

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

'13

RYAN ALLEYNE, ENID V. ALLEYNE, )  
MICHAEL BICETTE, MARCO )  
BLACKMAN, ANISTIA JOHN, )  
GEORGE JOHN, SUSIE SANES and )  
ALICIA SANES, on behalf of )  
themselves and all others similarly )  
situated, )  
Plaintiffs, )  
v. )  
DIAGEO USVI, INC. and CRUZAN )  
VIRIL, LTD., )  
Defendants. )

SX-13-CV- 1423

CLASS ACTION

Damages

JURY TRIAL DEMANDED

\*\*\*\*\*

COMPLAINT

Plaintiffs complain as follows:

NATURE OF THE ACTION

1. This action is necessary to protect the property rights of Plaintiffs and all other citizens of the United States Virgin Islands similarly situated who's real and personal property on St. Croix has been damaged due to Defendants' operations.
2. Defendants' operations cause the fungus *Baudoinia compniacensis*, colloquially referred to as "rum fungus", to accumulate on real and personal property, including shrubs, trees and plants thereon in the vicinity of Defendants' operations on St. Croix.
3. The accumulation of rum fungus on Plaintiffs' real property including shrubs, trees, and plants and the real property of all other similarly situated citizens of St. Croix, United States Virgin Islands is caused by Defendants' operations which creates an unsightly condition

requiring abnormal and costly cleaning and maintenance, early destruction/weathering of surfaces affected by the fungus and causes unreasonable and substantial annoyance and unreasonable interference with the use and enjoyment of the property, and, as a result of which, the value, value of use and/or the rental value of the property is reduced.

4. The accumulation of rum fungus on Plaintiffs' personal property, and the personal property of others similarly situated, caused by Defendants' operations, creates an unsightly condition requiring abnormal and costly cleaning and maintenance, early weathering of surfaces affected by the fungus and causes unreasonable and substantial annoyance and unreasonable interference with the use and enjoyment of the property, and, as a result of which, the value, of the property is reduced.

5. Rum fungus also accumulates on fruit and vegetable-bearing trees and plants, as well as the fruit harvested from these trees and plants, interfering with the natural maturation of the tree and/or plant as well as any fruit or vegetable growing on the tree and/or plant, rendering the fruit or vegetable, unsightly, undesirable, inedible and/or unmarketable.

6. Plaintiffs bring this action on behalf of themselves and all other citizens of the United States Virgin Islands who have similarly suffered injury to their property on St. Croix as a result of Defendants' conduct described herein.

7. The reason for not joining all potential class members as Plaintiffs is that, upon information and belief, there are hundreds of potential plaintiffs making it impractical to bring them before the Court. All Plaintiffs own or lease real property and/or personal property in the form of motorized vehicles and/or fruit or vegetable-bearing trees or plants that are situated in estates which are in the vicinity of Defendants' operations on St. Croix and are citizens of the United States Virgin Islands.

8. There are many citizens in estates surrounding Defendants' facilities on St. Croix who have been similarly affected and the question to be determined is one of common and general interest to the Class to which Plaintiffs belong and the group is so numerous as to make it impracticable to bring them all before the Court, for which reasons Plaintiffs initiate this litigation for all citizens similarly situated pursuant to Federal Rule of Civil Procedure 23.

9. Issues and questions of law and fact common to the members of the Class predominate over questions affecting individual members and the claims of Plaintiffs are typical of the claims of the proposed class.

10. The maintenance of this litigation as a Class Action will be superior to other methods of adjudication in promoting the convenient administration of justice.

11. Plaintiffs and the law firms of Colianni & Colianni, William F. McMurry, Esq. and Morris & Player PLLC will fairly and adequately assert and protect the interests of the Class.

#### **PARTIES AND JURISDICTION**

12. At all times material hereto, Defendant Diageo was and is a corporation of the U.S. Virgin Islands, with its principal place of business on St. Croix, which operates an alcoholic beverage factory, distillery and alcoholic beverage aging warehouses on St. Croix.

13. At all times material hereto, Defendant Cruzan was and is a corporation of the U.S. Virgin Islands, with its principal place of business on St. Croix, which operates an alcoholic beverage factory in Frederiksted and a distillery and alcoholic beverage aging warehouses on St. Croix.

14. Ryan Alleyne and Enid V. Alleyne are citizens of St. Croix and at all times material hereto resided at 6 Enfield Green, Frederiksted, St. Croix.

15. Michael Bicette is a citizen of St. Croix and at all times material hereto resided at 329 Enfield Green, Frederiksted, St. Croix and owned real property located at 327 Enfield Green, Frederiksted, St. Croix.

16. Marco Blackman is a citizen of St. Croix and at all times material hereto owned real and personal property located at 77 Enfield Green, Frederiksted, St. Croix.

17. Anistia John and George John are citizens of St. Croix and at all times material hereto resided at 65-A Estate Cane, Frederiksted, St. Croix.

18. Susie Sanes is a citizen of St. Croix and at all times material hereto resided at 721 Williams Delight, Frederiksted, St. Croix.

19. Alicia Sanes is a citizen of St. Croix and at all times material hereto resided at 71 Estate Cane, Frederiksted, St. Croix.

20. This court has jurisdiction under 4 V.I.C. §76.

21. The amount in controversy exceeds the jurisdictional requirements of this Court.

22. All of the members of all proposed Plaintiff classes in the aggregate, and the primary Defendants, are citizens of the United States Virgin Islands.

#### **FACTUAL ALLEGATIONS**

23. Defendants are engaged in the commercial production of alcoholic beverages.

24. As a result of Defendants' alcoholic beverage production operations on St. Croix, including specifically the fermentation, distillation, aging/warehousing and dumping for mass transportation, significant, uncontrolled ethanol emissions occur.



25. During the aging process several gallons of rum, in the form of ethanol, will evaporate from the oak barrel in which the ethanol (rum) is aged. These emissions are also known as “volatile organic compounds (VOC’s).”

26. Because the Defendants fail to capture and control the ethanol emissions they produce, they discharge thousands of tons of ethanol into the atmosphere of the surrounding community.

27. The ethanol emitted by the Defendants’ St. Croix alcoholic beverage production operations is present on and around the Plaintiffs’ real and personal property and the real and personal property of others similarly situated in the estates surrounding Defendants’ St. Croix operations.

28. Defendants have not adopted emission control technology to reduce the ethanol emitted during its alcoholic beverage production operations.

29. Reasonable and cost effective emissions control technology exists.

30. The ethanol released by the Defendants is known to combine with condensation on the Plaintiffs’ property and cause an invisible, naturally occurring fungal spore to “germinate” (start growing) and become a living organism, visible to the naked human eye.

31. The natural force, which causes ethanol and condensation to germinate or stimulate the growth of naturally occurring fungal spores, is not an extraordinary natural force, but is the ordinary and natural consequence of the growth pattern of certain fungi.

32. This visible, living fungus was first identified by scientific discovery in 2007 as *Baudoinia compniacensis*, which is black in color and colloquially referred to as “rum fungus.”

33. Rum fungus, germinated by the presence of ethanol emissions such as those produced by Defendants' St. Croix operations, accumulates on many types of surfaces, including metal, vinyl, concrete, wood, trees/plants and vegetables/fruit.

34. Rum fungus accumulates on surfaces in proximity to Defendants' St. Croix alcoholic beverage production operations, including specifically fermentation, distillation, aging/warehousing and dumping for mass transportation.

35. Rum fungus has accumulated on the Defendants' commercial property, including specifically the Defendants' aging warehouses.

36. Defendants' alcoholic beverage production operations have caused accumulation of rum fungus on Plaintiffs' real and personal property on St. Croix and the real and personal property of others similarly situated on St. Croix.

37. The rum fungus caused by Defendants' operations appears as a black stain, black dots, and soot. The black fungus is very visible on homes, businesses, vehicles, trees/plants and fruits/vegetables and is unsightly and damaging.

38. Because rum fungus germinates when exposed to Defendants' airborne ethanol, removing rum fungus growth requires time-consuming and expensive pressure washing and the use of chlorine bleach that damages property, places the Plaintiffs in a position of peril while cleaning from ladders high above the ground and precludes Plaintiffs and others similarly situated from the full use and enjoyment of their properties. Further, the accumulation of rum fungus on plant matter, including trees, plants, fruits and vegetables, inhibits regular maturation of the plant matter and renders the fruit and vegetables, unsightly, undesirable, inedible and/or unmarketable. Because rum fungus cannot be removed from the trunk, branches and foliage of

ornamental plants, shrubs and trees Plaintiffs are required to replace said plants and trees at great expense.

39. Rum fungus can only be removed from surfaces of homes and personal property with extreme cleaning measures such as a high-pressure washing or the application of caustic chemicals such as chlorine bleach, and even then much of the rum fungus cannot be completely removed.

40. Removing accumulations of rum fungus caused by Defendants' operations on St. Croix, requires an abnormal amount of time, money, energy and equipment to clean external surfaces, including gutters, siding, roofing, fencing and vehicles.

41. These measures to remove unsightly rum fungus must be repeated often because Defendants' continual discharge of ethanol causes the continual germination of new rum fungus spores.

42. Many residents and business owners do not have the physical or financial capability and/or equipment necessary to remove the accumulations of rum fungus on their property caused by Defendants' operations.

43. Rum fungus and the extreme cleaning methods necessary for its removal cause early destruction and weathering of surfaces affected by the fungus.

44. Defendant Diageo ferments, distills, ages/stores, and dumps alcohol for mass transportation on St. Croix in proximity to its Captain Morgan Distillery located at #1 Estate Annaberg & Shannon Grove, Kingshill and in proximity to Diageo's aging warehouses located in Estate Diamond, Frederiksted, St. Croix, U.S. Virgin Islands.

45. Diageo's operations emit ethanol into the estates surrounding its operations, including the Plaintiffs' estates and the estates of others similarly situated which causes

*Baudoinia compniacensis* to germinate and become an unsightly blackness on the outside and inside of the Plaintiffs' homes, as well as on the surface of any personal property left outdoors.

46. Defendant Cruzan ferments, distills, ages/stores, and dumps alcohol for mass transportation on St. Croix in proximity to its Cruzan Rum Distillery located at #3 & #3A Estate Diamond, Frederiksted, St. Croix, U.S. Virgin Islands.

47. Cruzan's operations emit ethanol into the estates surrounding its operations, including the Plaintiffs' estates and the estates of others similarly situated which causes *Baudoinia compniacensis* to germinate and become an unsightly blackness on the outside and inside of the Plaintiffs' homes, as well as on the surface of any personal property left outdoors.

48. The Defendants' emission of ethanol is done knowingly, with the knowledge that ethanol emissions will drift beyond their property boundaries and enter the Plaintiffs' property causing the germination and growth of *Baudoinia compniacensis* on the surfaces of homes and personal property, including automobiles. Defendants' emissions constitute both a "private nuisance" under 28 V.I.C Sec. 331 (2012) and the crime of "public nuisance" in violation of 14 V.I.C. Sec 1461-1462 (2012), in as much as said emissions are "offensive to the senses" and "an obstruction to the free use of property, as to interfere with the comfortable enjoyment of property by a considerable number of persons." Upon information and belief, over 1,000 residents are affected by the Defendants' emission of ethanol.

49. While Plaintiffs do not seek compensation for personal injury for exposure to *Baudoinia*, many residents in the affected estates have publically expressed concern for their health and the health of their family. Because there are no studies on the health effects of this fungus, these concerns coupled with uncertainty will adversely affect the price potential buyers (if any) will be willing to pay for the affected real and personal property.

50. At all times material hereto, Ryan and Enid V. Alleyne owned the real property located at 6 Enfield Green, Frederiksted, St. Croix which, as a result of Defendants' conduct herein described, accumulates rum fungus which causes damage to the property, an unsightly condition requiring abnormal and costly cleaning and maintenance, early weathering of surfaces affected by the fungus and causes unreasonable and substantial annoyance and unreasonable interference with the use and enjoyment of the property, and, as a result of which, the value, value of use and/or the rental value of the property has been reduced.

51. At all times material hereto, Michael Bicette owned the real property located at 327 and 329 Enfield Green, Frederiksted, St. Croix which, as a result of Defendants' conduct herein described, accumulates rum fungus which causes damage to the property, an unsightly condition requiring abnormal and costly cleaning and maintenance, early weathering of surfaces affected by the fungus and causes unreasonable and substantial annoyance and unreasonable interference with the use and enjoyment of the property, and, as a result of which, the value, value of use and/or the rental value of the property has been reduced.

52. At all times material hereto, Michael Bicette owned a 2006 Ford E350 van which is parked at his residence at 329 Enfield Green, Frederiksted, St. Croix. As a result of Defendants' conduct herein described, Mr. Bicette's vehicle accumulates rum fungus which causes damage to the property, an unsightly condition requiring abnormal and costly cleaning and maintenance, early weathering of surfaces affected by the fungus and causes unreasonable and substantial annoyance and unreasonable interference with the use and enjoyment of the property, and, as a result of which, the value, value of use and/or the rental value of the property has been reduced.

53. At all times material hereto, Marco Blackman owned the real property located at 77 Enfield Green, Frederiksted, St. Croix, which, as a result of Defendants' conduct herein described, accumulates rum fungus which causes damage to the property, an unsightly condition requiring abnormal and costly cleaning and maintenance, early weathering of surfaces affected by the fungus and causes unreasonable and substantial annoyance and unreasonable interference with the use and enjoyment of the property, and, as a result of which, the value and/or the value of use has been reduced.

54. At all times material hereto, Anistia and George John owned the real property at 65A Estate Cane, Frederiksted, St. Croix, which, as a result of Defendants' conduct herein described, accumulates rum fungus which causes damage to the property, an unsightly condition requiring abnormal and costly cleaning and maintenance, early weathering of surfaces affected by the fungus and causes unreasonable and substantial annoyance and unreasonable interference with the use and enjoyment of the property, and, as a result of which, the value, value of use and/or the rental value of the property has been reduced.

55. At all times material hereto, Susie Sanes was a tenant in possession of her residence at 721 Williams Delight, Frederiksted, St. Croix, which, as a result of Defendants' conduct herein described, accumulates rum fungus which causes damage to the residence and personal property, an unsightly condition requiring abnormal and costly cleaning and maintenance, early weathering of surfaces affected by the fungus and causes unreasonable and substantial annoyance and unreasonable interference with the use and enjoyment of the property, and, as a result of which, the value, value of use and/or the rental value of the property has been reduced.

56. At all times material hereto, the plant matter, including trees, plants, fruits and vegetables owned by Susie Sanes located on the property of 721 Williams Delight, as a result of Defendants' conduct herein described, accumulates rum fungus which inhibits regular maturation of the plant matter and renders the fruit and vegetables inedible and unmarketable.

57. At all times material hereto, Alicia Sanes owned the real property at 71 Estate Cane, Frederiksted, St. Croix, which, as a result of Defendants' conduct herein described, accumulates rum fungus which causes damage to the property, an unsightly condition requiring abnormal and costly cleaning and maintenance, early weathering of surfaces affected by the fungus and causes unreasonable and substantial annoyance and unreasonable interference with the use and enjoyment of the property, and, as a result of which, the value, value of use and/or the rental value of the property has been reduced.

#### CLASS ACTION ALLEGATIONS

58. Plaintiffs bring this class action against the Defendants pursuant to FRCP 23 on behalf of:

- a. All citizens of the United States Virgin Islands who own real property on St. Croix in the vicinity, the exact radius of which is to be determined, of Defendants' alcoholic beverage production operations on St. Croix; and
- b. All citizens of the United States Virgin Islands who rent or lease real property on St. Croix in the vicinity, the exact radius of which is to be determined, of Defendants' alcoholic beverage production operations on St. Croix and have an obligation to maintain the premises; and
- c. All citizens of the United States Virgin Islands who own motorized vehicles in St. Croix that are regularly parked and/or stored in the vicinity, the exact radius of

which is to be determined, of Defendants' alcoholic beverage production operations on St. Croix; and

- d. All citizens of the United States Virgin Islands who own ornamental trees, shrubs and plants and/or fruit and vegetable-bearing trees on St. Croix in the vicinity, the exact radius of which is to be determined, of Defendants' alcoholic beverage production operations on St. Croix; and
- e. All citizens of the United States Virgin Islands who harvest fruit and vegetables from rented or leased real property on St. Croix in the vicinity, the exact radius of which is to be determined, of Defendants' alcoholic beverage production operations on St. Croix.
- f. Excluded from the Class are the Defendants, their subsidiaries and affiliates, and their officers and directors and members of their immediate families, and any entity in which the Defendants have a controlling interest, and the legal representatives, heirs, successors or assigns of any such excluded party.

59. The members of the Class are so numerous that joinder of all members is impracticable. While the exact number of Class members is unknown at the present time, it is estimated that there are more than 1,000 members in the Class.

60. Despite the numerical size of the Class, the identities of the Class members can be readily ascertained. Plaintiffs and their counsel do not anticipate any difficulties in the management of this action as a Class Action.

61. Plaintiffs will fairly and adequately represent the interests of the Class. Plaintiffs are committed to vigorously prosecute this action and have retained competent counsel experienced in class action litigation. Plaintiffs are Class members and have no interests



antagonistic to or in conflict with other Class members. Plaintiffs are represented by lawyers with extensive experience in prosecuting class actions and will adequately represent the purported Class in this action.

62. This action raises numerous questions of law and fact which are common to the Class members, including:

- a. Whether Defendants knew or should have known of rum fungus accumulations in surrounding estates as a result of their alcoholic beverage production operations;
- b. Whether Defendants' use of their property unreasonably interferes with the private use and enjoyment of surrounding properties;
- c. Whether Defendants are liable for temporary or permanent nuisance, negligence, gross negligence and trespass;
- d. The remedies available to Defendants to prevent ethanol emissions;
- e. The remedies, including the cost thereof, to cure the existing accumulations of rum fungus;
- f. Whether the Class is entitled to exemplary damages;
- g. Whether the Class is entitled to injunctive relief.

63. The claims or defenses of the represented parties are typical of the claims or defenses of the Class. Plaintiffs have the same interests as the other Class members in prosecuting the claims against the Defendants. Plaintiffs and all the members of the Class sustained damages as a result of Defendants' wrongful conduct.

64. A class action is superior to other available methods for the fair and efficient adjudication of this controversy. Common issues predominate. Furthermore, the expense and

burden of individual litigation make it extraordinarily difficult for Class members to redress the wrongs done to them individually.

### COUNT I – NEGLIGENCE

65. The foregoing allegations are re-alleged and incorporated herein.

66. Defendants knew or should have known that their alcoholic beverage production operations on St. Croix cause rum fungus to accumulate on real and personal property located in proximity to their operations, thereby causing injury to such properties.

67. “A number of years” prior to 2002, agents, servants and/or employees of Diageo, including, but not limited to master distiller Keith Law, conducted a “study” to determine the nature and cause of the black fungus observed by Diageo on its warehouses, production facilities, private dwellings in the vicinity of its facilities, improvements on privately owned real property and on personal property, including automobiles. Over the years leading up to 2002, Diageo learned that its ethanol emissions (“Angel’s Share” as Diageo calls it) “result in a film of organisms” on the surfaces of “warehouse walls and nearby trees.” Diageo knew that the “unusual feature” of this mold or fungus was that it created a “black film on walls near warehouses.” Diageo knew that this “black growth” on the surface of buildings would “change its appearance, increasing the need for painting and cleaning.” Diageo knew that its emissions of ethanol would result in claims for compensation by “householders and residents for the blackening of their buildings.” Instead of admitting its complicity in causing the black “film of organisms” by its ethanol emissions, Diageo has engaged in a public campaign denying any responsibility for the blackening of buildings, residences and personal property in the vicinity of its spirit aging warehouses. *See Exhibit 1.*

68. At all times material hereto, Defendant Cruzan witnessed firsthand the blackening of its warehouses and rum productions facilities as well as the blackening of real property improvements on neighboring real estate.

69. At all times material hereto, Defendant Cruzan knew that this blackening was a fungus or mold caused by its emission of ethanol from its rum production facilities and by 2007 its scientists were aware of the scientific literature published by Dr. James Scott, identifying this blackening agent as *Baudoinia compniacensis*.

70. It was reasonably foreseeable that Defendants' failure to properly construct, maintain, and/or operate its facilities could result in an invasion of Plaintiffs' possessory interests by ethanol emissions which were known by the Defendants to cause a blackening fungus to germinate and propagate.

71. Defendants have a duty to minimize and prevent the accumulation of rum fungus on Plaintiffs' real and personal property and the real and personal property of others similarly situated caused by Defendants' alcoholic beverage production operations on St. Croix.

72. Defendants have a duty to minimize and prevent the ethanol emissions from entering onto Plaintiffs' real and personal property and the real and personal property of others, similarly situated, especially since controls are available to destroy the ethanol before it escapes the Defendants' property.

73. Defendants have a duty to comply with the law of the United States Virgin Islands which includes refraining from engaging in conduct which constitutes the commission or maintenance of a "private nuisance" under 28 V.I.C Sec. 331 (2012) and the crime of "public nuisance" under 14 V.I.C. Sec 1461-1462 (2012).

74. Defendants have breached the duty owed to the plaintiffs by failing to abate the nuisance through proper control of their ethanol emissions when they knew that their conduct was causing the accumulation of fungus to occur on Plaintiffs' real and personal property.

75. Defendants have breached the duty owed to the plaintiffs by failing and refusing to properly control their ethanol emissions when they were notified and asked to do so.

76. Defendants have breached the duty owed to the plaintiffs by committing and maintaining a "public nuisance" as defined and prohibited by 14 V.I.C. Sec 1461-1462 (2012), in as much as said emissions are "offensive to the senses" and "an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of property by a considerable number of persons." Upon information and belief, over 1,000 residents of St. Croix, United States Virgin Islands are affected by the Defendants' emission of ethanol.

77. Plaintiffs and all other citizens of the United States Virgin Islands who have similarly suffered injury to their real and personal property on St. Croix are among those intended to be protected by 14 V.I.C, Sect 1461-1462 (2012), and the statute was designed to prevent the type of harm suffered by the Plaintiffs and others similarly situated. Therefore, the Defendants are negligent, per se.

78. Defendants' conduct described herein constitutes gross negligence and/or a wanton, willful and reckless disregard for the rights of the Plaintiffs and others similarly situated entitling them to recover punitive damages.

79. As a direct and proximate result of the Defendants' negligent and or grossly negligent conduct as alleged herein, rum fungus and ethanol from Defendants' St. Croix alcoholic beverage production operations entered upon, accumulated upon, and physically invaded Plaintiffs' real and personal property and the property of others similarly situated,

thereby causing harm to the property of the Plaintiffs and others similarly situated by the accumulation of rum fungus which causes damage to their real and personal property, including an unsightly condition requiring abnormal, costly cleaning and maintenance, early destruction and weathering of surfaces causing unreasonable and substantial annoyance and unreasonable interference with the use and enjoyment of the property, and, as a result of which, the value, value of use and/or the rental value of the property has been reduced.

#### **COUNT II – PRIVATE NUISANCE**

80. The foregoing allegations are re-alleged and incorporated herein.

81. Plaintiffs and all other citizens of the United States Virgin Islands suffering similar injury to their real and personal property on St. Croix bring this private nuisance claim for damages pursuant to 28 V.I.C. Sec. 331, in as much as the Defendants have intentionally and unreasonably or unintentionally and negligently or recklessly caused an invasion of Plaintiffs' interest in the private use and enjoyment of their land, including personal property such as outdoor furniture and automobiles, by the emission of ethanol from its rum production facilities on St. Croix, United States Virgin Islands as set forth herein above.

82. The gravity of the harm alleged herein outweighs the utility of the Defendants' conduct in as much as the Defendants are not compensating the Plaintiffs herein and their exists controls which can eliminate the emission of ethanol at reasonable expense and the financial burden of compensating for the harms caused by the Defendants' emission of ethanol would not render it unfeasible to continue conducting the activity.

83. The Defendants knew that the formation of a black mold of fungus appearing substance would result from their ethanol emissions, thereby making their invasion of Plaintiffs' interest in the private use and enjoyment of their land intentional and unreasonable.

84. In the alternative, the Defendants should have known that the formation of a black mold or fungus appearing substance would result from their ethanol emissions, which conduct is unintentional and otherwise actionable under the rules controlling liability for negligence or reckless conduct set forth more particularly in paragraphs 64 through 71 above.

85. The harm caused by the Defendants' conduct as alleged herein is severe and greater than the Plaintiffs and others similarly situated should be required to bear without compensation.

86. The harm caused by the Defendants' conduct as alleged herein is significant and the Plaintiffs' use and enjoyment of their residential property is well suited to the character of the locality of their property and the Defendants' conduct as alleged herein is unsuited to the character of the locality unless they control their emission of ethanol.

87. The accumulation of rum fungus on Plaintiffs' property and the property of others similarly situated caused by Defendants' alcoholic beverage production operations on St. Croix can be corrected or abated at reasonable expense to the Defendants.

88. Defendants' ethanol emissions can be corrected or abated at reasonable expense to the Defendants and is not impracticable.

89. Defendants have a duty to minimize and prevent the accumulation of rum fungus on Plaintiffs' property and the property of others similarly situated caused by Defendants' alcoholic beverage production operations on St. Croix.

90. Defendants have a duty to minimize and prevent the ethanol emissions from entering onto Plaintiffs' property and the property of others similarly situated.

91. Defendants have breached the duty owed to the plaintiffs by failing to abate the nuisance through proper control of their ethanol emissions when they knew that their conduct was causing the accumulation of fungus to occur on Plaintiffs' real and personal property.

92. Defendants have breached the duty owed to the plaintiffs by failing and refusing to properly control their ethanol emissions when they were notified and asked to do so.

93. Defendants have breached the duty owed to the plaintiffs by committing and maintaining a "public nuisance" as defined and prohibited by 14 V.I.C. Sec 1461-1462 (2012), in as much as said emissions are "offensive to the senses" and "an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of property by a considerable number of persons." Upon information and belief, over 1,000 residents of St. Croix, United States Virgin Islands are affected by the Defendants' emission of ethanol.

94. Plaintiffs and all other citizens of the United States Virgin Islands who have similarly suffered injury to their real and personal property on St. Croix are among those intended to be protected by 14 V.I.C, Sect 1461-1462 (2012), and the statute was designed to prevent the type of harm suffered by the Plaintiffs and others similarly situated. Therefore, the Defendants are negligent, per se.

95. As a direct and proximate result of the conduct of the Defendants as alleged herein, rum fungus and ethanol from Defendants' St. Croix alcoholic beverage production operations entered upon, accumulated upon, and physically invaded Plaintiffs' real and personal property and the property of others similarly situated, thereby causing harm to the property of the Plaintiffs and others similarly situated by the accumulation of rum fungus which causes damage to their real and personal property, including an unsightly condition requiring abnormal, costly cleaning and maintenance, early destruction and weathering of surfaces causing unreasonable

and substantial annoyance and unreasonable interference with the use and enjoyment of the property, and, as a result of which, the value, value of use and/or the rental value of the property has been reduced.

### COUNT III – INTENTIONAL TRESPASS

96. The foregoing allegations are re-alleged and incorporated herein.

97. “A number of years” prior to 2002, agents, servants and/or employees of Diageo, including, but not limited to master distiller Keith Law, conducted a “study” to determine the nature and cause of the black fungus observed by Diageo on its warehouses, production facilities, private dwellings in the vicinity of its facilities, improvements on privately owned real property and on personal property, including automobiles. Over the years leading up to 2002, Diageo learned that its ethanol emissions (“Angel’s Share” as Diageo calls it) “result in a film of organisms” on the surfaces of “warehouse walls and nearby trees.” Diageo knew that the “unusual feature” of this mold or fungus was that it created a “black film on walls near warehouses.” Diageo knew that this “black growth” on the surface of buildings would “change its appearance, increasing the need for painting and cleaning.” Diageo knew that its emissions of ethanol would result in claims for compensation by “householders and residents for the blackening of their buildings.” Instead of admitting its complicity in causing the black “film of organisms” by its ethanol emissions, Diageo has engaged in a public campaign denying any responsibility for the blackening of buildings, residences and personal property in the vicinity of its spirit aging warehouses. *See Exhibit 1.*

98. At all times material hereto, Defendant Cruzan witnessed firsthand the blackening of its warehouses and rum productions facilities as well as the blackening of real property improvements on neighboring real estate.



99. At all times material hereto, Defendant Cruzan knew that this blackening was a fungus or mold caused by its emission of ethanol from its rum production facilities and by 2007 its scientists were aware of the scientific literature published by Dr. James Scott, identifying this blackening agent as *Baudoinia compniacensis*.

100. At all times material hereto, Defendants intentionally caused their ethanol emissions to enter the atmosphere of the Plaintiffs and all other similarly situated citizens of the United States Virgin Islands.

101. At all times material hereto, Defendants intentionally failed and refused to remove the ethanol emitted from their production facilities when they were in fact under a duty to remove it due to their knowledge that their ethanol emissions were causing the growth of black fungus/mold to grow on neighboring real and personal property, including that of Plaintiffs and all other similarly situated citizens of the United States Virgin Islands.

102. At all times material hereto, the aforesaid ethanol remains in the atmosphere of Plaintiffs' real property, causing the black fungus to continue to grow, colonize and remain on the real and personal property of Plaintiffs and all other similarly situated citizens of the United States Virgin Islands, constituting a continuing trespass.

103. Ethanol is a tangible product detectable and identifiable by existing means of air testing.

104. Defendants' conduct as set forth above constitutes a tangible encroachment of Plaintiffs' property by the Defendant.

105. Encroachment of ethanol on Plaintiffs' property has caused the growth of *Baudoinia*/rum fungus on Plaintiffs' property as set forth herein.

106. It was reasonably foreseeable that Defendants' failure to properly construct, maintain, and/or operate its facilities could result in an invasion of Plaintiffs' possessory interests by ethanol emissions which were known by the Defendants to cause a blackening fungus to germinate and propagate.

107. Defendants have a duty to minimize and prevent the invasion of Plaintiffs' real and personal property by their ethanol emissions and resulting accumulation of rum fungus on Plaintiffs' real and personal property caused by Defendants' alcoholic beverage production operations on St. Croix.

108. Defendants have a duty to minimize and prevent the ethanol emissions from invading Plaintiffs' real and personal property since controls are available to destroy the ethanol before it escapes the Defendants' property.

109. Defendants have a duty to comply with the law of the United States Virgin Islands which includes refraining from engaging in conduct which constitutes the commission or maintenance of a "private nuisance" under 28 V.I.C Sec. 331 (2012) and the crime of "public nuisance" under 14 V.I.C. Sec 1461-1462 (2012).

110. Defendants have breached the duty owed to the plaintiffs by failing to abate the nuisance and/or continuing trespass through proper control of their ethanol emissions when they knew that their conduct was causing the accumulation of fungus to occur on Plaintiffs' real and personal property.

111. Defendants have breached the duty owed to the plaintiffs by failing and refusing to properly control their ethanol emissions when they were notified and asked to do so.

112. Defendants have breached the duty owed to the plaintiffs by failing to abate the nuisance and/or continuing trespass through proper control of their ethanol emissions.

113. Defendants have breached the duty owed to the plaintiffs by committing and maintaining a “public nuisance” as defined and prohibited by 14 V.I.C. Sec 1461-1462 (2012), in as much as said emissions are “offensive to the senses” and “an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of property by a considerable number of persons.” Upon information and belief, 1,000 residents of St. Croix, United States Virgin Islands are affected by the Defendants’ emission of ethanol.

114. Plaintiffs and others similarly situated did not consent to the invasion of their property.

115. As a direct and proximate result of the foregoing conduct of Defendants, rum fungus and ethanol from Defendants’ St. Croix alcoholic beverage production operations entered upon, accumulated upon, and physically invaded Plaintiffs’ real and personal property and the property of others similarly situated, thereby causing harm to the property of the Plaintiffs and others similarly situated by the accumulation of rum fungus which causes damage to their real and personal property, including an unsightly condition requiring abnormal, costly cleaning and maintenance, early destruction and weathering of surfaces causing unreasonable and substantial annoyance and unreasonable interference with the use and enjoyment of the property, and, as a result of which, the value, value of use and/or the rental value of the property has been reduced.

#### **COUNT IV – NEGLIGENT TRESPASS**

116. The foregoing allegations are re-alleged and incorporated herein.

117. Defendants knew or should have known that their alcoholic beverage production operations on St. Croix cause rum fungus to accumulate on real and personal property located in proximity to their operations, thereby causing injury to such properties.

118. “A number of years” prior to 2002, agents, servants and/or employees of Diageo, including, but not limited to master distiller Keith Law, conducted a “study” to determine the nature and cause of the black fungus observed by Diageo on its warehouses, production facilities, private dwellings in the vicinity of its facilities, improvements on privately owned real property and on personal property, including automobiles. Over the years leading up to 2002, Diageo learned that its ethanol emissions (“Angel’s Share” as Diageo calls it) “result in a film of organisms” on the surfaces of “warehouse walls and nearby trees.” Diageo knew that the “unusual feature” of this mold or fungus was that it created a “black film on walls near warehouses.” Diageo knew that this “black growth” on the surface of buildings would “change its appearance, increasing the need for painting and cleaning.” Diageo knew that its emissions of ethanol would result in claims for compensation by “householders and residents for the blackening of their buildings.” Instead of admitting its complicity in causing the black “film of organisms” by its ethanol emissions, Diageo has engaged in a public campaign denying any responsibility for the blackening of buildings, residences and personal property in the vicinity of its spirit aging warehouses. See Exhibit 1.

119. At all times material hereto, Defendant Cruzan witnessed firsthand the blackening of its warehouses and rum productions facilities as well as the blackening of real property improvements on neighboring real estate.

120. At all times material hereto, Defendant Cruzan knew that this blackening was a fungus or mold caused by its emission of ethanol from its rum production facilities and by 2007 its scientists were aware of the scientific literature published by Dr. James Scott, identifying this blackening agent as *Baudoinia compniacensis*.

121. It was reasonably foreseeable that Defendants' failure to properly construct, maintain, and/or operate its facilities could result in an invasion of Plaintiffs' possessory interests by ethanol emissions which were known by the Defendants to cause a blackening fungus to germinate and propagate.

122. Defendants have a duty to minimize and prevent the invasion of Plaintiffs' real and personal property by their ethanol emissions and resulting accumulation of rum fungus on Plaintiffs' real and personal property caused by Defendants' alcoholic beverage production operations on St. Croix.

123. Defendants have a duty to minimize and prevent the ethanol emissions from invading Plaintiffs' real and personal property since controls are available to destroy the ethanol before it escapes the Defendants' property.

124. Defendants have a duty to comply with the law of the United States Virgin Islands which includes refraining from engaging in conduct which constitutes the commission or maintenance of a "private nuisance" under 28 V.I.C. Sec. 331 (2012) and the crime of "public nuisance" under 14 V.I.C. Sec 1461-1462 (2012).

125. Defendants have breached the duty owed to the plaintiffs by failing to abate the nuisance and/or continuing trespass through proper control of their ethanol emissions when they knew that their conduct was causing the accumulation of fungus to occur on Plaintiffs' real and personal property.

126. Defendants have breached the duty owed to the plaintiffs by failing to abate the nuisance and/or continuing trespass through proper control of their ethanol emissions when they asked to do so.

127. Defendants have breached the duty owed to the plaintiffs by committing and maintaining a “public nuisance” as defined and prohibited by 14 V.I.C. Sec 1461-1462 (2012), in as much as said emissions are “offensive to the senses” and “an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of property by a considerable number of persons.” Upon information and belief, over 1,000 residents of St. Croix, United States Virgin Islands are affected by the Defendants’ emission of ethanol.

128. Plaintiffs and all other citizens of the United States Virgin Islands who have similarly suffered injury to their real and personal property on St. Croix are among those intended to be protected by 14 V.I.C, Sect 1461-1462 (2012), and the statute was designed to prevent the type of harm suffered by the Plaintiffs and others similarly situated. Therefore, the Defendants are negligent, per se.

129. As a result of the conduct alleged herein above, Defendants have recklessly or negligently caused their ethanol emissions to enter the atmosphere of Plaintiffs’ real property, resulting in the accumulation of rum fungus on Plaintiffs’ real and personal property.

130. As a direct and proximate result of the Defendants’ reckless or negligent conduct as alleged herein, rum fungus and ethanol from Defendants’ St. Croix alcoholic beverage production operations entered upon, accumulated upon, and physically invaded Plaintiffs’ real and personal property and the property of others similarly situated, thereby causing harm to the property of the Plaintiffs and others similarly situated by the accumulation of rum fungus which causes damage to their real and personal property, including an unsightly condition requiring abnormal, costly cleaning and maintenance, early destruction and weathering of surfaces causing unreasonable and substantial annoyance and unreasonable interference with the use and

enjoyment of the property, and, as a result of which, the value, value of use and/or the rental value of the property has been reduced.

#### **COUNT V – RIGHT TO INJUNCTIVE RELIEF**

131. The foregoing allegations are re-alleged and incorporated herein.

132. As a direct and proximate result of the Defendants' alcoholic beverage production operations on St. Croix, the property rights of the Plaintiffs and others citizens of the United States Virgin Islands similarly situated have been injured and continue to be injured by Defendants' conduct.

133. The accumulation of rum fungus caused by Defendants' operations immediately damages Plaintiffs' property rights and the property rights of others similarly situated.

134. The accumulation of rum fungus on Plaintiffs' property and the property of others similarly situated caused by Defendants' operations creates an unsightly condition requiring abnormal, costly cleaning and maintenance, early destruction and weathering of surfaces causing unreasonable and substantial annoyance and unreasonable interference with the use and enjoyment of the property, and, as a result of which, the value, value of use and/or the rental value of the property has been reduced.

135. Defendants' failure to capture and control its ethanol emissions is not essential to Defendants' St. Croix operations and, as such, there is no benefit to Defendants' conduct.

136. A number of different ethanol-capture technologies have been developed since 2005 that are 100% efficient in eliminating ethanol releases from aging warehouses and have determined that many of them, including regenerative thermal oxidizers (RTO) were cost-effective.

137. RTO's require no operational costs for fuel because they are fueled by the very ethanol they are designed to convert to CO<sub>2</sub> and water vapor.

138. RTO technology captures ethanol emissions by creating a slight negative pressure inside an aging warehouse, diverting the ethanol-enriched air, and burning the ethanol vapor.

139. This RTO technology captures 100% of all of a facility's ethanol emissions.

140. On or about 2005, Richard Whitford, Vice President of Adwest Technologies, designed a system for controlling ethanol emissions "to totally capture the ethanol gasses from the warehouses where the Brandy oak wood barrels were stored for aging." Whitford Affidavit ¶ 5 (Exhibit 2).

141. "During the early stages of the design, numerous meetings were held with the scientists and engineers from the consortium (four brandy companies in California). There were many long discussions on the methods of capturing and evacuating the ethanol gasses from the warehouses without sacrificing the natural aging process of the Brandy." Whitford Affidavit ¶ 6. "The design consisted of sealing off the warehouse, installing internal stainless air plenum at the roofline along the longest length of the warehouse and installing floor vents with actuated dampers opposite the upper plenum." *Id.* ¶ 10.

142. There are no ongoing costs to power the RTO's because the RTO utilizes the ethanol emitted from the brandy aging barrel for its source of power. (To date, six RTO's are operating without auxiliary fuel (natural gas or propane), collecting 100% of the ethanol emissions and achieving 99% destruction rate efficiency of the ethanol without sacrificing quality. *Id.* ¶ 12.



143. In May of 2011, one brandy maker, Gallo, applied for Emission Reduction Credits based on the ethanol captured and destroyed by its RTO technology.

144. The experience of the brandy makers in California demonstrates that the technology is available, affordable, and effective.

145. These brandy manufacturers are not reporting diminished product quality following the adoption of technology that captures 100% of their warehouses' ethanol emissions and continue to use this technology today.

146. A reduction of ethanol emissions by 100% and achieving 99% destructive rate efficiency would abate the nuisance or continuing trespass for all Plaintiffs and others similarly situated, without sacrificing quality.

147. Any differences between the design of rum and brandy aging warehouses will not impede Adwest's ability to apply the same RTO technology to rum aging warehouses and achieve the same results as were achieved on the brandy aging warehouses.

148. Remedies available at law, including monetary damages, are inadequate to compensate Plaintiffs' for the injury to their property as set forth herein.

149. The interests of the Plaintiffs and others similarly situated in protecting their property rights far exceeds the right of the Defendants to continue conduct which causes the accumulation of rum fungus on Plaintiffs' real and personal property and the property of others similarly situated.

150. Plaintiffs and others similarly situated are entitled to a permanent injunction requiring Defendants to abate the conduct, including excessive ethanol emissions, which causes the accumulation of rum fungus on Plaintiffs' property and the property of others similarly situated.

151. The Defendants' conduct creating the nuisance alleged herein can be corrected or abated at reasonable expense to the Defendant, and since it can be abated or corrected, public policy requires the Court to enter an order of permanent injunction to avoid a permanent nuisance.

152. The grant of the injunction will not unduly prejudice either the public or Defendants.

WHEREFORE, Plaintiffs, on behalf of themselves and the putative class members, respectfully demand that the Class be certified, that judgment be entered against Defendants for such amounts as will fairly and reasonably compensate Plaintiffs and the Class for their compensatory damages as may be proven, a permanent injunction, punitive damages, their costs herein including reasonable attorneys' fees, a trial by jury and for all other relief to which they may appear properly entitled.

Respectfully Submitted,



VINCENT A. COLIANNI  
VINCENT COLIANNI, II  
Colianni & Colianni  
1138 King Street  
Christiansted, St. Croix  
U.S. Virgin Islands 00820  
[vince@colianni.com](mailto:vince@colianni.com)  
[vinny@colianni.com](mailto:vinny@colianni.com)  
*Co-Counsel for Plaintiffs*

DATE: April 26, 2013

WILLIAM F. MCMURRY  
McMurry & Associates  
1201 Story Avenue, Suite 301  
Louisville, Kentucky 40206  
U.S.A.  
bill@courtroomlaw.com  
*Co-Counsel for Plaintiffs*

DOUGLAS H. MORRIS  
LEA A. PLAYER  
ROBYN BELL STANTON  
Morris & Player, PLLC  
1211 Herr Lane, Suite 205  
Louisville, KY 40222  
U.S.A.  
dhm@morrisplayer.com  
lap@morrisplayer.com  
rbs@morrisplayer.com  
Co-Counsel for Plaintiffs



WELCOME TO UTORwebmail  
MY.UTORONTO.CA ROSI FEEDBACK

Date: Tue, 17 Dec 2002 08:45:48 -0500  
 From: David\_Miller <DavidMiller@pigeon.carleton.ca>  
 To: "John.Campbell-Smith@diageo.com" <John.Campbell-Smith@diageo.com>, "Keith.Law@diageo.com" <Keith.Law@diageo.com>  
 Subject: FW: "black building" info  
 Part(s): 2 black mould Q & A.doc application/msword 34.21 KB

Hello John & Keith

This is most interesting. I can tell you though that the information that the black fungus is *A pullulans* and the like is not correct although these ubiquitous fungi are also present. It turns out that there is a common and most remarkable fungus that Dr. Scott has found in Ontario, France and Scotland. Along with a number of mycologists he is trying to find its correct name or give it one.

It is of no environmental or public health significance that people have got the mycology wrong over the years but as things get published, you might want to amend your public documents.

If you need or want more details, feel free to contact Dr. Scott who is in the Faculty of Medicine at the University of Toronto.

james.scott@utoronto.ca

J. David Miller  
 Professor & NSERC Research Chair  
 Department of Chemistry  
 Visiting Scientist, Health Canada

-----Original Message-----

From: J. David Miller [mailto:millerjd@ca.inter.net]  
 Sent: December 17, 2002 7:00 AM  
 To: David\_Miller  
 Subject: Fw: "black building" info

----- Original Message -----

From: <John.Campbell-Smith@diageo.com>  
 To: <millerjd@ca.inter.net>  
 Sent: Tuesday, December 17, 2002 5:08 AM  
 Subject: "black building" info

> I got this response this morning. I have talked to Keith and there is  
 > nothing commercially sensitive about this information, so you are free to  
 > pass it on. I am sure Keith would be keen to hear if the current study is  
 > coming up with anything.  
 >  
 > Keith can be contacted at  
 >  
 > Keith.Law@diageo.com

Plaintiffs  
 Exhibit 1

>  
 > Keith says that he and a colleague did a study of this topic some years ago  
 > in response to an internal management query. They accessed a number of  
 > papers on the topic, both published and unpublished.  
 >  
 > Regards  
 >  
 > ----- Forwarded by John Campbell-Smith/Operations/UK/UDV  
 > on 17/12/2002 11:05 -----  
 >  
 > Keith Law  
 > 17/12/2002 09:57  
 >  
 >  
 > To: John Campbell-Smith/Operations/UK/UDV@UDV  
 > cc: Rhona Ferrans/Operations/UK/UDV@UDV  
 >  
 > Subject: "black building" info (Document link: John Campbell-Smith)  
 >  
 > John  
 >  
 > your query re "black buildings" was passed to me by my colleague Rhona  
 > Ferrans.  
 > I was involved, a number of years ago in putting a paper together on the  
 > subject. I attach a copy and think this should answer a few of your  
 > questions.  
 >  
 > If wish to discuss further, please feel free to call.  
 >  
 > regards  
 >  
 > Keith Law  
 >  
 > 01259 766826  
 >  
 >  
 > (See attached file: black mould Q & A.doc)  
 >  
 >  
 >  
 >  
 >  
 > -----  
 > This email and any files transmitted with it are confidential and intended  
 > solely for the use of the individual or entity to which they are addressed.  
 > If you have received this email in error please notify the Diageo Service  
 > Desk on +44 (0) 131 319 6000  
 >  
 > This footnote also confirms that this email has been scanned for all  
 > viruses by the Messagelabs SkyScan service.  
 >  
 > <http://www.diageo.com>  
 >  
 >  
 > -----

**1. Why are your warehouses black, what causes this, what is the fungus called?**

There are a group of organisms in nature that have exploited the ecological niche of using atmospheric carbon compounds and atmospheric moisture as their food and water sources. These include some fungi, some bacteria and some algae. The organisms commonly grow on surfaces of trees, buildings and other objects.

One feature of Scotch whisky maturation is the evaporation of some spirit to the atmosphere - the "angel's share" - and this spirit is a source of carbon compounds to organisms who exploit atmospheric carbon sources. The result is a film of these organisms on surfaces such as warehouse walls and nearby trees. This is common wherever in the world spirits are matured.

The organisms in the film are common (ubiquitous) ones - occurring widely in nature. They include fungi such as *Aspergillus niger*, *Aureobasidium pullulans*, *Penicillium* sp and some micro algae. The only unusual feature, where there is a black film on walls near warehouses, is that the numbers of these organisms will be higher than in most other situations.

Similar higher levels and black colourations occur in other environments where atmospheric carbon is elevated - such as around bakeries

**2. What are the public health implications?**

As stated above, the organisms involved are ubiquitous in nature, and none are pathogens (disease causing). People have lived and worked in the vicinity of spirit warehouses for many generations in many parts of the world - there is no instance of a health problem being associated with the black growth.

**3. What is the impact on local residents and your employees?**

There is no adverse health impact. The only impact is visual - the appearance of buildings, trees and other objects. The black colouration is seen by some as enhancing the traditional appearance of warehouses and distilleries and making them more attractive. Others, such as householders near distilleries, may see the black colouration as diminishing the appearance of their property.

**4. What medical conditions are caused by the fungus and under what circumstances does this happen?**

To date there is no identifiable (or proven) link (or association) between the fungi involved and any medical condition.

**5. What measures are you taking to protect your employees?**

In view of the total absence of any evidence of any health hazard there is no need to take any specific precautions. We routinely monitor dust levels on all sites and where we identify high levels, such as in cooperages, dust extraction and filtration equipment is installed.

**6. Has an environmental risk assessment ever been made, what was the conclusion?**

Environmental Risk Assessments have been carried out at each Diageo warehousing complex where the presence of the blackening was noted but no significant risk was identified.

A specific environmental risk assessment on the black moulds has not been carried out.

Thoughts on Environmental impact:

Positive Environmental effects

Removal of Ethanol vapour from the atmosphere:

- Reduction in level of Volatile Organic Chemicals (VOC's)
- Less Ethanol In rainwater, which could otherwise give a high BOD (Biological Oxygen Demand) run off water into local waterways.

Negative Environmental Effects

Black growth on surface of buildings

- Changing the appearance
- Increasing the need for painting and cleaning

**7. What is Diageo's position on compensating homeowners and residents for the blackening of their buildings?**

The vast majority of people recognises this black colour on buildings and trees as a natural occurrence in the vicinity of distilleries and warehouses and accepts it as part of living close to these establishments. If any claim for compensation for the blackening of buildings was made to Diageo then each case would be considered individually.

A Scotch Whisky Association (SWA) position paper "Ethanol Emissions: Black Mould Concerns" is currently being drafted.

**8. What studies have been done to assess: how far the warehousing area is affected, what cosmetic changes take place within this area and what the environmental impact is?**

On-going seeking of data on any association with adverse affects on health.

Surveys of the occurrence of black colouration of company buildings and ways of removing black film or preventing black film developing.

**AFFIDAVIT OF RICHARD G. WHITFORD**

\*\*\*\*\*

Comes the Affiant, Richard G. Whitford, after first being duly sworn, and states as follows:

1. I am over the age of 18 and competent to give this Affidavit.
2. I am Vice President of Adwest Technologies, Inc., 1175 North Van Horne Way, Anaheim, California, 92806.
3. I have been retained by William F. McMurry as an expert witness in Merrick, et al. v. Brown-Forman Corporation, et al, Jefferson Circuit Court, Case No. 12-CI-03382; Merrick, et al. v. Diageo America Supply, Inc., U.S. District Court, Western District of Kentucky, Civil Action No. 3:12CV-344-CRS; and Mills, et al. v. Buffalo Trace Distillery and Beam, Inc., Franklin Circuit Court, Case No. 12-CI-00743.
4. I will summarize the process and the procedures that were implemented to capture and control the emissions from aging Brandy warehouses.
5. Starting in early 2005, I met with four (4) Brandy companies in California that had joined together to form a consortium of Brandy suppliers whose sole objective was to evaluate current availability and effective design technology to totally capture the ethanol gases from the warehouses where the Brandy oak wood barrels were stored for aging.
6. During the early stages of the design, numerous meetings were held with the scientists and engineers from the consortium. There were many long discussions on the methods of capturing and evacuating the ethanol gases from the warehouses without upsetting the natural aging process of the Brandy.

**Plaintiffs  
Exhibit 2**



7. No one warehouse was the same; one company conditioned the air in the warehouse, controlling the temperature and humidity throughout the life of the aging process. While other companies operated without temperature and humidity controls depending only on the ambient conditions of the warehouses.

8. A design specification was written by the Consortium and submitted to oxidizer suppliers:

“Background:

Brandy is aged in oak wood barrels. Each barrel can store up to 58 gallons of Brandy. One PG (Proof Gallons) is 50% Ethanol in one (1) gallon of Liquid. Brandy is typically aged at 105 proofs (52% Alcohol). Brandy is aged for a period of two to eight years depending on product. Brandy gets soaked into oak barrels, when it starts aging; a process with approximate duration of six months. After oak wood is saturated with Brandy, barrel starts loosing Brandy from surface by evaporation in to the warehouse which is construed as VOC (Volatile Organic Compounds). The average loss rate by weighting lots of barrels on annual basis in past at 1.5 Proof-Gallon/Barrel-Yr. One owner stores approximately 330,000 barrels of Brandy for aging, at a given instance of time for aging. The owner has six (6) warehouses with an average warehouse volume of 1,197,058 Ft<sup>3</sup> each. Each warehouse had two (2) 14' x 10' access doors for forklift loading of barrels”

9. Our design consisted of evaluating each warehouse building; warehouse size, roof area, wall area, exposed area, warehouse volume, envelope volume, available storage barrels, aisle storage barrels, loss rates and equilibrium concentration and warehouse air condition

(temperature/humidity) for converting the warehouse to a PTE (Permanent Total Enclosure) per EPA method 204 – consisting of pulling a vacuum on the warehouse of 0.007” w.c..


10. The design consisted of sealing off the warehouse, installing internal stainless air plenum at the roofline along the longest length of the warehouse and installing floor vents with actuated dampers opposite the upper plenum.

11. To meet OSHA PEL (personnel exposure limits) requirements, during normal operation all door and vents were to be closed. If personnel were to enter the warehouse to removal or add barrels or checking the quality of the Brandy, the vents were opened allowing fresh air into the warehouse. Based on the LEL (Lower Explosive Limit) content of the warehouse this could be up to eight hours prior to entering.

12. Over the next year Adwest and the Brandy Consortium engineers and scientists customized the design to assure that the natural aging process would not be altered. To this date the six (6) RTO (regenerative thermal oxidizers) are operating without auxiliary fuel (natural gas or propane), collecting 100% of the Ethanol fugitives and achieving 99% DRE (Destruction Rate Efficiency) of the Ethanol without sacrificing quality.

13. I am aware of the various whiskey aging warehouse designs in use today. I have reviewed photographs of whiskey aging warehouses at issue in the Kentucky litigation and utilized by Scotch whisky makers in Scotland, United Kingdom. While there are structural differences between wooden, metal and brick warehouses such that some warehouses have windows and other warehouses do not but use other forms of ventilation; and some warehouses have roof vents and other warehouses do not; none of these differences will impede Adwest's ability to apply the same RTO technology to these whiskey warehouses and achieve the same results as were achieved on the Brandy aging warehouses.

Further the Affiant Sayeth naught.

  
RICHARD G. WHITFORD

State of California  
County of Orange

On December 17, 2012 before me, Bardia Sadeghi  
personally appeared RICHARD G. WHITFORD who proved to me on the basis of satisfactory evidence to be the person whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his authorized capacity, and that by his signature on the instrument the person, or the entity upon behalf of which the person acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature 

