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

IN RE: RED MUD CLAIMS	**MASTER CASE NO. SX-2020-MC-00009** **COMPLEX LITIGATION DIVISION**

SCRG'S RULE 12 MOTION TO DISMISS

The Plaintiffs in the Red Mud Complex Litigation case have all filed Complaints alleging identical multiple counts against ST. CROIX RENAISSANCE GROUP LLLP (hereinafter referred to as "SCRG") based on identical alleged facts and resulting injuries. However, the Plaintiffs failed to join multiple necessary parties pursuant to V.I.R. Civ. P. 19. Thus, pursuant to V.I.R. Civ. P. 12(b)(7), these cases must all be dismissed for the same reasons, as set forth herein.

Alternatively, one aspect of the Plaintiffs' identical Complaints regarding asbestos can be dismissed based pursuant to V.I.R. Civ. P. 12(c). Finally, a Rule 12(e) motion is included here as well regarding certain of the Plaintiff's damage claims.

I. Factual Background

Each complaint filed under the Master Case seeks damages against SCRG for conduct that has allegedly taken place for over thirty years at a now defunct aluminum plant, as alleged in ¶ 4:

> 4. 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 gist of this suit involves the alleged release of this bauxite residue, often called 'red dust' when dry, or 'red mud' when wet—from a large bauxite residue mound at the site, as alleged in ¶ 11:

> 11. From the beginning of the alumina refinery's operations, hazardous materials, including chlorine, fluoride, TDS, aluminum, arsenic, molybdenum, and selenium, as well as coal dust and other particulates were buried in the red mud, **and the red mud**

> **was stored outdoors in open piles that at times were as high as approximately 120** feet and covered up to 190 acres of land. The piles of red mud erode into the environment if they are not secured by vegetation or retaining walls. **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.** (Emphasis added).

As alleged in ¶ 27, this alleged exposure to the fugitive dust has caused multiple injuries.

However, as conceded in ¶ 6, SCRG only purchased the property where this large mound of bauxite residue storage is located in 2002. It was the prior owners of the property who created this large mound of bauxite residue, as noted in ¶ 14 of the complaint:

> 14. Previous owners ALCOA and St. Croix Alumina added red dust, coal dust and other particulates to the materials left behind by Virgin Islands Alumina Company, Glencore, Ltd., Glencore International AG, and Century Aluminum Company, the former owners and/or operators of the refinery and continued to stack and store them in huge uncovered piles.

The complaints do not allege that SCRG added bauxite residue to this large mound or nearby storage, nor did it do so, as SCRG never operated the alumina processing plant. The plant closed over a year before SCRG purchased the property. See **Exhibit A**.

When SCRG purchased the property, the problems with this bauxite residue had already been the subject of an Order issued in 1998 by the Virgin Islands Department of Planning and Natural Resources ("DPNR"). That 1998 Order directed that the prior owner, St. Croix Alumina ("SCA"), a wholly owned subsidiary of Alcoa, Inc., to take corrective actions as a result of bauxite residue being blown off of its property during Hurricane Georges into the adjacent neighborhoods. See **Exhibit A**. That Order also mandated that SCA conduct a "Best Management Practice" study to prevent bauxite and bauxite residue from leaving its property again. See **Exhibit A**.

In early 2002, SCRG began negotiating to purchase this property from SCA. On March 22, 2002, SCRG and SCA entered into a Purchase and Sales Agreement ("Agreement") to purchase this property. See **Exhibit A**. In the Agreement, SCA agreed to retain certain liabilities at closing, *including the 1998 DPNR Order*. The closing was in June.

However, before closing, in early March of 2002, heavy rains had caused red *mud* to run off the bauxite residue mound into the nearby mangroves that was not discovered until after the March 22nd Agreement had been signed. SCA, who still owned property owner, claimed it only became aware of this problem on April 16, 2002. See **Exhibit A**.

Four days later, SCA had an extensive environmental report in hand describing the red mud releases that occurred as a result of the March rains, titled "Assessment of the Red Mud Spill." See **Exhibit A**. Thus, DPNR again investigated the matter and learned that SCA *had* in fact been contouring the red mud piles in February of 2002 to "lower its profile and to induce ground cover to grow on the surface thereby increasing the attractiveness of the facility for sales purposes." See **Exhibit A**.

This discovery led to two developments. First, SCA entered into a pre-closing side letter agreement on June 13, 2002, with SCA to take responsibility for all corrective action required by DPNR to secure the bauxite residue mound and nearby areas. See **Exhibit 1**. However, the parties agreed that SCRG would do all final contouring and vegetation of the bauxite residue mound AFTER SCA remediated the area. See **Exhibit 1**. SCRG then took title to the property the next day, June 14, 2002. See **Exhibit A.**

Second, on June 18, 2002, DPNR issued a new Administrative Order ("AO") directing SCA to (1) make immediate repairs within 72 hours at the site on an emergency basis caused by its "reworking of the red mud piles" that removed all existing vegetation, causing the run off during the heavy rains in March and (2) to develop and implement a long term plan to prevent any such further occurrences. See **Exhibit A**.

As for SCA's efforts to do the emergency repairs, it continually botched the needed corrective work for months, which errors it tried to hide from both SCRG and DPNR. But DPNR eventually discovered what was going on and issued a subsequent AO on April 29, 2003 (see **Exhibit A**), which noted multiple, repeated violations, stating in part:

1. During April, 2002, the St. Croix Alumina L.L.C. (SCA) responded to a discharge of red mud into a ditch on the western portion of its facility and the near-shore marine environment from red mud piles by reinforcing and existing berm to prevent further discharges.

2. The Department of Planning and Natural Resources (DPNR-DEP) issued an Administrative Order on June 18, 2002 directing SCA to remove the red mud from the ditch, reconstruct a temporary containment system and submit a plan for a permanent containment system.

3. SCA responded that the reinforced berm/containment system was sufficient to contain any future releases until an engineered structure could be put in place by SCA.

4. DPNR-DEP relied on SCA's representations and assurances that the containment system would prevent future releases of red mud until a permanent structure is constructed.

5. On January 21, 2003, a settlement of the remaining issues of the June 18, 2002 Administrative Order was reached wherein SCA agreed to submit plans for the engineered structure to the Coastal Zone Management Division of DPNR.

6. On January 18, 2003, Dr. Ken Haines from St. Croix Renaissance Group (SCRG), which purchased the SCA facility following the spill event, reported to DPNR-DEP that on or about January 9, 2003, a new breach had occurred.

7. The breach allowed significant quantities of red mud and high pH liquid, that had accumulated behind the berm of the pond, to again flow into the West Ditch ("the Ditch").

8. Mr. Haines stated that the SCA Site Manager, Mr. Eric Black, inspected the site on January 13, 2003.

9. On January 31, 2003 and February 11, 2003, personnel from DPNR-DEP inspected the site and found the following:

    - New accumulations of red mud, up to four inches thick in the Ditch.
    - Pools of high pH liquid (9-11) at the discharged point of the Ditch and in the mangrove area at the south end of the Ditch;
    - The liquid in the pond created by the temporary berm had a pH greater than 10.0; and
    - Evidence that SCA or SCRG had recently attempted to strengthen the berm by adding material onto the berm to increase its width and height.

10. On March 7, 2003, DPNR-DEP personnel performed an inspection of the Ditch and found it contained a substantial quantity of red mud with pH ranging from 9-11.

. . . .

18. On April 15, 2003, Eric Black reported to DPNR that due to heavy rains over the preceding days, red mud and red-mud laden storm water flowed out of the red mud storage areas at the SCRG facility and into the drainage way that runs along the western boundary of the property.
. . . .

In short, because of SCA's half-hearted, fumbling efforts to do the repairs needed at the bauxite residue mound, the problems were not abated. To the contrary, they had become exacerbated, creating even worse problems.

The April 29th DPNR Order then directed SCA to secure the area, develop a new plan and fix the problem. See **Exhibit A**. While the Order also directed SCRG to **jointly** accommodate these obligations with SCA, SCRG's obligations were to cooperate (by granting access and non-interference) in the Alcoa Plan, but to not do any planning or remediation itself. See **Exhibit A**. As a result of this Order, SCA asked DPNR for permission to again try to do certain emergency work pursuant to an expanded plan it developed, which DPNR approved on May 23, 2003. See **Exhibit A**.

As for the long term fix, SCA had hired an independent engineering firm, Garver Engineering, who studied the problem and submitted a report entitled *Bauxite Residue Disposal Area Reclamation,* setting forth a work plan for SCA/Alcoa to do the needed corrective work. See **Exhibit A**. However, this long term work required a Major CZM permit due to the scope of earthwork needed to try to permanently fix the problems with the bauxite residue mound, which SCA did not even apply for until March 12, 2003. See **Exhibit A**. The Permit application made it clear that (1) *SCA was the applicant and developer* seeking (2) that Garver Engineering was the Project Designer and (2) the Zenon Construction Corp. was the principle "Earthwork Contractor." The scope of work was described as "Drainage improvements; drainage ditch construction, rip-rap placement, levee construction, and culvert replacement and redirection." Again, SCRG was neither required, or even allowed to go onto the mounds, or to do work, or to do anything of a similar nature.

Almost immediately, SCA/Alcoa tried to get out of doing so and further delayed the process. On May 23, 2003, SCA moved to vacate DPNR's April 29, 2003, Administrative Order (See **Exhibit A**), claiming it had already complied with DPNR's prior June 12, 2002, Administrative Order regarding the emergency work to be done in the area, so that the April 29, 2003, Order directing additional emergency work was improperly entered. DPNR filed an opposition memorandum on July 31, 2003, that summarized SCA's conduct regarding the bauxite residue mound, stating in part (See Exhibit A):

> SCA and Alcoa strenuously attempt to escape responsibility for the remedial actions prescribed by DPNR to be taken at the St. Croix (Renaissance Group, LLLP. Facility (the "Facility") as a result of the red mud and red mud laden high pH liquid discharges that occurred from a breach and the eventual complete collapse of the temporary containment berm built by SCA in collaboration With Alcoa.
> ….
> In 2002, Alcoa directed the transfer of the Facility from SCA to St. Croix Renaissance Group, L.L.L.P. ("SCRG") . . . . Prior to the sale, Alcoa, had directed the operation of the Facility as an aluminum refinery from 1995 to 2000. During those years, SCA accumulated large amounts of bauxite residue ("red mud") as a result of the extraction of aluminum from raw bauxite used in the refining process.
> ….
> In order to mitigate the harm caused by the continuing red mud spills or discharges during rain conditions, SCA (under the control and management of Alcoa), devised a dirt berm/containment system. This system, however, clearly proved inadequate when red mud once again discharged into a ditch on the western portion of the Facility and into the near-shore marine environment on or about April 16, 2002 following a significant rainfall event and SCA's reworking of the red mud piles. Immediately following that discharge, SCA attempted to reinforce the existing berm in order to prevent further discharges and represented that its reinforcement of the berm/containment system was done "to ensure that no subsequent incident (discharge] would occur." . . . . However, reports by SCRG, and DPNR inspections of the Facility reveal that from about January 9, 2003 to the present, substantial discharges of red mud from the temporary containment pond located between the red mud piles or "bauxite residue disposal areas," . . . . have occurred.
> ….
> Here, the record irrefutably shows that the temporary berm, which SCA had constructed under the control and management of Alcoa and subsequently reconstructed on April 17, 2002, following the discharges of April 2002 that were caused In part by their reworking of the red mud piles, failed and ultimately completely collapsed in April 2003, despite the many assurances made by SCA that this would not occur. The record additionally indisputably demonstrates that the failure and collapse of the containment system caused the unlawful discharges of red mud and red mud laden liquid at the Facility and the imminent and substantial threat of harm to the environment.

As SCA's corrective action was taking much longer than expected, SCRG became concerned about this work on its property. Thus, fearing bad results and another fumbling, half-hearted effort, SCRG began negotiations with SCA to try to take over responsibility for this work in early July of 2003. See **Exhibit A**. Indeed, SCRG notified DPNR that such discussions were underway. See **Exhibit A**. However, no such agreement was reached.

Thereafter, matters worsened on the ground, and SCRG decided that it needed to try to do some emergency corrective work itself at the bauxite residue mound, which it notified SCA it would begin to do on August 7, 2003, pointing out (See **Exhibit A**):

> We have repeatedly urged SCA/Alcoa to finish the repairs quickly and completely, but SCA/Alcoa has failed to meet its contractual obligation to complete the repairs to the drainage system. We have also tried to reach a settlement under which SCRG will assume SCA/Alcoa's responsibility for making the necessary repair. This has also failed. The combination of Alcoa's **lack of concern for the urgency of this situation**, Alcoa's refusal to honor its responsibilities for retained liabilities under the PSA, the probability of heavy rainfall, DPNR's position on the joint liability of SCRG, our desire to protect our Property and the environment, and the need to mitigate damages that may result from future red mud releases has led us to the conclusion that we must make appropriate corrective repairs to the drainage system.
>
> SCRG has, therefore, commenced work on the drainage system. . . .

However, the next day, August 8th, DPNR sent a letter to SCRG, instructing it to abruptly stop SCRG from doing ***any*** work, stating (see **Exhibit A**):

> It was a great surprise to learn at the August 5, 2003-informal meeting with Attorney Simone Francis and Mr. Eric Black that you had deliberately circumvented your responsibility to refrain from performing any work that deviated in any way from the emergency repairs delineated in the ALCOA work plan submitted, for which they had been given permission to commence since May 23, 2003. . . . .
>
> **As a result, DPNR-DEP herby requests that you cease and desist from conducting *any* further work . . . .** (Emphasis added).

On this same date, August 8, 2003, DPNR instructed SCA to begin implementation of the work DPNR had ordered to be done on May 23, 2003, noting that it understood and approved a new contractor, Zenon Construction, to do the work. See **Exhibit A**.

On August 14th SCRG responded to DPNR's August 8th letter, affirmatively noting that it did not believe the May 23rd SCA/Alcoa efforts would work and noting its many prior objections about this plan. See **Exhibit A**. However, that plea was to no avail. **Thus, SCRG's counsel informed DPNR on September 8, 2003, that it would *standby* and would be ready to perform its own agreed upon obligation of contouring and putting vegetation on the "Red Mud Piles" after SCA's approved Garver Plan was completed**. See **Exhibit A**.

While SCA and DPNR continued to squabble over the completion of the emergency repairs mandated by the April 29, 2003, Administrative Order, CZM issued the Major CZM permit on November 10, 2003, as requested by SCA. This Major CZM Permit allowed SCA to begin the fixed improvements set forth in the Garver Plan to permanently secure the bauxite residue mounds. See **Exhibit A**. The CZM Permit also noted that SCRG's responsibility for vegetating the bauxite residue mound would begin only *after* this construction was finished. See **Exhibit A**.

While SCA began to have Garver and Zenon commence this proposed permanent solution to secure the bauxite residue mounds, SCRG entered into a Consent Agreement with DPNR dated April 3, 2004, to resolve SCRG's portion of the April 29, 2003, Administrative Order. See **Exhibit A**. That Consent Agreement required SCRG to submit a vegetation plan for the bauxite residue area *after* SCA completed its work, stating in part:

> **2. Completion of Vegetation Work Plan:** Based on the results of the test studies to be performed pursuant to the R&D Plan, as soon as SCA's work has been completed and has been reviewed and approved by the DEP and the St. Croix Committee of the Virgin Islands Coastal Zone Management Commission, Renaissance will commence and diligently prosecute until completion the selected Vegetation Work Plan . . . .

Because of the continued delays with the project, SCRG filed a lawsuit in June of 2004 in the Superior Court of the Virgin Islands against SCA to get it to fix the mounds—

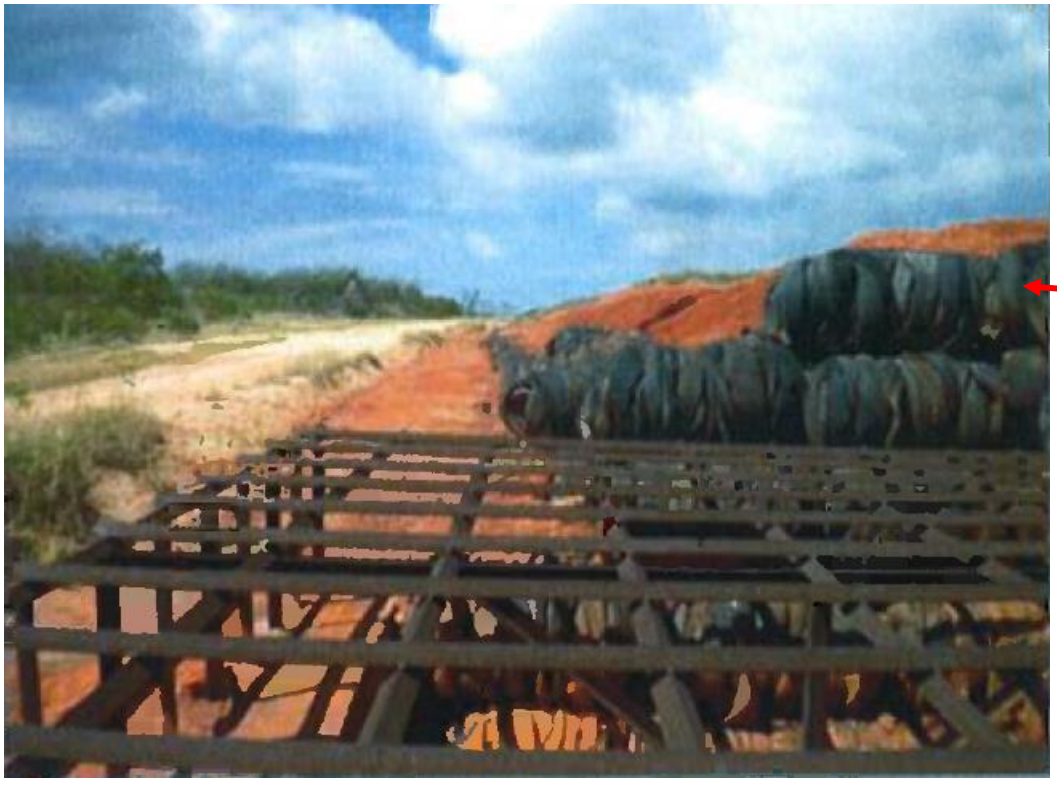
for misrepresentation, breach of contract and negligence. See **Exhibit A**. SCA and Alcoa removed this case to the U.S. District Court. See **Exhibit A**. However, this case was subsequently stayed by the agreement of the parties to see if the corrective work being undertaken by SCA to repair the bauxite residue mounds would work. See **Exhibit A**.

While SCA's contractors had now begun the site work to supposedly stabilize the area, DPNR's consultant inspected the work in November of 2004 and found that on-going releases continued at the site that SCA was trying to fix. See **Exhibit A**.

On May 3, 2005, DPNR inquired of SCA as to the status of the project permitted by CZM. See Exhibit A. On May 11, SCA responded, saying it was on the final stage of the work. See Exhibit A. On November 17, 2005, SCA informed DPNR that it had completed the project. However, when DPNR inspected the area, it found otherwise, as summarized on May 17, 2006, in its response to SCA's November 17, 2005, letter (See **Exhibit A**):

> **Further investigation revealed that the attempt to contain the residue has failed**. **It was observed that the tire bales were starting to degrade, break apart and become embedded in the residue. The adjacent ditches seem to have settled residue.** . . . **The Division of CZM has determined that St Croix Alumina L.L.C. has not complied with the Garver Plan.** (Emphasis added).

Indeed, photos of SCA's "tire dam" reveal the mess at the site (See **Exhibit A**):



FAILED TIRE DAM

FILLED DRAINAGE DITCH DUE TO FAILED TIRE DAM

In short, SCA/ALCOA had done many things wrong, further damaging the property. Unperturbed by DPNR's May 17th letter pointing out the obviously deteriorated condition of the site work, SCA responded on June 28, 2006, boldly stating (See **Exhibit A**):

> At a May 9, 2006 meeting held with representatives of SCA, the Division of Environmental Protection ("DEP"), and CZM to address technical issues concerning

> the completed work, we believe there was a consensus that the functional requirements of the drainage improvement project were satisfied by the completed work, which was certified by Garver Engineers in a previously-furnished November 17, 2005 letter, and therefore the requirements of the January 2003 Consent Order have been satisfied.
> …
> **To the extent that SCRG has been waiting to begin revegetation and/or other necessary actions until after SCA completed its work at the site, this letter is intended to serve as formal notification to SCRG and DPNR that SCA has completed its work at the site and its activities have ceased. As such, SCRG immediately should begin revegetation of the site and take whatever other measures are necessary to optimize the long-term management of the site and prevent the release of red mud into the waters of the USVI.**

These statements were false and contrary to all prior agreements. Thus, the Commissioner of DPNR rejected SCA's suggestion that its work was done, or that it was somehow now SCRG's responsibility, responding on August 10, 2006, as follows (See **Exhibit A**):

> My objections to your letters can be summarized as follows: (1) SCA does not decide when it has complied with its obligations under DPNR orders and CZM permits, the Government does; (2) SCA has not properly completed the work required by the Agreed Order and is out of compliance with the CZM permit issued to perform the work; and (3) SCA has not satisfied the requirements of the April 29, 2003 Administrative Order ("April Order").
> …
> As you know, Garver Engineers' ("Garver's") as-built survey is inconsistent with the permitted drawings SCA submitted with its application. After reviewing Garver's May 18. 2006 letter to Eric Black, it is apparent that much of the factual information upon which the permit application was premised was highly inaccurate (and perhaps false). Apparently, Garver's review of the site in advance of submitting SCA's application was woefully inadequate, resulting in Garver not knowing the actual conditions in the field until Garver was attempting to implement its plan.
> …
> DPNR finds your assertion that SCA has now complied with the April Order to be *laughable*. This assertion indicates a complete lack of credibility on the part of SCA.

Laughable! As for SCA's comments about SCRG in its June 28th letter, the DPNR Commissioner stated further as follows (emphasis added):

> SCA's continued reliance on SCRG's failure to vegetate the red mud piles as the basis for the Garver system not preventing red mud releases to the environment is **misplaced. SCRG did not even agree to perform any vegetation work until the spring of 2004**. SCA was obligated to construct a "red mud sediment control system" to "prevent or minimize future releases to the environment, if any, from the red mud piles" in January 2003, more than one year earlier. **The Agreed Order did**

> **not caveat this requirement on SCRG's future actions**. Rather, it was an absolute requirement. Thus, SCA's repeated references to SCRG' s obligations to prevent future red mud releases are inappropriate. **SCA should focus on complying with its obligations rather than point the finger at another party**, especially when that other party purchased the facility after all bauxite operations ceased at the facility, and SCA and Alcoa re-contoured the red mud piles, resulting in significant releases of red mud to the nearby environs. (Emphasis added.)

Out of patience with its repeated efforts to get SCA to complete the work to its satisfaction, DPNR then filed its own lawsuit against two former owners of the facility, the Virgin Islands Alumina Company (VIALCO) and SCA in the District Court of the Virgin Islands on December 21, 2006. See **Exhibit A**. SCRG was named as the present property owner. The complaint alleged that VIALCO was supposed to create a plan to cap the "red mud" piles, which it failed to do. The complaint then recounted the same history set forth herein about how SCA had begun contouring activities just before prior to sale to SCRG (without the required permits), which precipitated the onset of the "red mud" piles eroding and discharging into the nearby wetlands and ocean. The complaint also recited the litany of SCA's promises to fix the area and its repeated failures to do so, as alleged in ¶35:

> 35. For the next several years, DPNR attempted to enforce these [ ] violations via the administrative process but SCA has continued to violate the administrative orders issued.

Finally, while the complaint summarily alleged that SCRG had failed to establish a vegetation plan as agreed, but then specifically conceded in ¶39 (Emphasis added):

> 39. While SCRG has not performed other requirements of its Consent Agreement, such as the vegetation of the red mud piles, **SCRG is not required to perform such work until such time as SCA's work has been completed.**

Thus, there were now two lawsuits pending over this problem. SCRG was not allowed to either work or even repair emergencies on the site.

As a result, SCRG ultimately notified the District Court in late 2007 that its efforts to amicably resolve this matter with SCA had failed, so that the stipulated stay in the first lawsuit should be vacated, which it was. See **Exhibit A**. Protracted litigation ensued in both

cases, with all work on the affected site completely stopped by DPNR until SCA complied with its prior orders, which SCA refused to do. See **Exhibit A**. **During this time, DPNR expressly told SCRG that it could not even submit a vegetation plan for the bauxite residue mounds until SCA secured and repaired them.** See **Exhibit A**.

The suit filed by SCRG went to trial first in January of 2011. On January 20, 2011, the jury returned a verdict against SCA for breach of contract, fraud and negligence arising out of its conduct related to the bauxite residue mounds in the amount of $28,742,723, which included an award for punitive damages of $6,142,856. See **Exhibit A**. The jury found that SCA had repeatedly lied to both DPNR and SCRG because the mounds could not be fixed as planned since they were riddled with a destabilizing filter cloth. The subsequent post-trial decision stated that Alcoa officials at the highest level conspired to hide this—and that the mounds really could not have been corrected as SCA and Alcoa had stated, upholding the $6,142,856 punitive damage award, stating (See **Exhibit A**):

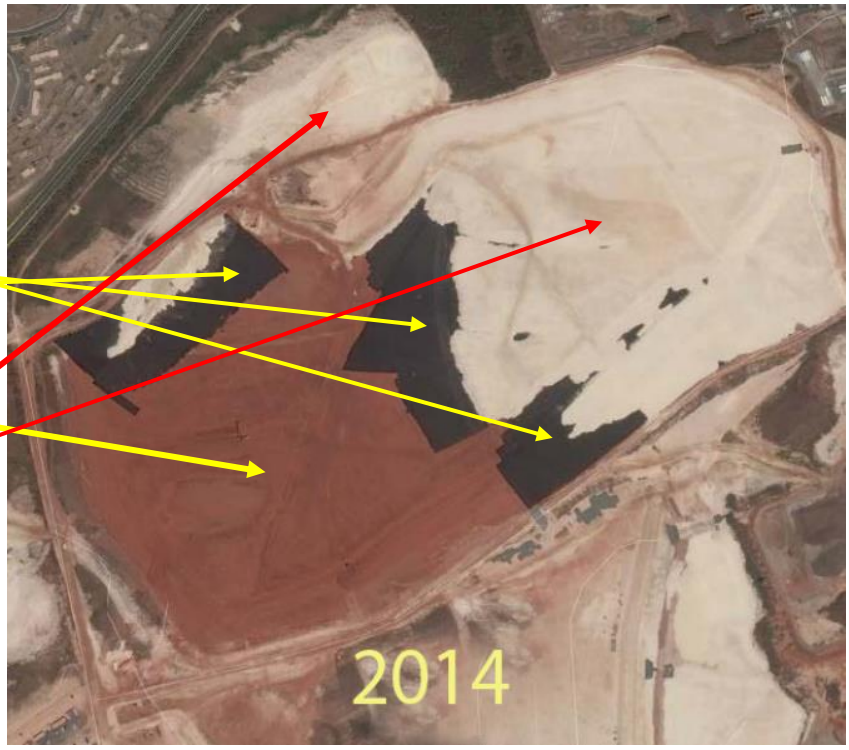
> There was sufficient factual basis of [SCA's] hidden misrepresentations and the involvement of top officials at the company to sustain the jury's finding that the fraud was "outrageous."

The compensatory award was partially remitted, but prejudgment interest was then added, leaving a total judgment in favor of SCRG of $20,374,723 against SCA, including the full jury award for punitive damages. See **Exhibit A**.

While the award was substantial, SCRG's primary interest was to have the problems with the bauxite residue mounds completely resolved, so it proposed to both SCA and DPNR that it **would waive the Judgment** if SCA undertook the work needed to **completely cap and close the bauxite residue mounds** pursuant to DPNR's instructions. As a result, a global settlement was reached with all parties and a Consent Judgment in the DPNR case was entered memorializing this agreement. See **Exhibit A**. SCA's parent company, Alcoa, guaranteed the performance of its subsidiary, SCA. See **Exhibit A**.

SCA's pre-construction plans showed the area in March of 2013 (See **Exhibit A**):

DPNR subsequently approved Alcoa's workplan on January 17, 2014. See **Exhibit A**. To make sure the plan worked, a special "geotextile" blanket was the placed over the newly contoured area and then covered with dirt, as shown in this photo (See **Exhibit A**):



There were some problems with dust leaving the site when that work was being done, which DPNR investigated due to complaints from adjacent neighborhoods, resulting in a new Administrative Order being issued against Alcoa and Waste Management, but not SCRG. See **Exhibit A**. On March 20, 2015, the work was stopped and the contractor was ordered to use water trucks to keep the fugitive dust from blowing around. See **Exhibit A**.

After the contractor complied with this DPNR directive, the new plan was then completed to DPNR's satisfaction on October 3, 2018, with the follow up inspections and maintenance then being completed on October 23, 2018. DNPR issued a No Further Action Letter on December 12, 2018, at which time the area was finally turned back over to SCRG. See **Exhibit A**. This photo shows the area today, which is fully covered with vegetation (see **Exhibit A**):

Totally and Completely Vegetated

With this history in mind, SCRG's Rule 19 argument can now be addressed.

I. Failure to Join a Necessary Party Pursuant Re the Red Dust Claim

V.I.R. Civ. P. 19(a) provides in relevant part as follows:

> (1) ***Required Party.*** A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if:
>
> (A) in that person's absence, the court cannot accord complete relief among existing parties; . . . .

Thus, under the express wording of this rule, SCA is a necessary party as defined by Rule 19(a) (and perhaps others, such as VIALCO, who also failed to comply with DPNR and CZM directives, like SCA.)

In this regard, as the record demonstrates, SCRG did not deposit the material and was ***never*** in a position where it was allowed by DPNR (or SCA) to take any action to secure the bauxite residue mounds after it purchased the property on June 16, 2002, as the area was placed immediately under an Administrative Order by DPNR on June 18, 2002, directing SCA to do emergency repairs to the area as well as to develop a long term plan to secure the area. It was not even allowed to respond to emergencies such as releases. Over the next few years, both DPNR and the CZM Committee issued Orders and Permits ordering SCA to this same effect. Indeed, as the records reflect, SCRG was repeatedly told by DPNR that it could not do any work or emergency repairs in the area, even though SCRG repeatedly objected to SCA's work plan, which was continually failing.

Moreover, while SCRG always had an obligation to ***subsequently*** vegetate the area which would have addressed the fugitive dust issues the Plaintiffs complain about, every single DPNR Order, permit and directive made it clear that no such work was to begin until SCA's corrective work was completed and fully approved by DPNR. Indeed, once SCRG agreed to waive its multi-million dollar judgment against SCA by entering into a Consent

Decree for SCA/Alcoa to finish covering and vegetating the area, SCRG was again barred from entering the area until the project was completed.

As noted in *Wright and Miller,* 7 Fed. Prac. & Proc. Civ. § 1609 (3d ed.):

> The burden is on the party raising the defense to show that the absentee is required to be joined under Rule 19. However, when an initial appraisal of the facts reveals the possibility that an unjoined party whose joinder is required under Rule 19 exists, the burden devolves on the party whose interests are adverse to the unjoined party to negate this conclusion and a failure to meet that burden will result in the joinder of the party or dismissal of the action. (Footnotes omitted).

Thus, the Plaintiff must either join SCA (and perhaps Alcoa or its subcontractor, Waste Management, for conduct after 2012) or that this matter must be dismissed.

II. Motion for Partial Judgment on the Pleadings Pursuant to Rule 12(c)

SCRG also seeks partial Judgment on the Pleadings under Rule 12(c), which states:

> **(c) Motion for Judgment on the Pleadings.** After the pleadings are closed — but early enough not to delay trial — a party may move for judgment on the pleadings.

In this case, the Plaintiffs make repeated references throughout their complaints that SCRG failed to properly handle and abate asbestos on its property. Indeed, the word "asbestos" not only appears in the opening set of facts, but it appears in each count thereafter, either by express reference thereto, or by reference to prior sections of the complaint.

However, not a single Plaintiff alleges any physical manifestation of an actual asbestos related injury. As noted in *Louis v. Caneel Bay, Inc.*, 50 V.I. 7, 16-17 (V.I. Super. July 21, 2008):

> Virgin Islands law dictates that a Plaintiff in a negligence action must demonstrate "harm." Restatement (Second) of Torts § 388 (1965); *see also Purjet v. Hess–Oil Virgin Islands Corp.,* 22 V.I. 147, 149 (D.V.I.1986). Harm is defined as the existence of loss or detriment to a person resulting from any cause. Restatement (Second) Torts § 7. A fundamental requirement for any Plaintiff in a negligence action, including an action for damages stemming from asbestos exposure, is "physical injury." Ordinarily, a mere risk of future harm or anxiety without physical injury is insufficient to establish legal harm.
>
> It has been held that "pleural thickening" of the lungs and other physical symptoms of asbestos exposure are compensable injuries. *Dunn v. HOVIC,* 28 V.I. 526, 531,

> 1 F.3d 1362, 1366–67 (3d. Cir.1993). Furthermore, where an individual has a reasonable fear of developing cancer or other asbestos-related conditions **stemming from a present condition**, such fear and anxiety are also compensable. *Id.* at 532–33. (Footnotes omitted) (Emphasis added).

Thus, absent an allegation of a physical injury caused by an exposure to asbestos, neither the exposure to asbestos or fear of cancer resulting from said exposure is compensable.

Thus, as there are no such allegations of an actual asbestos related injury in any of the complaints, the claims in all of the complaints related to the exposure to asbestos must be dismissed pursuant to Rule 12(c).

III. Failure to Join a Necessary Party Pursuant Re the Asbestos Claims

If the asbestos claims are not stricken pursuant to Rule 12(c), then they should still be dismissed pursuant to Rule 19. In this regard, When SCRG bought the plant from Alcoa in 2002, Alcoa agreed to remove the asbestos from the site. See **Exhibit A**. Alcoa then contracted with a company to remove the asbestos found at the site. See **Exhibit A**. Alcoa then submitted a report to SCRG saying that all asbestos had been removed except for some encapsulated asbestos that was left at the desal plant, power plant and related steam piping. See **Exhibit A**. Alcoa provided SCRG with an unsigned report supposedly being presented to the EPA regarding this removal. See **Exhibit A**. On March 7, 2006, SCRG applied for a CZM permit to take down the alumina processing units. The Application included a statement that SCRG did not anticipate finding any asbestos in this area because of the abatement done by Alcoa (with Alcoa's unsigned notice to the EPA attached). See excerpts attached as **Exhibit A**. A similar statement was filed with the EPA. See **Exhibit A**. ln April, DPNR requested SCRG to verify Alcoa's abatement, so SCRG hired a company to do a "rebuttal survey" to confirm Alcoa's work. See **Exhibit A**. That company submitted its findings on May 31, 2006, which found asbestos in the same areas that Alcoa had reported had been abated. See **Exhibit A**. SCRG promptly sent a copy of

this report to DPNR and the EPA. See **Exhibit A**.

Thus, again, pursuant to Rule 19, if the asbestos claim is not stricken as requested in the last section, then SCA is a necessary party to this claim as well, requiring dismissal.

IV. Rule 12 - More Definite Statement

Finally, SCRG also moves for a more definite statement pursuant to V.I.R. Civ. P. 12(e), which states in part:

> **(e) Motion for a More Definite Statement.** A party may move for a more definite statement of a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a response. The motion must be made before filing a responsive pleading and must point out the defects complained of and the details desired.

Regarding the specific paragraphs in all of the Plaintiffs' Complaints for which more definite statements are needed are the damage allegations, which state as follows:

> ¶ 16- When SCRG purchased the refinery, it had knowledge of the potential for red mud releases. It was aware of the loose bauxite and piles of red mud and knew that those substances had the propensity for particulate dispersion when exposed to wind and that the refinery was in close proximity to thousands of residential dwellings. Indeed, this close proximity to the dangerous dispersion of the red dust particulates applies to Plaintiffs. SCRG knew that every time there was a strong wind the toxic substances in the piles would be dispersed in to the air, where they were inhaled by Plaintiffs, deposited onto Plaintiffs person and real and personal property, and deposited into the cisterns that are the primary source of potable water for Plaintiffs. This dispersion of toxic materials occurred continuously from the same source, the red mud piles at the alumina refinery, and SCRG, the owner of the refinery from 2002, did nothing to abate it, and instead, allowed the series of continuous transactions to occur like an ongoing chemical spill. Plaintiffs' exposure occurred out of the same dispersions of toxic materials including the coal dust, which is buried in the red mud, and which was stored outdoors.
> . . . .
> ¶ 18-In addition, SCRG took actions related to the red mud piles that increased the disbursement of the toxic substances into Plaintiffs' property and further resulted in Plaintiffs' additional exposure to those toxic substances.
> . . . .
> ¶28-As a result of Defendant's conduct, Plaintiffs suffered and continue to suffer physical injuries, medical expenses, damage to property and 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, and a reasonable fear of contracting illness in the future, all of which are expected to continue into the foreseeable future. Pursuant to the Court's Order, only one plaintiff who resided in the same household as the other plaintiffs can recover for property damage to real

property.

> ¶29-To this date, Defendant is continuing to expose Plaintiffs to red dust, bauxite, asbestos and other particulates and hazardous substances. Defendant's conduct is also continuing to prevent the free enjoyment of property.

These paragraphs, as alleged, are too vague to respond to as drafted. In this regard, ¶16 and ¶29 allege a continuing exposure unrelated to any specific event, which would cause chronic, long term injuries covered by ¶28. On the other hand, ¶18 alleges specific events causing specific releases which would most likely cause acute injuries, but not described as such in ¶28.

Thus, absent a more specific statement clarifying these four paragraphs, SCRG is unable to ascertain exactly what are the allegations it needs to defend itself against—long term exposures with chronic injuries (requiring experts on causation) or specific temporal events causing acute injuries, for which others may be responsible (partially or otherwise).

These defects can be cured by simply requiring the Complaints to specify which allegations are being pursued here, which could be done by a simple stipulation filed in the Master Case acknowledging which damage claims are being pursued, amending the individual Complaints by reference thereto, without having to file an actual amended complaint in each individual case.

V. Conclusion

For the reasons set forth herein, SCRG respectfully submits that Plaintiff's Complaint should be dismissed with prejudice in whole pursuant to Rule 19, or at least in part pursuant to Rule 12(c). Alternatively, the Plaintiffs should be required to provide a more definite statement of facts as to the damage allegations pursuant to Rule 12(e).

Dated: October 1, 2020

/s/ Joel H. Holt
Joel H. Holt, Esq. (VI Bar #6)
Law Office of Joel H. Holt, P.C.
2132 Company Street
Christiansted, VI 00820
holtvi@aol.com

/s/ Carl Hartman, III
Carl Hartman III
1545 18th St. NW, Unit 816
Washington, DC 20036
carl@carlhartmann.com

CERTIFICATE OF RULE 6-1 COMPLIANCE

I hereby certify that the foregoing document complies with the page limitation in Rule 6-1(e).

/s/ Joel H. Holt

CERTIFICATE OF COMPLIANCE WITH STANDING ORDER NO. 4.1

Pursuant to Standing Order No. 4.1, it is hereby certified that the Parties conferred, and a good faith effort was made to resolve the dispute that is the subject of this motion before seeking relief from the Court, which the Defendant remains to committing to working out if the Plaintiffs decide to join SCA as a named defendant and withdraw the asbestos claim.

/s/Joel H. Holt

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1st day of October, 2020, I filed the foregoing with the Clerk of the Court and caused a true and correct copy of the foregoing to be sent via email, to:

Lee Rohn, Esq.
Rhea Lawrence, Esq.
Lee J. Rohn & Associates
56 King Street, 3rd Floor
Hamilton House
Christiansted, St. Croix VI 00820
340.778.8855 · Fax 340.773.2954
lee@rohnlaw.com
rhea@rohnlaw.com
Info@rohnlaw.com

/s/Joel H. Holt