or (c) agreed to by DPNR and SCA and/or VIALCO."

78. Upon information Defendant ALCOA failed to properly disclose to SCRG all hazardous substances and particulates at the refinery and concealed the same and, further, went in after the sale and destabilized the red mud piles. [1]

79. In addition, ALCOA represented that it was abating all asbestos at the refinery at the time of the sale to SCRG.

80. In reality, they failed to do so and failed to disclose this to SCRG.

81. At the time it failed to do so, it knew there was friable asbestos throughout the plant blowing into the Plaintiffs' home and being inhaled by Plaintiffs.

82. The Alcoa Defendants further concealed from Plaintiffs the true extent of the toxic substances, the toxicity of the substances, and misrepresented to Plaintiffs that

[1] In short, allegations ¶76 through ¶78 specifically assert that Alcoa was alternatively in control, actually operating, responding to USVI government orders or undertaking remedial operations on the piles throughout the 2002-present time period. Thus, rather than Alcoa being involved in a distinct time period, as assumed by the Court in its February 3rd Opinion, the Plaintiffs allege that Alcoa was the actual actor or a joint actor for most of the alleged wrongs from 2002 forward. The other defendants are implicated in that time period as well by way of allegations of past improper storage and containment of bauxite residue piles that continued to allegedly cause releases to affect the Red Dust Plaintiffs. See, e.g, ¶38 of the Lugo Complaint.

there were no dangerous conditions or substances at the refinery to which they were being exposed.

83. SCRG discovered that ALCOA had not abated the asbestos on or about 2006 when it was informed by DPNR.

84. SCRG attempted to conceal the fact it had friable asbestos in the plant and left it there for years.

85. SCRG knew that friable asbestos was being blown into Plaintiffs' home and being inhaled by Plaintiffs but failed to disclose orwarn.

86. In addition, ALCOA represented that it was abating all asbestos at the refinery at the time of the sale toSCRG.

87. In reality, they failed to do so and failed to disclose this to SCRG.

88. At the time it failed to do so, it knew there was friable asbestos throughout the plant blowing into the Plaintiffs' home and being inhaled by Plaintiffs.

89. The Alcoa Defendants further concealed from Plaintiffs the true extent of the toxic substances, the toxicity of the substances, and misrepresented to Plaintiffs that there were no dangerous conditions or substances at the refinery to which they were being exposed. [2]

90. SCRG discovered that ALCOA had not abated the asbestos on or about 2006 when it was informed by DPNR.

91. SCRG attempted to conceal the fact it had friable asbestos in the plant and left it there for years.

92. SCRG knew that friable asbestos was being blown into Plaintiffs' home and being inhaled by Plaintiffs but failed to disclose orwarn.

93. During its operation and/or ownership of the alumina refinery, SCRG has failed to remove the asbestos from the refinery.

94. Upon information the asbestos has been friable and in an extremely dangerous condition for at least 10 years but Plaintiffs had no way of knowing or discovering that. In particular, Defendants concealed the existence of the friable asbestos from Plaintiffs until 2010 . . . .

95. Upon information SCRG hid the fact that it had friable asbestos not only from the Plaintiffs but also from Department of Natural Resources (DPNR) and

[2] Again, these allegations have Alcoa acting well into the post-2002 period regarding the asbestos abatement problems. See, e.g., ¶84, ¶87-89.

Environmental Protection Agency (EPA) and in fact, made false reports concerning the same.

96. SCRG did nothing to remove that asbestos for some three (3) years.

97. As a result deadly asbestos blew about the neighborhoods near the refinery for at least ten (10) years causing Plaintiffs to inhale asbestos and otherwise be exposed to asbestos.

The critical point here, as can be seen from those pleadings, is that while the time periods of any given Defendant's conduct may vary between defendants at various points in time, **the conduct and responsibilities of the various defendants overlap throughout these allegations and *definitely* into the post-2002 period.**

This factual recitation of the allegations against all of the Defendants then concluded with a claim that the Plaintiffs' damages were caused by all of the Defendants during all relevant time periods, both before and after 2002:

98. **As a result of Defendants' conduct before, during and after Hurricane Georges, and continuing to date, Plaintiffs suffered and continue to suffer physical injuries,** medical expenses, damage to their real property and personal possessions, loss of income, loss of capacity to earn income, mental anguish, pain and suffering and loss of enjoyment of life a propensity for additional medical illness, a reasonable fear of contracting illness in the future **all of which are expected to continue into the foreseeable future.** (Emphasis added).

Thus, the individual Red Dust Plaintiffs all seek long term, continuing damages **based on the collective conduct of all of the Defendants**—not any individualized defendant. Moreover, in the case of Alcoa, it is a series of post-2002 actions by Alcoa on the property and events it physically caused, not just post-2002 effects of its prior acts.

These allegations are then followed by six Counts asserted against all of the Defendants,[3] stating in part as follows (See ¶107 to ¶188)(Emphasis added):

Count I: Abnormally Dangerous Condition

...

[3] Count IV is against SCRG and other Defendants, but not all of the Red Dust Defendants.

¶ 108 **The action of each Defendant** constitutes maintaining an abnormally dangerous condition.

. . .

COUNT II: Public Nuisance

. . .

¶ 116 **The actions of all Defendants** constitute a public nuisance.

. . .

COUNT III: Private Nuisance and Trespass

. . .

¶121 **All Defendants' actions** constitute a private nuisance and/or a trespass.

. . .

COUNT V: Intentional Infliction of Emotional Distress

. . .

¶ 134 **The actions of all Defendants** constitute the intentional infliction of emotional distress on Plaintiffs.

. . .

COUNT VI: Negligent Infliction of Emotional Distress

. . .

¶146 In the alternative to intentional infliction of emotional distress, **the actions of all Defendants** constitute the negligent infliction of emotional distress

. . . .

COUNT VII: Negligence as to All Defendants

. . .

¶ 149 **The actions of Defendants** constitute negligence that damaged Plaintiffs.

Thus, after alleging common, continuing damages from all of the activities described in the general allegations in the complaint, each complaint then alleges a claim against all Defendants, not just SCRG, in every Count, with only Count IV containing less than all named Defendants. These Counts, as alleged, completely undermine the predicate basis for the solution ordered by the Court.

Based on the plain reading of this sample Lugo Complaint, it is clear that the Red Dust Plaintiffs seek far more relief than just distinct, separable claims prior to 1999 and after 2002. Indeed, while it may make logical sense to base the claims on the various time periods of ownership, the pleadings make it clear that the obligations for the respective Defendants for being responsible for maintenance and remediation of the bauxite residue "Red Mud" storage area extended to several Defendants well after they transferred title to the next owner, including the alleged negligent failure by both Glencore and the Alcoa Parties **to fulfill <u>their</u> obligations after SCRG took title in 2002**. Again, with Alcoa, it was the principal actor in many of the post-2002 claims as it controlled and operated the site for many of those years.

Indeed, while it is unknown what the "Model Complaint" will include, if it contains the same or similar allegations, SCRG will be put into the position of having to decide whether to add some or all of the Red Dust Defendants as third parties in the new cases, which make these cases identical to the current Red Dust cases, warranting consolidation of these multiple claims that this Court just directed to be severed.

To put this another way, based on what the complaints allege, SCRG may be forced to bring in all of the defendants in third party pleadings—not because it would want to, but to avoid the possibility that those defendants acted as to the same events and in the same time periods as SCRG under the averments in the complaints. If the allegations either remove the other defendants from SCRG's "time period" or, even better, Plaintiff will state particulars as described in the following section—this will not be the case.

In short, this Court committed clear error by construing the Red Dust complaints as claims based on the time periods that correlated to the time various parties owned the

former alumina site, instead of reviewing the common allegations of joint liability causing a continuous stream of inseparable damages by all of the Red Dust Defendants. This clear error of law is based on the Court misconstruing and then rewriting what the Plaintiffs alleged in their complaints that controls here--- that all of these Red Dust Defendants either acted within what the Court seems to feel was the "SCRG-Only" period or acted outside of that period with continuing effects on the Red Dust Plaintiffs within the period.

Thus, this Court should reconsider and withdraw its Order severing the 434 Red Dust Cases against SCRG from the other Red Dust Defendants.

III. It was clear error to find that the Plaintiffs in the Red Dust cases could not be required to amend their complaints based on their counsel's representations to this Court

In directing the Red Dust Plaintiffs to refile new complaints against just SCRG, the Court committed clear error by not directing the Red Dust Plaintiffs to limit the relief being sought to that set forth in the representation of their counsel to this Court. At a hearing before this Court on January 24, 2019, Counsel for the Plaintiffs represented to the Court as follows (See **Exhibit 2** at pp. 24-25):

> MS. ROHN: Well, let me -- can I just interrupt here?
>
> THE COURT: Yes.
>
> MS. ROHN: Because that happens normally in a case where you're -- you're -- and I'm not talking about the selection, but the issue of IMEs. Usually, in those cases, this is an ongoing problem, an ongoing claim for future damages. In our particular case, we're not claiming future damages. **We're claiming acute exposures and acute damages that resolved at the end of the exposure**. So I see absolutely no reason at 19 years later to do an IME. We're not -- this is not the same case that was brought earlier where we claimed chromium six and they might have cancer.
>
> We have looked at this case and we agree -- when we took a look at it, we talked to our plaintiffs about their conditions, we agree that this is a number of acute exposures with acute symptoms that go directly to what would be expected to be

> experienced by that exposure and that when the exposure ceased, the symptoms ceased.
>
> So it's a pretty simple case. You know, I guess the devil is in how many plaintiffs there are. But the cases themselves, other than punitive damage claims for the actions of the defendant, are pretty finite. Thus, my belief that I do not need expert opinions because I am not giving -- there are no opinions as to future problems or future medical bills or future likelihood of –
>
> THE COURT: Are you claiming mental anguish?
>
> MS. ROHN: Well, mental anguish ended when they cleaned up their house and they stopped itching and their eyes weren't scratchy and itchy anymore.
>
> THE COURT: Let me ask: For each of your plaintiffs, do -- obviously you have a beginning date. Do you have an end date?
>
> MS. ROHN: Well, there are -- the reason SCRG is in this case is there was the initial exposure and, yes, we have a beginning and end date that is a little different for everybody **but in no account for more than six months**. (Emphasis added.)

Then, on February 15, 2019, Plaintiffs' counsel again stated in writing in a pleading filed with this Court as follows (See **Exhibit #3**):

> . . . . Plaintiffs no longer seek any long-term exposure effects, medical monitoring claims or asbestos related claims.

These repeated judicial admissions are clear—the Plaintiffs' pending claims are now based on discreet, specific events that resulted in acute injuries (rather than long term, chronic injuries) without any claims for medical monitoring or asbestos related claims.

Despite these clear admissions, this Court refused to limit the scope of the new complaints it has now required to be filed, citing *Burns v. Femiani*, 786 F. App'x 375, 378–79 (3d Cir. 2019), which held:

> On appeal, Appellants argue that Rick Marcinko is merely a member of Regional Claims Expediters, LLC, and that they had intended to remove him as a defendant before filing the complaint. We note that "[t]he plaintiff is the master of the complaint and has the option of naming ... those parties the plaintiff chooses to sue." *Lincoln Property Co. v. Roche*, 546 U.S. 81, 91, 126 S.Ct. 606, 163 L.Ed.2d 415 (2005).

The referenced Supreme Court case, *Lincoln Property Co. v. Roches, supra,* cited Moore's Federal Practice, as follows:

> 16 J. Moore et al., Moore's Federal Practice § 107.14[2][c], p. 107–67 (3d ed. 2005) (hereinafter Moore) ("In general, the plaintiff is the master of the complaint and has the option of naming only those parties the plaintiff chooses to sue, subject only to the rules of joinder [of] necessary parties.").

However, those cases are easily distinguishable, as they dealt with a rule of law applicable in the U.S. District Courts **when reviewing complaints removed from a state court.** That rule requires federal courts to limit its "diversity of citizenship" or "federal question" review the express wording of the complaint in the removed case. Neither of those cases dealt with a court requiring a plaintiff to revise a complaint to eliminate claims that have been expressly abandoned on the record by counsel.[4]

The V.I. Supreme Court has expressly recognized the doctrine of judicial admissions and judicial estoppel in *Walters v. Walters*, 2014 WL 1681319, at *3 n. 7(V.I. Apr. 28, 2014), holding:

> Although "unsworn representations of an attorney are not evidence," *Henry v. Dennery,* 55 V.I. 986, 994 (V.I. 2011), **an attorney's client may nevertheless be bound by such statements under the doctrines of judicial admissions and judicial estoppel.** (Citations Omitted)(Emphasis added)

Thus, this Court committed clear error by relying upon quotes from two federal cases that involve a specific federal rule of law—the review of complaint when asked to remand a removed case—that has no relevance to any local court in the Virgin Islands. On the other

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[4] Indeed, if the holding in those cases were applicable here, they would bar this Court from telling the Plaintiffs which parties to join as co-defendants, which is exactly what this Court did in severing the 434 cases against SCRG from the claims against the other Red Dust Defendants. Indeed, this rule of law, if applicable, would also bar this Court from limiting the substantive changes the Plaintiff could make, as was done the Order accompanying the February 3rd Order. However, that rule of law is inapplicable as noted.

hand, the V.I. Supreme Court has made it clear that judicial admissions by counsel are binding on a client and can be applied to limit a claim.

There is a solution that resolves the clear error in both Section II above and this Section III. If this Court did direct the Plaintiffs to tailor their new complaints to the scope described by their counsel so that is what would now be sought, this would moot the issues raised above.[5] In short, if the scope of the new complaints would only allege the existence of discreet events against SCRG, with resulting temporal damages, then those new complaints would not involve the other Red Dust Defendants.[6]

IV. It was clear error not to dismiss the old cases against SCRG where the plaintiffs failed to file new complaints by the Court imposed deadline.

In ¶ 29 of the Court's February 19, 2019, Opinion, this Court noted:

> **¶29** But whether to coordinate *Eleanor Abraham* along with the other *Red Dust* cases is not clear. And the Court cannot make that determination, and cannot rule on SCRG's motion, until the ***Eleanor*** **plaintiffs first answer whether *Eleanor Abraham* is a related case to the *Henry-Abednego-Phillip Abraham* line of cases, or whether *Eleanor Abraham* is different from these *Red Dust* cases.** Because, if *Eleanor Abraham* is a different case, coordinating it with the other *Red Dust* cases would not be appropriate. And if it is related, it might have to be dismissed. (Emphasis added).

This Court then held in ¶ 35:

> **¶35** If the *Eleanor* plaintiffs are as many *Abednego* plaintiffs as Attorney Rohn could locate after the November 16, 2010 order dismissed SCRG, **then this case should be dismissed**. . . . (Emphasis added).

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[5] It would also moot the need for the Plaintiffs to use the prior depositions that it took in the *Henry* case, an issue that concerned this Court, as noted on page 14 of its February 3rd opinion.

[6] On the other hand, if the new complaints are still required to be filed without any such limitation, SCRG may well have to file third-party complaints against the Red Dust Defendants, a right it preserved by objecting on February 13th to the limitations placed on its Model Answer to the Model Complaint.

The Plaintiffs filed a response on March 12th that answered that question in the affirmative by agreeing that these *Eleanor* Plaintiffs who did not file new claims as directed were related to those cases already pending under the Red Dust Master Docket.

This Court took note this admission by the Plaintiffs on pages 9-10 of its February 3rd Opinion and then found that the claims of the *Eleanor* Plaintiffs who did not previously file individual cases are the same as the those who did file new cases (now in the Red Dust Docket), holding on pp. 14-15:

> Assuming the truth of the Plaintiffs' assertion, that SCRG did not own the refinery until 2002, what is more likely is that the *Henry-Abednego-Phillip Abraham* cases concern exposure to red dust and other toxic substances prior to 1999, ***while Eleanor Abraham*** **(and SCRG's alleged liability) concerns ongoing exposure to red dust and other toxic substances from 2002 forward.** (Emphasis added).

Thus, based on this express finding, the claims of those *Eleanor* Plaintiffs who did not file new cases should have been dismissed as per the February 19, 2019, Opinion, which expressly held in ¶35:

> If the *Eleanor* plaintiffs are as many *Abednego* plaintiffs as Attorney Rohn could locate after the November 16, 2010 order dismissed SCRG, **then this case should be dismissed**. . . . (Emphasis added).

However, in its February 3rd opinion, this Court did not follow that mandate.

Instead, the Court decided to give the Plaintiffs who failed to timely file complaints **even more time to do so,** which constitutes clear error under the applicable law.

In this regard, this precise issue arose previously in 2017, where this Court faced the same issue—what to do with the Plaintiffs who had missed the Court imposed deadline to re-file their cases (with specific procedural requirements). In *In re Red Dust Claims*, 69 VI 147, 150 (V.I. Super. July 7, 2017):

> 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."** (Emphasis added).

In addressing the delays by these Plaintiffs in filing these new complaints, the Court went on to point out its patience in dealing with this fact, pointing out that it had already granted several extensions of time to file these new complaints, *id.* at 151:

> 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.

Despite these extensions, the Plaintiffs still sought an additional extension to allow the cases filed after the April 29, 2016, deadline to be deemed to be timely filed.

In addressing this renewed request for more time to file the new complaints, the Court took note of SCRG's objection to this request, *id* at 155-156:

> 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 ...." Eight months was "enough time," SCRG concluded, "for a lawyer to find her clients" and file approximately two thousand complaints.

Notwithstanding this objection, the Court held as follows, *id* at 160:

> 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.** (Emphasis added).

The Court then went on to state what constitutes "excusable neglect", *id*:

> "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, 2016 WL 6069499 (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. (Emphasis added)

The Court then went through a lengthy analysis and found that based on the facts in the record that the Plaintiffs did meet this "excusable neglect" standard, *id.* at 161-164, and then deeming the tardy complaints filed after the April 29, 2016, deadline to be timely.

Thus, based on the applicable law—and the law of this case---this Court cannot now grant these same Plaintiffs even more time to file new claims against SCRG without going through an "excusable neglect" analysis in allowing these Plaintiffs to file these quite belated new complaints.[7] In short, under the current Order, the Plaintiffs have been granted another extension—**this time a four year extension**—without any discussion of, much less adherence to, the required "excusable neglect" analysis and finding.[8]

As such, to do so is clear error, requiring this Court to reconsider and dismiss these remaining Plaintiffs who have not previously filed new complaints.

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[7] Indeed, the Court did not even suggest it would allow such "out of time" filings in its February 19, 2019, Order, so this matter was not even an issue for the parties to address.

[8] Moreover, the Court's February 3rd Order did not even require the new complaints to be verified, as ordered by the Court in *Abednego v. St. Croix Alumina, LLC*, 63 V.I. 153, 193 (Super. Ct. 2015) to make sure these plaintiffs know about and have authorized this litigation.

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[7] Indeed, the Court did not even suggest it would allow such "out of time" filings in its February 19, 2019, Order, so this matter was not even an issue for the parties to address.

[8] Moreover, the Court's February 3rd Order did not even require the new complaints to be verified, as ordered by the Court in *Abednego v. St. Croix Alumina, LLC,* 63 V.I. 153, 193 (Super. Ct. 2015) to make sure these plaintiffs know about and have authorized this litigation.

V. Summary

For the reasons set forth herein, it is respectfully submitted that the relief sought should be granted, withdrawing this Court's February 3rd Order severing SCRG from the 434 cases currently pending in the Red Dust Docket. Alternatively, if this Order is not withdrawn, it should be modified to require the Plaintiffs to limit their 434 new complaints in scope to what their counsel has represented to this Court is their current scope. Finally, the *Eleanor* Plaintiffs who have not previously filed new complaints should not be permitted to file new complaints without an "excusable neglect" analysis.

Dated: February 24, 2020

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CERTIFICATE OF SERVICE AND RULE 6-1(e) COMPLIANCE

I hereby certify that this document complies with the page or word limitation set forth in Rule 6-1(e); and that on this 24th day of February, 2020, I served a copy of the foregoing by hand delivery on:

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EXHIBIT 1

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. CROIX

NAOMI LUGO and FRED CARRASQUILLO, SR. Plaintiffs, v. ST. CROIX ALUMINA LLC, GLENCORE INTERNATIONAL AG, ALCOA, GLENCORE, LTD. f/k/a CLARENDON, LTD., CENTURY ALUMINUM COMPANY, and ST. CROIX RENAISSANCE GROUP, LLLP Defendants.	CIVIL NO: 571/09 **Red Dust Docket** **ACTION FOR DAMAGES** JURY TRIAL DEMANDED

VERIFIED COMPLAINT

Plaintiffs NAOMI LUGO and FRED CARRASQUILLO, SR. by and through their undersigned counsel, file their Verified Complaint and respectfully represent to the Court as follows:

1. This Court has jurisdiction pursuant to 4 V.I.C § 76, *et seq.*
2. Plaintiff Naomi Lugo is a resident of Kissimmee, Florida.
3. Plaintiff Fred Carrasquillo, Sr. is a resident of Kissimmee, Florida.
4. Plaintiffs Naomi Lugo and Fred Carrasquillo, Sr. were married on June 30, 2002.
5. Plaintiff Naomi Lugo was born December 1, 1982.
6. Plaintiff Fred Carrasquillo, Sr. was born January 21, 1977.
7. At the time of Hurricane Georges on or about September 21, 1998, Plaintiff Naomi Lugo physically resided at No. 62 Estate Profit, St. Croix, United States Virgin Islands.

8. At the time of Hurricane Georges on or about September 21, 1998, Plaintiff Fred Carrasquillo, Sr. physically resided at No. 26 Estate Profit, St. Croix, United States Virgin Islands.

9. Plaintiff Naomi Lugo resided at No. 62 Estate Profit at the time of Hurricane Georges and resided there continuously until July 7, 2012.

10. Plaintiff Fred Carrasquillo, Sr. resided at No. 26 Estate Profit at the time of Hurricane Georges and resided there until June 30, 2002 when he married Naomi Lugo and moved into her residence No. 62 Estate Profit. Plaintiff Fred Carrasquillo, Sr., resided at No. 62 Estate Profit from June 30, 2002 continuously until July 7, 2012.

11. Each individual Plaintiff was a member of the *Henry*[1] class until it was de-certified. As of September 21, 1998, each individual Plaintiff resided in property, specifically Nos. 26 and 62 Estate Profit, respectively, which is located in one of the following six communities adjacent to and downwind from the St. Croix Alumina Refinery Plant: the Projects of Harvey, Clifton Hill and the estates of Barren Spot, Profit, Clifton Hill and La Reine, and suffered damages or injuries as a result of exposure *during and after* Hurricane Georges to red dust and red mud blown during Hurricane George. None of the individual Plaintiffs opted out of the class.

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[1] *Henry v. St. Croix Alumina, LLC*, Civ. No. 1999-0036, in the District Court of the Virgin Islands.

12. On information and belief, Defendant St. Croix Alumina, LLC, is a limited liability company, and is deemed to be a citizen of each state in which one of its members is a citizen.

13. On information and belief, Defendant Alcoa is a Pennsylvania corporation with its principal place of business in New York.

14. On information and belief, Defendant Glencore, LTD, is a limited liability company, and is deemed to be a citizen of each state in which one of its members is a citizen.

15. On information and belief, Defendant Glencore International, AG, is an Anglo–Swiss multinational commodity trading and mining company headquartered in Baar, Switzerland, with its registered office in Saint Helier, Jersey. Plaintiffs do not know its exact form of organization.

16. On information and belief, Defendant St. Croix Renaïssance Group, LLLP is a limited liability limited partnership, with its principle place of business in St. Croix. On information and belief, Defendant St. Croix Renaissance Group, LLLP is deemed to be a citizen of Florida, Massachusetts, Puerto Rico and the U.S. Virgin Islands, because of the citizenship of its partners.

17. For about thirty years, an alumina refinery located near thousands of homes on the south shore of the island of St. Croix was owned and/or operated by a number of entities. The facility refined a red ore called bauxite into alumina, creating enormous mounds of the by-product, bauxite residue, red mud, or red dust.

18. Defendant Glencore, Ltd., f/k/a as Clarendon, Ltd., is a Swiss company that wholly owned and controlled Virgin Islands Alumina Company ("VIALCO"), and VIALCO acquired the alumina refinery on St. Croix in 1989. VIALCO is not a party to this lawsuit

19. Glencore, Ltd. is wholly owned by Defendant Glencore International AG ("Glencore International"), a Swiss company.

20. Glencore, Ltd. f/k/a Clarendon Ltd., actively participated in planning meetings and data collection for the startup of the alumina refinery and in VIALCO's operation of the alumina refinery. Glencore had to approve VIALCO's most basic decisions, including but not limited to, salaries and benefits of its employees, and improvements at the facility. Glencore funded all refinery activities and regularly inspected the facility.

21. The height of the red mud piles increased while Glencore and VIALCO operated the refinery.

22. In April 1995, VIALCO's stock was transferred to Defendant Century Aluminum Company ("Century Aluminum") Century Chartering Company, a wholly owned subsidiary of Glencore International. Century Chartering Company changed its name to Century Aluminum Company ("Century Aluminum") in July 1995 and remained a wholly owned subsidiary of Glencore International through April 1996. Defendant Century Aluminum is a Delaware corporation with its principal place of business in California.

23. Substantially all of VIALCO's assets, including the alumina refinery, were sold by

Defendant Century Aluminum to Defendant St. Croix Alumina, L.L.C. ("SCA"), a subsidiary of Defendant Alcoa, Inc. (Alcoa"), on July 24, 1995. In the Acquisition Agreement for the sale of the refinery, Defendant Glencore International was identified as VIALCO's ultimate parent and Alcoa was identified as the ultimate parent of SCA.

24. As a condition of the sale, Glencore International, retained liability for up to $18 million for claims made by July 24, 2001 arising from specified environmental conditions, including without limitation, claims related to substances migrating from the refinery, and the parties agreed to cooperate with regard to the investigation and remediation of environmental conditions covered by the Acquisition Agreement.

25. Subsequently, both Glencore Ltd and Century Aluminum acted to satisfy the indemnification obligations of Glencore International pursuant to the Acquisition Agreement for the sale of the VIALCO facility to SCA. Glencore International, Glencore Ltd. and Century Aluminum are hereinafter collectively "the Glencore Defendants."

26. Century Aluminum "accrued the expense of settlement in 1996" of a 1995 case against VIALCO for, *inter alia*, nuisance from "pollutants, toxins, dusts . . . and particulates" discharged from the refinery property.

27. As another condition of the 1995 sale, Alcoa agreed to purchase bauxite from Glencore, Ltd. for the St. Croix facility at least through 1998. Concurrent with the sale, various Alcoa entities entered into three separate alumina supply contracts

with Glencore, Ltd.

28. As a term of the 2002 sale of the refinery to SCRG, and as further established by a subsequent amendment of the PSA, Defendants ALCOA and SCA retained liability arising out of any alleged failure to secure materials at the refinery, including but not limited to bauxite, "red dust" and "red mud" and a right of access to remediate the red mud piles.

29. Defendant St. Croix Alumina, LLC ("SCA") is a limited liability corporation which is registered in Delaware and is deemed to be a citizen of Delaware, Pennsylvania, Virginia, and Australia. SCA operated the alumina refinery from 1998 to 2001. At all relevant times, SCA was a wholly-owned subsidiary of Defendant ALCOA, Inc. and was an "Alcoa-controlled entity."

30. Defendant ALCOA, Inc., ("Alcoa") formerly Alumina Company of America, is a Pennsylvania corporation with its principal place of business in New York, and at all relevant times ALCOA was the parent company of St. Croix Alumina and made environmental decisions concerning the refinery as well as economic and budgetary decisions. Alcoa and SCA are hereinafter collectively "the Alcoa Defendants."

31. In or about 2002, the Alcoa Defendants entered into a Purchase and Sale Agreement ("PSA") for the refinery with Brownfields Recovery Corporation ("BRC") and Energy Answers of Puerto Rico ("EAPR") and BRC and EAPR immediately transferred their interests in the refinery to St. Croix Renaissance Group ("SCRG").

32. SCRG has owned and/or operated the refinery from 2002 to the present.

FACTUAL BACKGROUND

A. The St. Croix Alumina Refinery

33. Alumina is extracted from a naturally-occurring ore called bauxite. Bauxite is red in color. Defendants' own Material Safety Data Sheet ("MSDS") for bauxite warns that it can cause irritation of the eyes, skin and upper respiratory tract.

34. The byproduct of the alumina refining process used at the St. Croix refinery is a red substance called bauxite residue, or "red mud" or "red dust," which is indistinguishable in color and texture from bauxite. The MSDS for red mud states that it can cause "severe irritation and burns [of eyes], especially when wet," "can cause severe irritation [of skin], especially when wet," and "can cause irritation of the upper respiratory tract." It also advises against skin and eye exposure to red mud. Both red mud and bauxite damage real and personal property and can stain it.

35. From the beginning of the alumina refinery's operations, the red mud was stored with coal dust and other particulates outdoors in open piles that at times were as high as approximately 120 feet and covered up to 190 acres of land. For years, the uncovered piles often emitted fugitive dust when winds blew across the refinery and on the frequent occasions when bulldozers ran over them.

36. In addition, the refinery contained asbestos and other particulates in various conditions that were never removed from the premises, in violation of law.

37. The bauxite was stored in a steel A-frame structure with plastic sheets hung

down the sides, called the bauxite storage shed. In 1995, Hurricane Marilyn hit St. Croix and damaged the roof of the bauxite storage shed, which allowed the dusty bauxite to be blown out of the shed.

38. The Glencore Defendants failed to correctly control the storage and containment of the bauxite while they owned and operated the alumina refinery. The Glencore Defendants also failed to properly store, contain and/or remove the asbestos, red dust and/or red mud, coal dust, and other particulates prior to the sale of the refinery to the Alcoa Defendants. Instead Glencore left the red dust, coal dust, and other particulates in open uncovered piles on the property and failed to remove or properly contain the friable, unencapsulated and/or uncovered asbestos that was there.

39. Defendants ALCOA and St. Croix Alumina continued to fail to correctly control the storage and containment of the bauxite, red mud, coal dust, and other particulates.

40. In 1995, Defendants ALCOA and St. Croix Alumina estimated the cost of asbestos removal to be "in the range of $20 million" and continued to fail to correctly control the storage and containment of friable, unencapsulated and/or uncovered asbestos.

41. Defendants ALCOA and St. Croix Alumina added red dust, coal dust and other particulates to the materials left behind by the Glencore Defendants and continued to stack and store them in huge uncovered piles.

42. The Alcoa Defendants failed to properly store, contain and/or remove the

asbestos, red dust and/or red mud, coal dust, and other particulates, prior to the sale of the refinery to SCRG. Instead, the Alcoa Defendants left the red dust, coal dust, and other particulates, in uncovered piles on the property. In 1995, Alcoa estimated the future costs to close the red dust disposal areas at $3.7 to $15 million and the total projected cost to clean up major environmental issues on shut down at $30 to $45 million.

43. At all relevant times, Defendants knew about the risk of dust emissions from the alumina refinery. In 1977, the owners and operators of the alumina refinery learned about the need to control drainage, erosion, and dust problems from the red mud piles and ways in which to prevent such emissions.

44. In 1987, an Alcoa research scientist wrote about the potential for emissions from the red mud piles and recommended methods for controlling releases.

45. A 1989 report from Ormet Corporation to Glencore identified a potential air pollution problem posed by bauxite residue and the concern about the ability of the bauxite shed to withstand storm conditions.

46. In 1991, SCA knew that residents living downwind from the alumina refinery had complained about fugitive dusts from the refinery.

47. For years before Georges, the uncovered red mud piles often emitted fugitive dust when winds blew across the alumina refinery or on the frequent occasions when SCA ran bulldozers over them.

48. In 1994, a DPNR field inspection found evidence of dust emissions from the red mud piles. There had also been numerous reports of water causing the erosion

of red mud during storms.

49. In June of 2000, SCA itself acknowledged that a major community concern is fugitive emissions from red mud dusting in weather conditions less severe than hurricanes.

B. Hurricane Georges

50. Despite their admitted knowledge that St. Croix was a hurricane-prone area, that the red-mud piles and the bauxite shed could emit fugitive dusts, and that emissions from the refinery affected the neighboring residences, the Glencore Defendants and the Alcoa Defendants recklessly failed to properly prepare for Hurricane Georges including, but not limited to, failing to secure the bauxite, red dust, coal dust and other particulates or remove and/or secure asbestos.

51. Hurricane Georges struck St. Croix on September 21, 1998.

52. Because Defendants did not properly store and/or safeguard the bauxite, red mud, coal dust, and other particulates, the winds of Hurricane Georges blew huge quantities of red dust consisting of both red mud and bauxite and/other particulates into the neighboring residences. Refinery workers employed by the Alcoa Defendants reported seeing the winds shift and blow huge amounts of bauxite out of holes in the roof of the storage shed towards the nearby neighborhoods, and area residents saw red dust swirling about their properties during the storm. Later, Defendants also admitted that the hurricane carried bauxite and red mud from the piles to the adjacent neighborhoods. Witnesses could see the red-mud piles were visibly smaller after the hurricane. On

information and belief, Defendants hired a third party to measure the red mud piles after Hurricane Georges but Defendants have concealed this evidence.

53. Plaintiffs' home, yard, and personal property was coated in the Red Dust consisting of both red mud and bauxite and other particulates from the alumina refinery and was damaged and/or destroyed.

54. Specifically, Plaintiff Naomi Lugo incurred costs of cleaning the Red Dust from No. 62 Estate Profit including cleaning out the cistern and refilling the cistern with usable water. Plaintiff Naomi Lugo lost valuable plants from her yard and garden. Plaintiff Naomi Lugo had to clean and replace furniture, curtains, and bedding. Plaintiff Naomi Lugo was deprived of the use of her real property and this caused her emotional distress and because she and her real property was covered in Defendants' industrial waste.

55. The Red Dust consisting of red mud and bauxite and other particulates blew into Plaintiff Naomi Lugo's cistern, the primary source of potable water for many residents of St. Croix, and turned the water red.

56. Plaintiff Naomi Lugo also inhaled, ingested and/or was physically exposed to numerous toxic substances that blew over from the alumina refinery.

57. Specifically, Plaintiff Naomi Lugo suffered from red and itchy eyes, itchy skin, rashes and respiratory distress.

58. Plaintiff Fred. Carrasquillo, Sr. incurred costs of cleaning the Red Dust from No. 26 Estate Profit including cleaning out the cistern and refilling the cistern with usable water. Plaintiff Fred Carrasquillo, Sr. had to clean and replace furniture,

clothes, curtains, bedding, electronics and food. Plaintiff Fred Carrasquillo, Sr. suffered from emotional distress because he was covered in Defendants' industrial waste.

59. The Red Dust consisting of red mud and bauxite and other particulates blew into Plaintiff Fred Carrasquillo's, Sr. cistern, the primary source of potable water for many residents of St. Croix, and turned the water red.

60. Plaintiff Fred Carrasquillo, Sr. also inhaled, ingested and/or was physically exposed to numerous toxic substances that blew over from the alumina refinery.

61. Specifically, Plaintiff Fred Carrasquillo, Sr. suffered from red and itchy eyes, itchy skin, rashes and respiratory distress.

62. Plaintiffs incurred the costs of having to clean the inside and outside of their respective residences which were covered in Red Dust.

63. Plaintiffs had to purchase water as a result of their cisterns being contaminated.

64. Plaintiffs cleaned the inside and outside of the houses themselves, as a family, which took several weeks and are entitled to the reasonable value of this cleanup.

65. Plaintiffs suffered from fatigue from having to constantly clean the house because of Defendants' industrial waste.

66. During this time of cleanup, all Plaintiffs did not have the reasonable use and enjoyment of their home and suffered stress and anxiety as a result.

67. All of Plaintiffs personal items, such as their clothes, furniture, curtains, etc. became stained or damaged by Red Dust and had to be discarded.

C. After Hurricane Georges

68. After Hurricane Georges, Defendants continued to improperly store the bauxite, red dust, and other particulates and allowed those substances to continue to blow about the island and damage Plaintiffs wherever there was a strong wind or work done on the Red Dust piles.

69. Defendants also delayed cleaning up the bauxite, red dust, and other particulates and allowed those substances to continue to blow about the island and damage Plaintiffs.

70. When Defendants ALCOA and St. Croix Alumina finally began to attempt to clean up the substances from the neighborhoods, they did so in a negligent matter which resulted in incomplete clean up, damage to Plaintiffs' homes, appliances, furnishings and clothes among other items.

71. Defendants have failed to clean and thoro-seal the Plaintiffs cisterns required as a result of the release.

72. Plaintiffs were forced to obtain potable water and incur the expense, thereof.

73. Alcoa and SCA retained responsibility for red mud or bauxite releases during Hurricane Georges and were required to continue post-closing remediation of certain areas of the alumina refinery premises to the satisfaction of the DPNR.

74. The refinery ceased operations in approximately 2002.

75. Upon information, in 2001 the Alcoa Defendants sought indemnification from the Glencore Defendants, pursuant to the Acquisition Agreement between Alcoa and Glencore, for the investigation and cleanup of the refinery prior to closure.

76. In January 2003, SCA entered into a consent order with DPNR to remediate releases from the red mud piles that occurred in 2002 and to construct a control system to prevent or minimize future releases from the red mud piles into the environment.

77. Defendant SCRG has also granted "DPNR, SCA and VIALCO and the contractors, subcontractors, and other agents of DPNR, SCA and/or VIALCO access to the Alumina Facility reasonably necessary to effectuate any and all remediation of the red mud piles and red mud releases, which may be (a) ordered by a court, (b) ordered and/or approved by DPNR, or (c) agreed to by DPNR and SCA and/or VIALCO."

78. Upon information Defendant ALCOA failed to properly disclose to SCRG all hazardous substances and particulates at the refinery and concealed the same and, further, went in after the sale and destabilized the red mud piles.

79. In addition, ALCOA represented that it was abating all asbestos at the refinery at the time of the sale to SCRG.

80. In reality, they failed to do so and failed to disclose this to SCRG.

81. At the time it failed to do so, it knew there was friable asbestos throughout the plant blowing into the Plaintiffs' home and being inhaled by Plaintiffs.

82. The Alcoa Defendants further concealed from Plaintiffs the true extent of the toxic substances, the toxicity of the substances, and misrepresented to Plaintiffs that there were no dangerous conditions or substances at the refinery to which they were being exposed.

83. SCRG discovered that ALCOA had not abated the asbestos on or about 2006 when it was informed by DPNR.

84. SCRG attempted to conceal the fact it had friable asbestos in the plant and left it there for years.

85. SCRG knew that friable asbestos was being blown into Plaintiffs' home and being inhaled by Plaintiffs but failed to disclose or warn.

86. In addition, ALCOA represented that it was abating all asbestos at the refinery at the time of the sale to SCRG.

87. In reality, they failed to do so and failed to disclose this to SCRG.

88. At the time it failed to do so, it knew there was friable asbestos throughout the plant blowing into the Plaintiffs' home and being inhaled by Plaintiffs.

89. The Alcoa Defendants further concealed from Plaintiffs the true extent of the toxic substances, the toxicity of the substances, and misrepresented to Plaintiffs that there were no dangerous conditions or substances at the refinery to which they were being exposed.

90. SCRG discovered that ALCOA had not abated the asbestos on or about 2006 when it was informed by DPNR.

91. SCRG attempted to conceal the fact it had friable asbestos in the plant and left it there for years.

92. SCRG knew that friable asbestos was being blown into Plaintiffs' home and being inhaled by Plaintiffs but failed to disclose or warn.

93. During its operation and/or ownership of the alumina refinery, SCRG has failed to

remove the asbestos from the refinery.

94. Upon information the asbestos has been friable and in an extremely dangerous condition for at least 10 years but Plaintiffs had no way of knowing or discovering that. In particular, Defendants concealed the existence of the friable asbestos from Plaintiffs until 2010, when DPNR produced documents, indicating the presence of asbestos in discovery in the *Bennington v. SCRG* matter indicating that unencapsulated asbestos fibers were permitted to hang and blow about freely.

95. Upon information SCRG hid the fact that it had friable asbestos not only from the Plaintiffs but also from Department of Natural Resources (DPNR) and Environmental Protection Agency (EPA) and in fact, made false reports concerning the same.

96. SCRG did nothing to remove that asbestos for some three (3) years.

97. As a result deadly asbestos blew about the neighborhoods near the refinery for at least ten (10) years causing Plaintiffs to inhale asbestos and otherwise be exposed to asbestos.

98. As a result of Defendants' conduct before, during and after Hurricane Georges, and continuing to date, Plaintiffs suffered and continue to suffer physical injuries, medical expenses, damage to their real property and personal possessions, loss of income, loss of capacity to earn income, mental anguish, pain and suffering and loss of enjoyment of life a propensity for additional medical illness, a reasonable fear of contracting illness in the future all of which are expected to

continue into the foreseeable future.

D. Related Litigation

99. In 1999, local residents and workers filed a class action ("*Henry*") against all the Defendants in this case except SCRG in a case styled *Henry v. St. Croix Alumina, LLC*, Civ. No. 1999-0036, in the District Court of the Virgin Islands. The *Henry* plaintiffs sought compensatory and punitive damages for personal injuries and property damage sustained from exposure to toxic materials from the refinery, including bauxite, red mud, and other particulates, during and after Hurricane Georges.

100. In addition to damages for personal injuries and property damages, the *Henry* plaintiffs also sought an injunction requiring the defendants to (a) stop all activities that allow the release of pollutants, (b) remove the piles of red dust, coal dust, and other particulates from the island, and (c) refrain from allowing said substances from reaccumulating on the island.

101. The initial class in *Henry* was defined as

> [a]ll individuals who, as of September 21, 1998 [the date of Hurricane Georges], resided, worked, and/or owned property located in the following six communities adjacent to and downwind from the St. Croix Alumina Refinery Plant—the projects of Harvey and Clifton Hill and the estates of Barren Spot, Profit, Clifton Hill and La Reine—who, due to Defendants' conduct with regard to the containment and storage of red dust containing bauxite and red mud, suffered damages and/or injuries as a result of exposure during and after Hurricane Georges to red dust and red mud blown during Hurricane Georges.

102. Plaintiffs herein 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 located in one of the six communities described above, and they have suffered and continue to suffer damages and/or injuries as a result of exposure to red dust, red mud, and other particulates during and after Hurricane Georges.

103. Plaintiffs did not opt out of the *Henry* class.

104. In 2004, SCRG filed a separate suit against Alcoa for fraud, breach of contract, and negligence arising out of the sale of the St. Croix Alumina Refinery.

105. In 2006, the *Henry* court ruled that the class would only remain certified for the liability stage of trial, and then the class would be decertified for the damages stage.

106. About two years later, on June 3, 2008, the *Henry* court decertified the original class and certified a new class of "[a]ll persons who **currently** reside, work, and/or own property in the projects of Harvey and Clifton Hill and the estates of Barren Spot, Profit, Clifton Hill, and La Reine. . . ." Also, the *Henry* court ruled that the new class was certified "only insofar as they seek cleanup, abatement or removal of the substances **currently present** on the refinery property." The *Henry* court also appointed the representatives of the former class to represent the new class. The Court ruled that it would not hear individual damage claims on a class basis. Plaintiffs then timely filed their individual claims.

COUNT I: Abnormally Dangerous Condition

107. Plaintiffs repeat and re-allege each allegation of Paragraph 1-106 as if set forth herein verbatim.

108. The action of each Defendant constitutes maintaining an abnormally dangerous condition.

109. The St. Croix Alumina refinery is located in a known hurricane zone at the head of the Kraus Lagoon Channel at Port Alucroix, which leads to the Caribbean Sea. The natural resources of the Virgin Islands are particularly sensitive and precious.

110. Residential communities are also located just north of the refinery.

111. Defendants' use, storage, disposal and failure to remediate the bauxite, red dust and/or red mud, asbestos, coal dust, and other particulates at the refinery was solely for Defendants' own business purposes.

112. Defendants knew and understood that there was a high risk that strong winds could blow bauxite, red mud, asbestos and other particulates into Plaintiffs' neighborhood.

113. Defendants' storage, disposal, and failure to remediate the bauxite, red mud, asbestos, and other particulates presented a high risk of great harm to Plaintiffs' health, chattel, and properties. Bauxite and red mud can irritate the skin, respiratory tract, and eyes and can permanently stain, clog, and otherwise damage property and objects. Friable asbestos is also a known carcinogen that can cause a variety of respiratory illnesses.

114. Defendants' use, storage, disposal and failure to remediate bauxite, red mud, asbestos and other particulates at the alumina refinery caused serious harm to Plaintiffs' persons, chattel, and properties. As a result, the Plaintiffs suffered

damages as alleged herein.

COUNT II: Public Nuisance

115. Plaintiffs repeat and re-allege each allegation of Paragraphs 1-114 as if set forth herein verbatim.

116. The actions of all Defendants constitute a public nuisance.

117. Specifically, the ongoing release of harmful dusts, including bauxite, red mud, coal dust, asbestos, and other particulates, from the alumina refinery unreasonably threatens and interferes with the public rights to safety, health, peace, comfort, and the enjoyment of private land and public natural resources.

118. The actions of all Defendants violated the statutes of the Virgin Islands (including, but not limited to, 12 V.I.R. & R. § 204-20(d) & (e), § 204-25(a)(2) & (3), § 204-25(c), and § 204-27(a)) and constitutes nuisance *per se*.

119. Plaintiffs are entitled to damages as a result, thereof.

COUNT III: Private Nuisance/Trespass

120. Plaintiffs repeat and re-allege each allegation of Paragraphs 1-119 as if set forth herein verbatim.

121. All Defendants' actions constitute a private nuisance and/or a trespass.

122. All Defendants' release of massive quantities of bauxite, red mud, asbestos, and other particulates has stained, clogged, and otherwise damaged Plaintiffs' home and yard.

123. All Defendants' release of massive quantities of bauxite, red mud, asbestos, and other particulates has exposed Plaintiffs' bodies to toxic and/or irritating dusts.

124. By so doing, all Defendants have wrongfully and unreasonably interfered with Plaintiffs' private use and enjoyment of their home and property. As a result, Plaintiffs have been damaged as alleged, herein.

COUNT IV: Negligence as to Defendants Alcoa, SCA and SCRG only

125. Plaintiffs repeat and re-allege each allegation of Paragraphs 1-124 as if set forth herein verbatim.

126. Defendants' negligently attempted to abate the nuisance of the bauxite and/or red mud deposited in Plaintiffs' neighborhood, such that Defendants caused additional damage to Plaintiffs' bodies, real property, and personal property.

127. For some time after Hurricane Georges hit St. Croix, SCA and Alcoa failed to clean up the bauxite, red mud, and other particulates from both the alumina refinery and the nearby neighborhoods. This failure allowed toxic and irritating dusts to blow about Plaintiffs' neighborhood and damage Plaintiffs and their property.

128. Eventually, SCA and Alcoa admitted they were responsible for the bauxite, red mud and other particulates that had inundated the Plaintiffs and their property and voluntarily undertook the effort to clean up the bauxite, red mud, and other particulates from Plaintiffs' neighborhood.

129. Defendants SCA and Alcoa negligently and improperly used high-pressure water sprayers on Plaintiffs' property, which damaged Plaintiffs' home, yard, cistern, and other property.

130. Defendants SCA and Alcoa improperly and/or inadequately used cleaning agents

on Plaintiffs' property, which damaged Plaintiffs' home, yard, cistern, and other property.

131. Defendants SCA and Alcoa failed to thoroughly remove all the deposits of bauxite and/or red mud or other particulates from Plaintiffs' home, yard, cistern, and other property, which caused further damage to such property and further exposed Plaintiffs to the toxic and irritating dusts.

132. As a result, Plaintiffs have suffered damages as alleged, herein.

COUNT V: Intentional Infliction of Emotional Distress

133. Plaintiffs repeat and re-allege each allegation of Paragraphs 1-132 as if set forth herein verbatim.

134. The actions of all Defendants constitute the intentional infliction of emotional distress on Plaintiffs.

135. For many years before Hurricane Georges hit St. Croix, Defendants knew and understood that exposure to bauxite and red mud asbestos and other particulates presented serious risks to the health and property of thousands of St. Croix residents. Defendants also understood that the emissions posed serious threats to the local environment and natural resources.

136. Long before Hurricane Georges, Defendants knew that wind, rain and/or flooding, and other physical disturbances could release bauxite, red mud asbestos and other particulates from the alumina refinery into Plaintiffs' neighborhood.

137. For decades, Defendants have understood that St. Croix is a hurricane-prone

area and that local residents rely on cisterns as their primary source of drinking water.

138. Since at least 2006, Defendant SCRG also knew that dangerous friable asbestos was present at the refinery and could be blown by winds into Plaintiffs' neighborhood as well as the red mud and related particulates.

139. Despite this knowledge, Defendants' knowingly and intentionally failed to take precautions to prevent bauxite, red mud, asbestos and other particulates from blowing into Plaintiffs' neighborhood.

140. Furthermore, after Hurricane Georges, Defendants SCA and Alcoa delayed the clean-up and failed to properly remove the bauxite and red mud from Plaintiffs' cistern and property, even though they knew that hurricane victims had limited access to clean drinking water.

141. After Defendants permitted Plaintiffs to be exposed to bauxite, red mud, asbestos and other particulates emissions from the alumina refinery, Defendants' purposefully concealed and/or misrepresented the health risks associated with exposure to the emissions from Plaintiffs.

142. Years after learning that emissions from the alumina refinery presented high risk of serious injury to Plaintiffs and the natural resources of the Virgin Islands, Defendants continue to allow bauxite, red mud, asbestos and other particulates to blow into Plaintiffs' neighborhood and cause significant harm to Plaintiffs' minds, bodies, and property.

143. Defendants (1) acted intentionally or recklessly; (2) engaged in extreme and

outrageous conduct that exceeds all bounds of decency such that it is regarded as atrocious and utterly intolerable in a civilized society; and (3) caused the Plaintiffs to suffer from severe emotional distress.

144. As a result of Defendants' outrageous and callous disregard for the health, safety, well-being and property of Plaintiffs, Plaintiffs have suffered damages as alleged herein, including severe emotional distress and physical ailments resulting from such distress.

COUNT VI: Negligent Infliction of Emotional Distress

145. Plaintiffs repeat and re-allege each allegation of Paragraphs 1-144 as if set forth herein verbatim.

146. In the alternative to intentional infliction of emotional distress, the actions of all Defendants constitute the negligent infliction of emotional distress. Defendants owed the Plaintiffs a duty of care to ensure that the plaintiff did not suffer from serious emotional distress, which duty arose by operating an abnormally hazardous condition, through the common law, and through statutory and regulatory obligations to prevent hazardous material from escaping from its facility; (2) Defendants breached its duty; and (3) as a direct and proximate result of the Defendants' breach, Plaintiffs suffered a serious emotional injury.

147. As a result, Plaintiffs have been damaged as alleged, herein.

COUNT VII: Negligence as to All Defendants

148. Plaintiffs repeat and re-allege each allegation of Paragraphs 1-147 as if set forth herein verbatim.

149. The actions of Defendants constitute negligence that damaged Plaintiffs.

150. Before Hurricane Georges, Defendant Glencore owned and operated the alumina refinery.

151. Glencore failed to secure and/or properly store or maintain bauxite and/or red mud and/or asbestos and other particulates. Glencore also continued to supply bauxite to the successive owners and/or operators of the refinery without adequately warning and/or ensuring that those successors properly stored and/or maintained the bauxite and/or red mud and or removed the asbestos and other particulates.

152. Glencore's conduct fell below the standard of care of a reasonable property owner and/or operator in similar circumstances.

153. Glencore knew and/or should have known that its failure to secure the bauxite and red mud and related particulates at the alumina refinery and remove the asbestos would allow these dangerous and irritating materials to blow freely into Plaintiffs' neighborhoods and harm Plaintiffs' and their properties.

154. Glencore's failure to secure the bauxite and red mud, asbestos and related particulates at the alumina refinery caused the toxic and irritating dusts to blow into nearby neighborhoods and damage Plaintiffs and their properties.

155. Before and after Hurricane Georges, Alcoa and SCA owned and/or operated the alumina refinery and failed to adequately secure the bauxite and red mud and related particulates on the premises or to remove the asbestos.

156. Alcoa and SCA's conduct fell below the standard of care of a reasonable

property owner and/or operator in similar circumstances.

157. Alcoa and SCA knew and/or should have known that its failure to secure the bauxite and red mud and related particulates at the alumina refinery and remove the asbestos would allow these toxic and irritating materials to blow freely into Plaintiffs' neighborhoods and harm Plaintiffs' and their property.

158. Alcoa and SCA's failure to secure the bauxite and red mud and related particulates at the alumina refinery and failure to remove the asbestos caused the toxic and irritating dusts to blow into nearby neighborhoods and damage Plaintiffs and their property.

159. Before and after Hurricane Georges, Alcoa and SCA failed to adequately secure the bauxite and red mud and related particulates at the alumina refinery and failed to remove asbestos.

160. Alcoa and SCA's conduct fell below the standard of care of a reasonable property owner and/or operator in similar circumstances.

161. Alcoa and SCA knew and/or should have known that its failure to secure the bauxite and red mud and related particulates at the alumina refinery and to remove the asbestos would allow these toxic and irritating materials to blow freely into Plaintiffs' neighborhood and harm Plaintiffs' and their property.

162. Alcoa and SCA's failure to secure the bauxite and red mud and related particulates at the alumina refinery and remove the asbestos caused the toxic and irritating dusts to blow into nearby neighborhoods and damage Plaintiffs and their properties.

163. SCRG owned and/or operated the alumina refinery.

164. SCRG failed to properly store and/or secure bauxite, red mud, related particulates and asbestos on the premises.

165. SCRG knew and/or should have known that its failure to secure these dangerous materials would allow them to blow freely into Plaintiffs' neighborhood and harm Plaintiffs and their property.

166. SCRG's failure to properly secure, store and/or maintain the bauxite, red mud, related particulates and asbestos at the alumina refinery allowed these materials to blow into the nearby areas and harm Plaintiffs and their property.

167. Defendants' negligence caused both physical personal injury and real and personal property damage that also resulted in emotional distress and anxiety.

168. Plaintiffs also specifically allege that they are entitled to recover under *Banks* and the Restatement (Second) of Torts: (a) for bodily harm; and (b) for emotional distress, without any proof of pecuniary loss. *See* RESTATEMENT (SECOND) OF TORTS § 905 (1979); see also *Moolenaar v. Atlas Motor Inns, Inc.*, 616 F.2d 87, 90 (3d Cir. 1980). "Bodily harm is *any impairment of the physical condition of the body*, including illness or physical pain. It frequently causes the harms described in Comments c to e. It is not essential to a cause of action that pecuniary loss result. Furthermore, damages can be awarded although there is no impairment of a bodily function and, in some situations, even though the defendant's act is beneficial." *See id.* at cmt. a.

169. The general rule is that if an actor's negligent conduct causes bodily harm, he is

also liable for the emotional disturbance resulting from the bodily harm, as further bodily harm resulting from the emotional disturbance. *See* RESTATEMENT (SECOND) OF TORTS § 456 (1965). The rule is "not limited to emotional disturbance resulting from the bodily harm itself, but also includes such disturbance resulting from the conduct of the actor." *See id.* cmt. e.

170. Under Restatement § 905, comment b, as an element of damages for a tort, a plaintiff can also recover for anxiety—independent of physical injury—if this is the expectable result of the defendant's tortious act or if the defendant intended that result. *See* Illustrations 6 and 7. In accordance with the rule stated in § 501, the extent of liability for this sort of emotional distress is increased if the actor's conduct is reckless rather than merely negligent. *See* Illustration 8. In some cases fear and anxiety alone are a sufficient basis for the action, as when the defendant has assaulted the plaintiff or trespassed on her property. *See* Illustrations 7 and 9. *See, e.g., Moolenaar*, 616 F.2d at 90.

171. Moreover, Restatement § 939 expressly authorizes recovery for "discomfort and annoyance" for actions in which that person's property has been injured but not totally destroyed without physical injury. *See* RESTATEMENT (SECOND) TORTS § 939 (1979). "Discomfort and annoyance to an occupant of the land and to the members of the household are distinct grounds of compensation for which in ordinary cases the person in possession is allowed to recover in addition to the harm to his proprietary interests." *See id.* cmt. on subsection 1.

172. Additionally, courts interpreting Restatement §§ 905 and 939 have concluded

that claims for nuisance and property damage are also sufficient to support a claim for mental-anguish-personal-injury damages, even in the absence of physical injury when they result in pecuniary loss or when the tortfeasor engages in reckless conduct. For example, in *Nnadili v. Chevron U.S.A. Inc.*, 435 F. Supp. 2d 93 (D.D.C. 2008), the plaintiffs alleged that gas spilled from a Chevron station and "Plaintiffs further allege that the gasoline subsequently migrated into the Riggs Park neighborhood, contaminating the air, soil, and groundwater of the properties currently or formerly owned or occupied by plaintiffs." *See id.* at 96. Chevron moved for summary judgment on claims for recovery of "emotional distress" because there was no proof of physical injury or physical endangerment. *See id.* The court, relying on §§ 905 and 939, determined these sections allowed, under the facts of the case, for the recovery of mental anguish in the absence of bodily injury, under plaintiff's theories of trespass, nuisance, and negligence. *See id.*; *see also French v. Ralph E. Moore, Inc.*, 203 Mont. 327, 661 P.2d 844, 847-48 (Mont. 1983) (holding damages for mental anguish recoverable for trespass, nuisance, and negligence claims arising out of gasoline discharge from USTs).

173. In *Komoff v. Kingsburg Cotton Oil Co.* (1955), 45 Cal.2d 265, 288 P.2d 507, the plaintiffs brought an action for nuisance and trespass for damages sustained as the result of dust pollution emanating from the defendant's ginning mill. *See id.* The court upheld the right to seek damages for injury to real property as well as for personal discomfort, annoyance, nervous distress and mental anguish. *See*

id. The court expressly recognized that such damages would, or at least could, be proximately caused by a defendant's invasion of the property, even where there is no physical injury suffered. *See id.* (collecting cases).

174. Furthermore, in *Antilles Ins. v. James*, 30 V.I. 230 (D.V.I. 1994), the appellate division of the district court affirmed a Superior Court jury verdict awarding emotions-distress damages without physical injuries in a negligence case, where the jury awarded the James's $146,486, consisting of property damage in the amount of $96,486; $10,000 for extended loss of use of their home; and $40,000 in emotional distress, relying on Restatement §§ 904 and 436A. The court reasoned:

> "The Restatement considers several hours worrying about securing shelter to be a potential element of damage recovery. RESTATEMENT (SECOND) OF TORTS § 905, cmt. e, illus. 8. Antilles' suggestion that in the absence of physical injury, emotional distress is only compensable if Antilles' conduct was intentional or extremely outrageous is rejected. If appellees only recovered damages for emotional distress, appellants would be correct in asserting that the award would not be permitted pursuant to the Restatement. RESTATEMENT (SECOND) OF TORTS § 436A. Since emotional distress was only a part of the damages awarded, this section is inapplicable.

Antilles Ins., 30 V.I. at 257.

175. Here, Plaintiffs were covered in industrial waste and suffered from some form of physical bodily harm sufficient to support a claim for mental anguish. Plaintiffs are also entitled to recover for personal discomfort, annoyance, nervous distress and mental anguish because: (1) the Refinery acted with reckless disregard for the health and safety of its neighbors such that the recovery of these types of

damages is authorized by the Restatement; (2) Plaintiffs suffered other pecuniary losses, including property damage to their homes and the contamination of their cisterns; (3) the type of torts at issue here are sufficiently like a trespass and the illustrations to § 905 to warrant these remedies even if Plaintiffs weren't physically injured; and (4) Plaintiffs are entitled to recover for their "discomfort and annoyance" under Restatement § 939 because the Defendants' damaged or ruined their property, regardless of whether the Plaintiffs recover in nuisance, negligence, trespass, or any other theory of liability.

176. Plaintiffs are also entitled to punitive damages. The Defendants knew that escaping red mud and bauxite presented health risks to the surrounding neighborhoods, but consciously and with reckless indifference took no reasonable steps to protect the surrounding neighborhoods.

177. There were seven cells of red mud when Hurricane Georges hit; all were above 50 feet; the tallest was about 120 feet. Alcoa's Management Standards and Guidelines for handling red mud states that: "Dust from the residue can effect neighbors and vegetation. . .bauxite residue deposits have been assessed as a major potential environmental liability for the company." The cells were visibly smaller after the hurricane.

178. Before Hurricane Georges, VICZM conducted a field inspection of the Refinery and found that the branches of vegetation were stained red and so were the white shirt, faces, and arms of the staff, "indicating the presence of [red dust] in the air." The Title V permitting-application documents admitted that red-mud

piles could be covered or treated with chemicals to prevent wind erosion and to reduce fugitive emissions—and despite complaints from neighbors about red dust—the Refinery took no steps to contain emissions.

179. Plant personnel who handled bauxite and bauxite residue were issued safety equipment that included respirators, dust masks, face shields, and cover gear. Black admitted that full respirators—not just dust masks—were required in potential high-dust areas. Despite this, Mr. Black, in his capacity as an environmental manager for the Refinery, admitted he never took into account the safety and protections of the surrounding residents in considering how to store bauxite or the bauxite residue.

180. In another litigation, SCA and Alcoa filed a "Statement of Undisputed Facts" in Case No. 2004/67. They admitted that, "much of the current bauxite residue disposal area is uncovered" and should be "stabilized" and presents an environmental hazard for a number of reasons, included that the containment area "no longer reflected any containment." They admitted that that the poor condition and lack of containment was "open and obvious." They also admitted there were elevated levels of poisons in the ground water including arsenic, selenium and lead, along with elevated pH levels.

181. The Refinery had prior knowledge about its dangerous industrial waste escaping. Mr. Black admitted they knew about complaints from neighbors about red-mud dusting and drinking-water contamination. Mr. Pedersen admitted he knew generally about complaints that fugitive emissions were making people in the

surrounding neighborhoods sick. Mr. Black admitted the Refinery used a type of bauxite that was particularly susceptible to dusting. Internal documents show that the bauxite-storage facility was inadequately constructed to withstand storms—portions of the roof had previously blown off in Hurricanes Hugo, Marilyn, and did so again in Georges. (This caused problems even before Georges storing both dry and wet bauxite because 25% of the bauxite-storage-building roof was missing and there's no structural siding.) Internal documents admitted that the entire structure should have been enclosed to handle "particularly the dusty bauxites," but Mr. Black isn't aware of any efforts to fully enclose the building, except for using "plastic curtains."

182. The Refinery's officials knew hurricanes were a problem and Mr. Black was one of the officials responsible for preparing for them. Despite this, Mr. Black took no steps to prevent bauxite from being blown around the islands. The Refinery never took any steps to prevent the red mud from escaping during a hurricane. Documents show Black falsely justified the Refinery's failure to prepare the shed to DPNR by claiming the bauxite-storage building was "built to withstand hurricanes." In fact the bauxite was stored in an open A-frame and with only plastic curtains on it. Mr. Pedersen, the official in charge of the whole Refinery, wasn't aware of any extra precautions taken to protect neighbors in the area in the event of a hurricane. Mr. Black admitted the Refinery failed to take any steps to secure the red mud and bauxite.

183. Refinery employees witnessed the bauxite leaving the storage shed during the

storm through a hole in the roof. The facility was cited by DEP because "a substance described as red mud contaminated numerous properties including cisterns during the hurricane." The Refinery's investigation revealed homes with "what looked like bauxite on the walls." The Refinery recklessly failed to test or measure to determine the amount of bauxite and red mud that escaped the Refinery during the hurricane.

184. DEP found that the Refinery failed to take any precautionary measures to prevent bauxite from escaping. This prompted the Refinery to buy approximately $50,000 worth of tarps to cover the bauxite in the event of another storm, but it didn't take any steps to secure the red mud. The Refinery covered the bauxite with tarp the next time a hurricane threatened.

185. In prior lawsuits, SCRG learned in or about 2006 that its property contained friable asbestos as well as red mud, bauxite and other toxic waste.

186. Despite this knowledge, SCRG took no measures to remove or contained those hazardous chemicals.

187. SCRG knew that those substances repeatedly blew into Plaintiffs' home but failed to warn Plaintiffs or attempt to contain the substances.

188. The actions of Defendants were and are so callous and done with such extreme indifference to the rights and interests of the Plaintiffs and the citizens of St. Croix so as to entitle Plaintiffs to an award of punitive damages.

WHEREFORE, Plaintiffs pray for damages as they may appear, compensatory and punitive, and interest and litigation costs and such other relief this Court finds fair and just.

RESPECTFULLY SUBMITTED,
LEE J. ROHN & ASSOCIATES, LLC
Attorneys for Plaintiffs

DATED: December 1, 2015

BY: _____

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VERIFICATION

I, **NAOMI LUGO**, being fully sworn, state that I have read the allegations contained in the foregoing **VERIFIED COMPLAINT** and know that the facts relating to my personal situation, including my personal and property damages are true and correct to the best of my knowledge and belief. I have given Lee J. Rohn and Associates, LLC authority to file this lawsuit on my behalf.

NAOMI LUGO

SUBSCRIBED AND SWORN TO before me this 2 day of ~~November~~ December, 2015.

NEIDY M. ASTACIO
Notary Public, State of Florida
Commission # FF 21333
My comm. expires May 23, 2017

NOTARY PUBLIC

VERIFICATION

I, **FRED CARRASQUILLO, SR.**, being fully sworn, state that I have read the allegations contained in the foregoing **VERIFIED COMPLAINT** and know that the facts relating to my personal situation, including my personal and property damages are true and correct to the best of my knowledge and belief. I have given Lee J. Rohn and Associates, LLC authority to file this lawsuit on my behalf.

Fred Carrasquillo
FRED CARRASQUILLO, SR.

SUBSCRIBED AND SWORN TO V.I.
Before me this 2 day of ~~November~~ December, 2015.

NEIDY M. ASTACIO
Notary Public, State of Florida
Commission # FF 21333
My comm. expires May 23, 2017

Neidy M. Astacio
NOTARY PUBLIC

EXHIBIT 2

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

IN RE: RED DUST CLAIMS,) MASTER CASE NO.
) SX-15-CV-620

Thursday, January 24, 2019
Kingshill, St. Croix

The above-entitled action came on for HEARING before the Honorable ROBERT A. MOLLOY, Judge, in Courtroom Number 203.

THIS TRANSCRIPT REPRESENTS THE PRODUCT OF AN OFFICIAL COURT REPORTER, ENGAGED BY THE COURT, WHO HAS PERSONALLY CERTIFIED THAT IT REPRESENTS HER ORIGINAL NOTES AND RECORDS OF TESTIMONY AND PROCEEDINGS OF THE CASE AS RECORDED.

CAROL GRECO, RPR
Official Court Reporter
(340) 778-9750 Ext. 7153

their four best cases for them, they're going to need to know something about all 1,300 of the part -- of the plaintiffs.

MS. ROHN: Well, let me -- can I just interrupt here?

THE COURT: Yes.

MS. ROHN: Because that happens normally in a case where you're -- you're -- and I'm not talking about the selection, but the issue of IMEs. Usually, in those cases, this is an ongoing problem, an ongoing claim for future damages. In our particular case, we're not claiming future damages. We're claiming acute exposures and acute damages that resolved at the end of the exposure. So I see absolutely no reason at 19 years later to do an IME. We're not -- this is not the same case that was brought earlier where we claimed chromium six and they might have cancer.

We have looked at this case and we agree -- when we took a look at it, we talked to our plaintiffs about their conditions, we agree that this is a number of acute exposures with acute symptoms that go directly to what would be expected to be experienced by that exposure and that when the exposure ceased, the symptoms ceased.

So it's a pretty simple case. You know, I guess the devil is in how many plaintiffs there are. But the cases themselves, other than punitive damage claims for the actions of the defendant, are pretty finite. Thus, my belief that I do not need expert opinions because I am not giving -- there are no opinions as to future problems or future medical bills or future likelihood of --

THE COURT: Are you claiming mental anguish?

MS. ROHN: Well, mental anguish ended when they cleaned up their house and they stopped itching and their eyes weren't scratchy and itchy anymore.

THE COURT: Let me ask: For each of your plaintiffs, do -- obviously you have a beginning date. Do you have an end date?

MS. ROHN: Well, there are -- the reason SRG is in this case is there was the initial exposure and, yes, we have a beginning and end date that is a little different for everybody but in no account for more than six months. And then when SRG bought the refinery from St. Croix Alumina, they went in and took the crust off the red dust and did move the red dust and then the red dust went back into my clients' homes when the heavy winds blew.

EXHIBIT 3

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 Alumnia*, 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.

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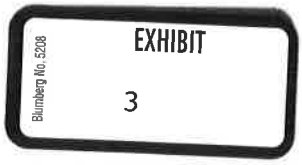

ARGUMENT

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

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

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