

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

ELEANOR ABRAHAM et al.,

Plaintiffs,

v.

ST. CROIX RENAISSANCE GROUP,
LLLP,

Defendant.

CIVIL NO. SX-2011-CV-00550

ACTION FOR DAMAGES

JURY TRIAL DEMANDED

NOTICE OF FILING THIRD AMENDED COMPLAINT

Pursuant to the Stipulation filed in the Master Case No. SX-20-MC-009 on December 15, 2020, Plaintiffs file their Third Amended Complaint. (Red-lined, **Exhibit 2**; Clean, **Exhibit 1**.)

RESPECTFULLY SUBMITTED
LEE J. ROHN AND ASSOCIATES, LLC
Attorneys for Plaintiff

DATED: December 16, 2020

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NOTICE OF FILING THIRD AMENDED COMPLAINT

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CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on December 16, 2020, I electronically filed the foregoing with the Clerk of the Court using the electronic filing system, which will send a notification of such filing to the following:

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/s/Lee J. Rohn (rl)

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

ABRAHAM, ELEANOR AND ABRAHAM
RATCLIFFE

Plaintiff,

v.

ST. CROIX RENAISSANCE GROUP LLLP,
ST. CROIX ALUMINA, LLC and ALCOA,
INC.

Defendants.

CIVIL NO. 11-CV-550

ACTION FOR DAMAGES

JURY TRIAL DEMANDED

IN RE: RED MUD LITIGATION

MASTER CASE NO. SX-20-CV-009

COMPLEX LITIGATION DIVISION

THIRD AMENDED COMPLAINT

COME NOW, the Plaintiffs by and through undersigned counsel, and file this **THIRD AMENDED** Complaint and respectfully represents to the Court as follows:

1. This Court has jurisdiction pursuant to 4 V.I.C Section 76, *et seq.*
2. Plaintiff, Eleanor Abraham, is a citizen of St. Croix, United States Virgin Islands.
3. Plaintiff, Ratcliffe Abraham, is a citizen of St. Croix, United States Virgin Islands.
4. Defendant, St. Croix Alumina, LLC, is a Virgin Islands Company, wholly owned by ALCOA.
5. 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.

6. At all times relevant to this action, and within the time period of 2002 to the present, Plaintiffs were residents in close proximity to the Defendant's alumina refinery on the south shore of St. Croix.

FACTUAL BACKGROUND

7. 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.
8. Defendant St. Croix Renaissance Group LLLP ("SCRG") upon information is a Limited Liability Limited Partnership and is deemed to be a citizen of Delaware, Florida, Massachusetts, Puerto Rico and St. Croix, U.S. Virgin Islands. On March 22, 2002, Alcoa World Alumina, LLC, as the owner of St. Croix Alumina ("ALCOA") and St. Croix Alumina, LLC ("SCA") entered into a Purchase and Sale Agreement ("PSA") for the refinery with Brownfields Energy Recovery Corporation ("BRC") and Energy Answers Corporation of Puerto Rico ("EAPR") and BRC and EAPR immediately transferred their interests in the refinery to St. Croix Renaissance Group ("SCRG").
9. SCRG has owned and/or operated the refinery from 2002 to the present.
10. In 1998, DPNR had entered into an Order that directed SCA, through its owner Alcoa, to take corrective actions, as a result of bauxite residue being blown off of its

property during Hurricane Georges. That order also required the Alcoa Defendants conduct a “Best Management Practice” study to prevent bauxite, and bauxite residue from leaving the property again.

11. The purchase agreement between SCRG and the Alcoa Defendants, provided that the Alcoa Defendants retain the liability of fulfilling the obligations of the 1998 DPNR order.
12. In early March 2002, heavy rains caused red mud to run off the bauxite residue mound into the mangroves.
13. On April 20, 2002, the Alcoa Defendants had an extensive environmental report done entitled “Assessment of the Red Mud Spill”.
14. This resulted in an investigation by DPNR, that discovered that the Alcoa Defendants had been illegally contouring the red mud piles in February 2005, to increase the attractiveness of the facility for sale.
15. As a result, the Alcoa Defendants entered into a pre-closing letter of agreement, on June 13, 2002, to take responsibility for all corrective actions required by DPNR to secure the residue mounds and nearby areas.
16. The agreement further made it the requirement of SCRG to do all final contouring, and vegetation of the bauxite mounds after the Alcoa Defendants remediated the area.
17. On June 18, 2002, DPNR issued an Administrative Order that the Alcoa Defendants repair the site within forty-eight (48) hours, on an emergency basis, caused by the Alcoa Defendants reworking the red mud piles that had removed existing

vegetation, and develop a plan, and implement it to prevent further occurrences.

18. According to SCRG, for months the Alcoa Defendants ineffectively performed necessary corrective actions that caused additional discharge of red mud residue in to Plaintiffs' homes and affected Plaintiffs.
19. DPNR issued another order in April 29, 2003, which noted multiple repeated violations by the Alcoa Defendants on the property owned by SCRG, such that it caused another breach on January 9, 2003.
20. That breach allowed significant quantities of red mud to flow into the West Ditch.
21. On April 29, 2003, DPNR ordered the Alcoa Defendants and SCRG develop a new plan, and fix the red mud problem.
22. As a result, the Alcoa Defendants requested of DPNR for permission to do additional emergency work on the red mud on SCRG's property, which was approved by DPNR on May 2, 2003.
23. The Alcoa Defendants then hired an engineer from Gavier Engineering who submitted the Bauxite Residue Disposal Area Reclamation, as to what needed to be done to correct the red mud residue problem on SCRG's property that continued to harm the Plaintiffs and their property.
24. The Defendants, knowing that there were continuous issues with the red dust flying off the red mud piles, and harming Plaintiffs, and their property, waited until May 12, 2003, to apply to DPNR for an Earth Change Permit to remove the red mud piles, while the ongoing nuisance continued.
25. Thereafter, the Alcoa Defendants attempted to get out of actually remedying the

dangerous nuisance, and on May 23, 2003, moved to vacate the DPNR April 29, 2003 Order, falsely claiming they had already complied with DPNR's June 12, 2002 Order regarding the emergency work to be done, such that the April 23, 2003 order was improper.

26. As a result, the Alcoa Defendants did not correct the red mud piles, and on July 2003, SCRG began to negotiate with the Alcoa Defendants to gain further control of the removal of the dangerous nuisance, but no agreement was reached.
27. On August 7, 2003, SCRG acknowledged that emergency corrective work needed to be done on the red mud piles, and informed the Alcoa Defendants that it acknowledged, that DPNR held SCRG equally liable and commenced mitigation work without the authority and approval of DPNR.
28. On August 8, 2003, DPNR ordered SCRG to cease and desist the unapproved work.
29. On August 8, 2003, DPNR instructed the Alcoa Defendants to begin the work ordered on May 23, 2003.
30. SCRG then objected to the order on August 14, 2003, pointing out that it did not believe the work proposed by the Alcoa Defendants would resolve the issues damaging the Plaintiffs.
31. On November 10, 2003, CZM approved a major permit to Alcoa that would allow the Defendants to permanently secure the red mud piles, which also required SCRG to vegetate the bauxite residue/red mud piles.

32. 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.
33. In 2004, SCRG entered into a consent decree with DPNR to vegetate the red mud piles.
34. This allowed the Alcoa Defendants to create ongoing releases of red dust on SCRG's property, that was documented by DNPR in November 2004.
35. In May 2005, DPNR inquired as to the status of the remediation, and the Alcoa Defendants falsely represented to DPNR that it was in the final stages of the remediation.
36. On November 17, 2005, the Alcoa Defendants falsely informed DPNR that it had completed the remediation of the red mud piles.
37. DPNR found, on May 17, 2006, that "the attempt to contain the residue has failed", this applied to all Defendants.
38. On June 28, 2006, the Alcoa Defendants falsely stated that the work was completed and SCRG could now start the revegetation work.
39. On August 10, 2006, DPNR informed the Defendants that the Alcoa Defendants do not decide when Alcoa has complied, DPNR does, that the remediation work was not properly done, and Defendants remained in violation of DPNR orders, and found the Alcoa Defendants lacked credibility.
40. On December 21, 2006, DPNR filed suit against the Alcoa Defendants and SCRG, as a result of the failure to reduce the red mud piles.

41. In late 2007, SCRG finally requested the Court that its stay of the case against the Alcoa Defendants be lifted.
42. All work on the red mud piles was stayed until the Defendants complied with DPNR's orders.
43. On January 20, 2011, the jury in the case, *SCRG v. Alcoa Defendants*, found that the Alcoa Defendants has breached its contract with SCRG, engaged in negligence, and fraud related to the red mud piles.
44. The jury further found that the Alcoa Defendants had repeatedly lied to DPNR because the mounds could not be fixed as planned, because they were riddled with a destabilizing filter cloth.
45. There was a specific finding by the jury that the top officials of the Alcoa Defendants had hidden misrepresentations.
46. Upon information, SCRG then agreed to waive the judgment, the Alcoa Defendants undertook the work to recap, and completely close the red mud piles in accordance with DPNR's instructions.
47. A Consent Judgment was then entered in the DPNR case against Defendants.
48. DPNR then approved Defendants work plan on January 17, 2014.
49. Again, problems arose with red mud and bauxite residue leaving the mounds, and causing further damages to the Plaintiffs.
50. On March 20, 2015, DPNR stopped the work and required the Alcoa Defendants to use water trucks to contain the fugitive dust.

51. Upon information, work was finally completed on October 23, 2018, by the Alcoa Defendants, and then needed to be revegetated by SCRG.
52. Alumina is extracted from a naturally-occurring ore called bauxite. Bauxite is red in color. The Material Safety Data Sheets ("MSDS") for bauxite warn that it can cause irritation of the eyes, skin and upper respiratory tract.
53. 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. Red mud causes damages to real and personal property.
54. Red mud causes significant physical injuries. 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," "can cause irritation of the upper respiratory tract," and that is a "cancer hazard." The MSDS also advises against skin and eye exposure to red mud.
55. 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.

56. 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.
57. 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.
58. 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 into 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, owner of the refinery, and the Alcoa Defendant receiving orders from DPNR 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.

59. Despite that knowledge SCRG and the Alcoa Defendants failed to take proper measures to control those emissions ever since it took control of the refinery from 2002 to the present.
60. In addition, SCRG and the Alcoa Defendants 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.
61. Red mud contains caustic soda, crystalline silica, iron oxide, titanium dioxide, and other toxic substances that make it a health risk to Plaintiffs and exposes Plaintiffs to toxic injuries.
62. Plant personnel who handled bauxite and bauxite residue were issued safety equipment that included respirators, dust masks, face shields, and cover gear. Refinery management previously admitted that full respirators—not just dust masks—were required in potential high-dust areas.
63. As a result of Defendants' 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, , 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 other

plaintiffs can recover for damage to real property.

64. To this date, Defendants are continuing to expose Plaintiffs to red dust, bauxite, and other particulates and hazardous substances. Defendant's conduct is also continuing to prevent the free enjoyment of property.

COUNT I: Abnormally Dangerous Condition

65. Plaintiffs repeats and re-allege each allegation of Paragraph 1-64 as if set forth herein verbatim.
66. The actions of the Defendants constitute maintaining an abnormally dangerous condition.
67. 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.
68. Thousands of residential dwellings are located in close proximity to the refinery and Plaintiffs lived in close proximity to the refinery and certainly within range of the dispersion of the toxic materials from the refinery.
69. Defendants' use, storage, disposal and failure to remediate the bauxite, red dust and/or red mud, asbestos, coal dust, and other particulates and hazardous materials at the refinery is solely for Defendant's own business purposes.
70. Defendants know and understand that there is a high risk that strong winds could blow bauxite, red mud, asbestos and other particulates and hazardous materials into Plaintiffs' neighborhood.
71. Defendants' ongoing storage, disposal, and failure to remediate the bauxite, red

mud, asbestos, and other particulates and hazardous materials presented and continues to present 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.

72. Plant personnel who handled bauxite and bauxite residue were issued safety equipment that included respirators, dust masks, face shields, and cover gear. Refinery management previously admitted that full respirators—not just dust masks—were required in potential high-dust areas.
73. Defendants' ongoing use, storage, disposal and failure to remediate bauxite, red mud, and other particulates and hazardous materials at the alumina refinery caused and continue to cause serious harm to person and property. As a result, the Plaintiffs suffered damages as alleged herein.

COUNT II: Public Nuisance

74. Plaintiffs repeat and re-allege each allegation of Paragraph 1-73 as if set forth herein verbatim.
75. The actions of Defendants constitute a public nuisance.
76. Specifically, the ongoing release of harmful dusts, including bauxite, red mud, coal dust, and other particulates and hazardous materials, 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.
77. The actions of Defendants violate 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 constitute nuisance *per se*.

- 78. Defendants know or have reason to know that their conduct has a significant effect on the public rights.
- 79. Plaintiffs are entitled to damages as a result, thereof.

COUNT III: Private Nuisance

- 80. Plaintiffs repeat and re-allege each allegation of Paragraph 1- 79 as if set forth herein verbatim.
- 81. Defendants' actions constitute a private nuisance in violation of Virgin Islands common law against Plaintiffs as living within close proximity to the refinery and subjected to the dangerous ongoing emissions.
- 82. Defendants' recurring releases of massive quantities of bauxite, red mud, and other particulates and hazardous substances have stained, clogged, and otherwise significantly damaged and/or destroyed homes contents and yards, and the damages and destruction continue to date.
- 83. Defendants' recurring releases of massive quantities of bauxite, red mud, and other particulates and hazardous substances have exposed and continue to expose Plaintiffs to toxic and/or irritating dusts.
- 84. By so doing, Defendants have wrongfully and unreasonably interfered with Plaintiffs' private use and enjoyment of home and property. As a result, Plaintiffs have been damaged, and continue to be damaged, as alleged, herein.

COUNT IV: Intentional Infliction of Emotional Distress

85. Plaintiffs repeat and re-allege each allegation of Paragraph 1- 84 as if set forth herein verbatim.
86. The actions of Defendants constitute the intentional infliction of emotional distress on Plaintiffs.
87. Defendants know and understand that exposure to bauxite, red mud, and other particulates and hazardous substances presented and continues to present serious risks to the health and property of thousands of St. Croix residents. Defendants also understand that the emissions posed and continue to pose serious threats to the local environment and natural resources.
88. Defendants know that wind, rain and/or flooding, and other physical disturbances could release bauxite, red mud, and other particulates and hazardous substances from the alumina refinery into neighborhoods.
89. Defendants understand that St. Croix is a hurricane-prone area and that local residents rely on cisterns as their primary source of potable water.
90. After Defendants permitted Plaintiffs to be exposed to bauxite, red mud, and other particulates and hazardous substances emissions from the alumina refinery, Defendants purposefully concealed and/or misrepresented the health risks associated with exposure to the emissions from Plaintiffs.
91. 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, and other particulates and

hazardous substances to blow into neighborhoods and cause significant harm.

92. 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.
93. As a result of Defendants' 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 V: Negligent Infliction of Emotional Distress

94. Plaintiffs repeat and re-allege each allegation of Paragraph 1- 93 as if set forth herein verbatim.
95. In the alternative to intentional infliction of emotional distress, the actions of Defendants constitute the negligent infliction of emotional distress. Defendants owed the Plaintiffs a duty of care to ensure that the Plaintiffs 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.
96. As a result, Plaintiffs have been damaged as alleged, herein.

COUNT VI: Negligence

97. Plaintiffs repeat and re-allege each allegation of Paragraph 1- 96 as if set forth herein verbatim.
98. The actions of Defendants constitute negligence.
99. SCRG has owned and/or operated the alumina refinery from 2002 to the present.
100. During that period, the Alcoa Defendants agreed to help SCRG to remove the dangers of the red mud in Plaintiffs.
101. Defendants failed to properly store and/or secure bauxite, red mud, related particulates on the premises.
102. Defendants 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 Plaintiffs' property.
103. Defendants' 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 Plaintiffs' property.
104. Defendants' negligence caused both physical personal injury and real and personal property damage that also resulted in emotional distress and anxiety.
105. Plaintiffs also specifically allege entitlement 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.
106. 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.
107. Under Restatement § 905, comment b, as an element of damages for a tort, Plaintiffs 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 Plaintiffs or trespassed on the Plaintiffs’ property. *See* Illustrations 7 and 9. *See, e.g., Moolenaar*, 616 F.2d at 90.
108. 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.

109. 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 Plaintiffs’ 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).

110. In *Kornoff 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).

111. 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.

112. Here, Plaintiffs were covered in industrial waste, and have suffered from recurring disbursements of red mud since 2002, 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 Defendants 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, and the contamination cistern; (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 "discomfort and annoyance" under Restatement § 939 because the Defendants damaged or ruined property, regardless of whether the Plaintiffs recover in nuisance, negligence, trespass, or any other theory of liability.

113. 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.
114. Defendants knew that those substances repeatedly blew into Plaintiffs' home but failed to warn Plaintiffs or attempt to contain the substances.
115. 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.
116. Defendants have failed and continue to fail to properly store and/or secure bauxite, red mud, related particulates, hazardous substances, on the premises.

117. Defendants 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 Plaintiffs' property.

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

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.

Pursuant to V.I. R. Civ. P. 8(a)(3), damages are within the jurisdictional limit of this Court.

LEE J. ROHN AND ASSOCIATES, LLC
Attorneys for Plaintiffs

DATED: December 16, 2020

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IN RE: RED MUD LITIGATION

MASTER CASE NO. SX-20-CV-009

COMPLEX LITIGATION DIVISION

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COME NOW, the Plaintiff by and through undersigned counsel, and file this

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3. Plaintiff, Ratcliffe Abraham, is a citizen of St. Croix, United States Virgin Islands.
4. Defendant, St. Croix Alumina, LLC, is a Virgin Islands Company, wholly owned by ALCOA.
5. 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.

6. At all times relevant to this action, and within the time period of 2002 to the present, Plaintiffs were residents in close proximity to the Defendant's alumina refinery on the south shore of St. Croix.

FACTUAL BACKGROUND

7. 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.
8. Defendant St. Croix Renaissance Group LLLP ("SCRG") upon information is a Limited Liability Limited Partnership and is deemed to be a citizen of Delaware, Florida, Massachusetts, Puerto Rico and St. Croix, U.S. Virgin Islands. On March 22, In or about 2002, Alcoa World Alumina, LLC, as the owner of St. Croix Alumina ("ALCOA") and St. Croix Alumina, LLC ("SCA") entered into a Purchase and Sale Agreement ("PSA") for the refinery with Brownfields Energy Recovery Corporation ("BRC") and Energy Answers Corporation of Puerto Rico ("EAPR") and BRC and EAPR immediately transferred their interests in the refinery to St. Croix Renaissance Group ("SCRG").
9. SCRG has owned and/or operated the refinery from 2002 to the present.
10. In 1998, DPNR had entered into an Order that directed SCA, through its owner Alcoa, to take corrective actions, as a result of bauxite residue being blown off of its

property during Hurricane Georges. That order also required the Alcoa Defendants conduct a “Best Management Practice” study to prevent bauxite, and bauxite residue from leaving the property again.

11. The purchase agreement between SCRG and the Alcoa Defendants, provided that the Alcoa Defendants retain the liability of fulfilling the obligations of the 1998 DPNR order.

12. In early March 2002, heavy rains caused red mud to run off the bauxite residue mound into the mangroves.

13. On April 20, 2002, the Alcoa Defendants had an extensive environmental report done entitled “Assessment of the Red Mud Spill”.

14. This resulted in an investigation by DPNR, that discovered that the Alcoa Defendants had been illegally contouring the red mud piles in February 2005, to increase the attractiveness of the facility for sale.

15. As a result, the Alcoa Defendants entered into a pre-closing letter of agreement, on June 13, 2002, to take responsibility for all corrective actions required by DPNR to secure the residue mounds and nearby areas.

16. The agreement further made it the requirement of SCRG to do all final contouring, and vegetation of the bauxite mounds after the Alcoa Defendants remediated the area.

17. On June 18, 2002, DPNR issued an Administrative Order that the Alcoa Defendants repair the site within forty-eight (48) hours, on an emergency basis, caused by the Alcoa Defendants reworking the red mud piles that had removed existing

vegetation, and develop a plan, and implement it to prevent further occurrences.

18. According to SCRG, for months the Alcoa Defendants ineffectively performed necessary corrective actions that caused additional discharge of red mud residue in to Plaintiffs' homes and affected Plaintiffs.

19. DPNR issued another order in April 29, 2003, which noted multiple repeated violations by the Alcoa Defendants on the property owned by SCRG, such that it caused another breach on January 9, 2003.

20. That breach allowed significant quantities of red mud to flow into the West Ditch.

21. On April 29, 2003, DPNR ordered the Alcoa Defendants and SCRG develop a new plan, and fix the red mud problem.

22. As a result, the Alcoa Defendants requested of DPNR for permission to do additional emergency work on the red mud on SCRG's property, which was approved by DPNR on May 2, 2003.

23. The Alcoa Defendants then hired an engineer from Gavier Engineering who submitted the Bauxite Residue Disposal Area Reclamation, as to what needed to be done to correct the red mud residue problem on SCRG's property that continued to harm the Plaintiffs and their property.

24. The Defendants, knowing that there were continuous issues with the red dust flying off the red mud piles, and harming Plaintiffs, and their property, waited until May 12, 2003, to apply to DPNR for an Earth Change Permit to remove the red mud piles, while the ongoing nuisance continued.

25. Thereafter, the Alcoa Defendants attempted to get out of actually remedying the

dangerous nuisance, and on May 23, 2003, moved to vacate the DPNR April 29, 2003 Order, falsely claiming they had already complied with DPNR's June 12, 2002 Order regarding the emergency work to be done, such that the April 23, 2003 order was improper.

26. As a result, the Alcoa Defendants did not correct the red mud piles, and in July 2003, SCRG began to negotiate with the Alcoa Defendants to gain further control of the removal of the dangerous nuisance, but no agreement was reached.

27. On August 7, 2003, SCRG acknowledged that emergency corrective work needed to be done on the red mud piles, and informed the Alcoa Defendants that it acknowledged that DPNR held SCRG equally liable and commenced mitigation work without the authority and approval of DPNR.

28. On August 8, 2003, DPNR ordered SCRG to cease and desist the unapproved work.

29. On August 8, 2003, DPNR instructed the Alcoa Defendants to begin the work ordered on May 23, 2003.

30. SCRG then objected to the order on August 14, 2003, claiming out that it did not believe the work proposed by the Alcoa Defendants would resolve the issues damaging the Plaintiffs.

31. On November 10, 2003, CZM approved a major permit to Alcoa Defendants that would allow the Defendants to permanently secure the red mud piles, which also required SCRG to vegetate the bauxite residue/red mud piles.

32. 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.
33. In 2004, SCRG entered into a consent decree with DPNR to vegetate the red mud piles.
34. This allowed the Alcoa Defendants to create ongoing releases of red dust on SCRG's property, that was documented by DNPR in November 2004.
35. In May 2005, DPNR inquired as to the status of the remediation, and the Alcoa Defendants falsely represented to DPNR that it was in the final stages of the remediation.
36. On November 17, 2005, the Alcoa Defendants falsely informed DPNR that it had completed the remediation of the red mud piles.
37. DPNR found, on May 17, 2006, that "the attempt to contain the residue has failed", this applied to all Defendants
38. On June 28, 2006, the Alcoa Defendants falsely stated that the work was completed and SCRG could now start the revegetation work.
39. On August 10, 2006, DPNR informed the Defendants that the Alcoa Defendants do not decide when Alcoa has complied, DPNR does, that the remediation work was not properly done, and Defendants remained in violation of DPNR orders, and found the Alcoa Defendants lacked credibility.
40. On December 21, 2006, DPNR filed suit against the Alcoa Defendants and SCRG, as a result of the failure to reduce the red mud piles.

41. In late 2007, SCRG finally requested the Court that its stay of the case against the Alcoa Defendants be lifted.
42. All work on the red mud piles was stayed until the Defendants complied with DPNR's orders.
43. On January 20, 2011, the jury in the case, *SCRG v. Alcoa Defendants*, found that the Alcoa Defendants has breached its contract with SCRG, engaged in negligence, and fraud related to the red mud piles.
44. The jury further found that the Alcoa Defendants had repeatedly lied to DPNR because the mounds could not be fixed as planned, because they were riddled with a destabilizing filter cloth.
45. There was a specific finding by the jury that the top officials of the Alcoa Defendants had hidden misrepresentations.
46. Upon information, SCRG then agreed to waive the judgment, the Alcoa Defendants undertook the work to recap, and completely close the red mud piles in accordance with DPNR's instructions.
47. A Consent Judgment was then entered in the DPNR case against Defendants
48. DPNR then approved Defendants' work plan on January 17, 2014.
49. Again, problems arose with red mud and bauxite residue leaving the mounds, and causing further damages to the Plaintiffs.
50. On March 20, 2015, DPNR stopped the work and required the Alcoa Defendants to use water trucks to contain the fugitive dust.

51. Upon information, work was finally completed on October 23, 2018, by the Alcoa Defendants, and then needed to be revegetated by SCRG.
52. Alumina is extracted from a naturally-occurring ore called bauxite. Bauxite is red in color. The Material Safety Data Sheets (“MSDS”) for bauxite warn that it can cause irritation of the eyes, skin and upper respiratory tract.
53. 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. Red mud causes damages to real and personal property.
54. Red mud causes significant physical injuries. 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,” “can cause irritation of the upper respiratory tract,” and that is a “cancer hazard.” The MSDS also advises against skin and eye exposure to red mud.
55. 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.

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

57. 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.

58. 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.

59. 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 into 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, owner of the refinery, and the Alcoa Defendant receiving orders from DPNR 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.

60. Despite that knowledge SCRG and the Alcoa Defendants failed to take proper measures to control those emissions ever since it took control of the refinery from 2002 to the present.

61. In addition, SCRG and the Alcoa Defendants 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.

62. Red mud contains caustic soda, crystalline silica, iron oxide, titanium dioxide, and other toxic substances that make it a health risk to Plaintiffs and exposes Plaintiffs to toxic injuries.

63. Plant personnel who handled bauxite and bauxite residue were issued safety equipment that included respirators, dust masks, face shields, and cover gear. Refinery management previously admitted that full respirators—not just dust masks—were required in potential high-dust areas.

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

65. SCRG attempted to conceal the fact it had friable asbestos in the plant and left it

there for years.

66. SCRG knew that friable asbestos was being blown into Plaintiffs' homes and being inhaled by Plaintiffs but failed to disclose its knowledge or warn Plaintiffs.

67. During its operation and/or ownership of the alumina refinery, SCRG failed to remove the asbestos from the refinery for years and upon information asbestos remains in the property.

68. 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, Defendant 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.

69. 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.

70. SCRG has done nothing to remove that asbestos to the present.

71. As a result of Defendants' 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 other plaintiffs can recover for damage to real property.

72. To this date, Defendants **s are** 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.

COUNT I: Abnormally Dangerous Condition

73. Plaintiffs repeats and re-allege each allegation of Paragraph 1-**64** as if set forth herein verbatim.
74. The actions of the Defendants **s** constitute maintaining an abnormally dangerous condition.
75. 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.
76. Thousands of residential dwellings are located in close proximity to the refinery and Plaintiffs lived in close proximity to the refinery and certainly within range of the dispersion of the toxic materials from the refinery.
77. Defendants' use, storage, disposal and failure to remediate the bauxite, red dust and/or red mud, asbestos, coal dust, and other particulates and hazardous materials at the refinery is solely for Defendant's own business purposes.
78. Defendants **s** know and understand **s** that there is a high risk that strong winds could blow bauxite, red mud, asbestos and other particulates and hazardous materials

into Plaintiffs' neighborhood.

79. Defendants' ongoing storage, disposal, and failure to remediate the bauxite, red mud, asbestos, and other particulates and hazardous materials presented and continues to present 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.~~

80. Plant personnel who handled bauxite and bauxite residue were issued safety equipment that included respirators, dust masks, face shields, and cover gear. Refinery management previously admitted that full respirators—not just dust masks—were required in potential high-dust areas.

81. Defendants' ongoing use, storage, disposal and failure to remediate bauxite, red mud, asbestos and other particulates and hazardous materials at the alumina refinery caused and continue to cause serious harm to person and property. As a result, the Plaintiffs suffered damages as alleged herein.

COUNT II: Public Nuisance

82. Plaintiffs repeat and re-allege each allegation of Paragraph 1-73 as if set forth herein verbatim.

83. The actions of Defendants constitute a public nuisance.

84. Specifically, the ongoing release of harmful dusts, including bauxite, red mud, coal dust, asbestos, and other particulates and hazardous materials, 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.

85. The actions of Defendants violate 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 constitute nuisance *per se*.

86. Defendants know or have reason to know that its their conduct has a significant effect on the public rights.

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

COUNT III: Private Nuisance

88. Plaintiffs repeat and re-allege each allegation of Paragraph 1- 79 as if set forth herein verbatim.

89. Defendants' actions constitute a private nuisance in violation of Virgin Islands common law against Plaintiffs as living within close proximity to the refinery and subjected to the dangerous ongoing emissions.

90. Defendants' recurring releases of massive quantities of bauxite, red mud, asbestos, and other particulates and hazardous substances have stained, clogged, and otherwise significantly damaged and/or destroyed homes contents and yards, and the damages and destruction continue to date.

91. Defendants' recurring releases of massive quantities of bauxite, red mud, asbestos, and other particulates and hazardous substances have exposed and continue to expose Plaintiffs to toxic and/or irritating dusts.

92. By so doing, Defendants **s have** wrongfully and unreasonably interfered with Plaintiffs' private use and enjoyment of home and property. As a result, Plaintiffs have been damaged, and continue to be damaged, as alleged, herein.

COUNT IV: Intentional Infliction of Emotional Distress

93. Plaintiffs repeat and re-allege each allegation of Paragraph 1- **84** as if set forth herein verbatim.
94. The actions of Defendants **s** constitute the intentional infliction of emotional distress on Plaintiffs.
95. Defendants **s** knows **s** and understands **s** that exposure to bauxite, red mud, **asbestos**, and other particulates and hazardous substances presented and continues to present serious risks to the health and property of thousands of St. Croix residents. Defendants **s** also understands **s** that the emissions posed and continue to pose serious threats to the local environment and natural resources.
96. Defendants **s** knows **s** that wind, rain and/or flooding, and other physical disturbances could release bauxite, red mud, **asbestos** and other particulates and hazardous substances from the alumina refinery into neighborhoods.
97. Defendants **s** understands **s** that St. Croix is a hurricane-prone area and that local residents rely on cisterns as their primary source of potable water.
98. ~~Since at least 2006, Defendant SCRG also knew that dangerous friable asbestos was present at the refinery and could, along with the red mud and related particulates and hazardous substances, be blown by winds into neighborhoods, and that it did in fact do so.~~

99. Despite this knowledge, Defendant has knowingly and intentionally failed to take precautions to prevent bauxite, red mud, asbestos and other particulates and hazardous substances from blowing into Plaintiffs' neighborhood, where it did blow and was dispersed exposing Plaintiffs to the harmful emissions and toxic substances continuously.
100. After Defendants permitted Plaintiffs to be exposed to bauxite, red mud, asbestos and other particulates and hazardous substances emissions from the alumina refinery, Defendants purposefully concealed and/or misrepresented the health risks associated with exposure to the emissions from Plaintiffs.
101. 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 continues to allow bauxite, red mud, asbestos and other particulates and hazardous substances to blow into neighborhoods and cause significant harm.
102. 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.
103. As a result of Defendants' 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 V: Negligent Infliction of Emotional Distress

104. Plaintiffs repeat and re-allege each allegation of Paragraph 1- 93 as if set forth herein verbatim.
105. In the alternative to intentional infliction of emotional distress, the actions of Defendants constitute the negligent infliction of emotional distress. Defendants owed the Plaintiffs a duty of care to ensure that the Plaintiffs 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.
106. As a result, Plaintiffs have been damaged as alleged, herein.

COUNT VI: Negligence

107. Plaintiffs repeat and re-allege each allegation of Paragraph 1- 96 as if set forth herein verbatim.
108. The actions of Defendants constitute negligence.
109. SCRG has owned and/or operated the alumina refinery from 2002 to the present.
110. During that period, the Alcoa Defendants agreed to help SCRG to remove the dangers of the red mud in Plaintiffs.
111. Defendants failed to properly store and/or secure bauxite, red mud, related particulates and asbestos on the premises.

112. Defendants 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 Plaintiffs' property.
113. Defendants' 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 Plaintiffs' property.
114. Defendants' negligence caused both physical personal injury and real and personal property damage that also resulted in emotional distress and anxiety.
115. Plaintiffs also specifically allege entitlement 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.
116. 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.

117. Under Restatement § 905, comment b, as an element of damages for a tort, Plaintiffs 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 Plaintiffs or trespassed on the Plaintiffs’ property. *See* Illustrations 7 and 9. *See, e.g., Moolenaar*, 616 F.2d at 90.

118. 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.

119. 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 *Nhadili 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 Plaintiffs’ 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).

120. In *Kornoff 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).

121. 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.

122. Here, Plaintiffs were covered in industrial waste, and have suffered from recurring disbursements of red mud since 2002, 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 Defendants 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, and the contamination cistern; (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 “discomfort and annoyance” under Restatement § 939 because the Defendants damaged or ruined property, regardless of whether the Plaintiffs recover in nuisance, negligence, trespass, or any other theory of liability.

123. 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.

124. 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.

125. Despite this knowledge, SCRG took no measures to remove or contain those hazardous chemicals.

126. Defendants SCRG knew that those substances repeatedly blew into Plaintiffs’ home but failed to warn Plaintiffs or attempt to contain the substances.

127. 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.

128. Defendants SCRG has have failed and continue to fail to properly store and/or secure bauxite, red mud, related particulates, hazardous substances, and asbestos on the premises.

129. Defendants 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 Plaintiffs’ property.

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

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.

Pursuant to V.I. R. Civ. P. 8(a)(3), damages are within the jurisdictional limit of this Court.

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DATED: December 16, 2020

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