**IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS**

**DIVISION OF ST. CROIX**

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| **RYAN ALLEYNE, ENID V. ALLEYNE,****MICHAEL BICETTE,****MARCO BLACKMAN, ANISTIA JOHN, GEORGE JOHN, SUSIE SANES** and **ALICIA SANES,** on behalf of ANA VENTURA, on behalf of themselves and all others similarly situated,*Plaintiffs,* **v.****DIAGEO USVI, INC.** and**CRUZAN VIRIL, LTD.,***Defendants.* |  **Case No.: SX 2013-CV- 143** **CLASS ACTION** **JURY TRIAL DEMANDED** |

**DEFENDANTS DIAGEO USVI, INC. AND CRUZAN VIRIL, LTD.’S RULE 12(b)(6) MEMORANDUM IN SUPPORT OF THEIR JOINT MOTION TO DISMISS**

Defendants Diageo USVI, Inc. (“Diageo USVI”) and Cruzan VIRIL, Ltd. (“Cruzan”) respectfully move to dismiss the Complaint pursuant to Rule 12(b)(6) for failing to state a claim upon which relief can be granted.

**I. Introduction**

For centuries, rum has been produced and aged on St. Croix. Under the guise of nuisance and other common law claims, Plaintiffs are asking this Court to regulate ethanol emissions that occur during rum production and aging. Specifically, Plaintiffs are asking this Court to interfere with Defendants’ long-established practices for aging rum by demanding that they install regenerative thermal oxidizer (“RTO”) technology to capture and control ethanol emissions at their rum-aging facilities.

But Congress set up a comprehensive system to regulate air emissions—including ethanol emissions—through the Clean Air Act (“CAA”). And as numerous courts recently have held, the CAA’s comprehensive regulatory framework leaves “no room for a parallel track” where private plaintiffs can sidestep the expert federal and state agencies through a lawsuit alleging common law claims. *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2538 (2011) (“*AEP*”); *see also* *infra* at 11-12 (citing cases). This Court, too, should hold that Plaintiffs’ common law claims are preempted by the CAA.

Even if Plaintiffs’ claims were not preempted, they each fail. Plaintiffs premise each of their claims on the allegation that there is capture and control technology reasonably available for Defendants’ rum-aging facilities, and that Defendants have a newfound duty to alter their operations by implementing RTO technology. *See, e.g.,* Compl. ¶¶ 72, 88-92, 107-08, 122-26, 131-52. But Plaintiffs do not and cannot allege the existence of any state or federal statute or regulation, local ordinance, or other law requiring Defendants (or any other rum producer) to utilize capture and control technology at rum-aging facilities. Moreover, even though Defendants are highly regulated—and operate under permits issued by the USVI Department of Planning and Natural Resources (“DPNR”)—Plaintiffs do not and cannot allege that these permits require such technology. To the contrary, for over three decades, the United States Environmental Protection Agency (“EPA”) consistently has taken the position that, because of the negative impacts on product quality and costs, there is *no duty* to implement capture and control technology at distilled spirits aging facilities.

Plaintiffs’ request rests on nothing more than the fact that RTO technology is employed by makers of a wholly separate product—brandy—in one area of California, and Plaintiffs’ speculation that “it will work here too.” But Plaintiffs’ speculation is just that—speculation—and they plead no facts to plausibly support it. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (holding that, in order to survive a motion to dismiss, a plaintiff must plead facts—not “labels and conclusions”—that “raise a right to relief above the speculative level”). For this, and the additional reasons described below, each of Plaintiffs’ claims must be dismissed.

**II. Background**

 **A. Defendants’ Rum-Aging Facilities**

 The Nelthropp family has produced and aged rum under the name “Cruzan” in Estate Diamond for at least seven generations. St. Croix Chamber of Commerce, “Doing Business in the Virgin Islands”, http://www.stxchamber.org/doing\_business (last accessed July 24, 2013). In 2011, after establishing its production and aging operations in St. Croix and obtaining the necessary permits, Diageo USVI also began aging rum in Estate Diamond. Compl. ¶ 44. Today, rum is the only remaining major production industry on St. Croix.[[1]](#footnote-1)

 Rum is aged in oak barrels. Compl. ¶ 25. During this centuries-old aging process, alcohol vapor (ethanol) escapes from the barrels and is emitted into the atmosphere. *Id.* Ethanol emissions are a type of natural “volatile organic compound” or “VOC.” *Id.* As described in further detail below, in the CAA, Congress set up an extensive scheme to regulate the emissions of VOCs, including ethanol emissions. *See, e.g.*, 40 C.F.R. § 51.100(s) (defining “volatile organic compounds” to include ethanol); 12-9 V.I. R. & Regs. § 204-20(ddd) (defining “regulated air pollutants” to include “any volatile organic compounds”).

 Under the CAA, each state or territory must enact a state implementation plan or “SIP” consistent with the CAA’s mandates.[[2]](#footnote-2) The USVI’s SIP requires both Cruzan and Diageo USVI to maintain permits in order to operate their aging facilities. 12-9 V.I. R. & Regs. § 206-20(c). The USVI DPNR—working in concert with EPA—oversees the permitting process and Defendants’ emissions. 12 V.I.C. § 218(a)(2), (c) (requiring each proposed permit to be submitted to and approved by EPA); 12-9 V.I. R. & Regs. §§ 206-26, 206-27 (standards for DPNR review of construction and operation permit applications).

 For example, when Diageo USVI established its rum operations in St. Croix, it evaluated ethanol emissions, discussed them with EPA and DPNR,[[3]](#footnote-3) and submitted a permit application for its aging warehouse that explained the emissions should be treated as “fugitive” emissions—*i.e.,* emissions that cannot reasonably be captured through control technology.[[4]](#footnote-4) *See* Diageo USVI, Authority to Construct and Permit to Operate General Permit Application, Rum Storage Warehouses (May 2009) (“Permit Application”) (Exhibit 3). As the Permit Application explained:

The emissions from this facility should be treated as fugitive for the same reasons presented in a recent decision by the Indiana Office of Environmental Adjudication (Ref. 1; Attachment G). In this decision, the emissions from a Seagram’s Whiskey aging warehouse were deemed to be fugitive after considering the EPA definition of fugitive emissions, the reasonableness of collecting emissions, and extensive evidence presented regarding the negative effect the collection of ethanol emissions would have on the aging process.

*See id.* at 6-7 under “Project Description.”[[5]](#footnote-5)

 The Indiana Office of Environmental Adjudication decision, to which the Permit Application referred, found that ethanol “emissions are not collected at other similar facilities and that U.S. EPA has not identified any reasonably available control technology (RACT) for ethanol emissions from alcohol beverage aging warehouses.” In re: Objection to the Issuance of Part 70 Operating Permit No. T-137-6928-00011 for Joseph E. Seagram & Sons, Inc., Ripley County, Indiana, 2004 OEA 58, ¶ 21 (03-AZ-J-3003) (Aug. 4, 2004), *available at* http://www.in.gov/oea/decisions/2004oea58.pdf. Indeed, for over three decades, EPA has taken the consistent position that ethanol emissions from distilled spirits aging facilities cannot be reasonably captured due to cost and the negative impact that control technology would have on product quality. *See* EPA, EPA-450/2-78-013, Cost and Engineering Study – Control of Volatile Organic Emissions from Whiskey Warehousing, p. 1-4 (1978) (due to cost and effect on product quality, “control of emissions from whiskey warehousing [including empty barrel storage] has not been demonstrated at this time”) (Exhibit 4); EPA, EPA Contract 68-D2-0159, Emission Factor Documentation for AP-42 Section 9.12.3 – Distilled Spirits, Final Report, pp. 2-12 (1997) (noting “adverse impact” that ethanol control systems would have on product quality) (Exhibit 5); Letter from John C. Beale, Deputy Assistant Administrator for Air and Radiation, EPA, to the Honorable Robert C. Smith, U.S. Senate (Oct. 23, 2000) (EPA has not identified any “available technology which it considers to be RACT for alcohol beverage aging warehouses”) (Exhibit 6).

 Exercising their expert judgment, EPA and DPNR agreed that the emissions from Diageo USVI’s aging warehouse are “fugitive,” which was essential to Diageo USVI’s classification as a “minor source” rather than a “major source.” *See* 40 C.F.R. § 52.21(b)(1)(iii) (fugitive emissions “shall not be included in determining” whether source is a “major stationary source”); 12-9 V.I. R. & Regs. § 204-20(hh)(2) (stating the same). DPNR thus issued “minor source” permits to Diageo USVI for the construction and operation of its aging warehouse. *See* DPNR, Minor Source Permit Authority To Construct, Permit No. STX-792-A-B-09 (Exhibit 7); DPNR, Minor Source Permit To Operate, STX-792-A-B-11 (Exhibit 8). These permits did not require Diageo USVI to implement any type of control technology to stop ethanol from escaping from the rum-aging warehouse. Likewise, Cruzan’s permits have never required it to control ethanol emissions from its rum-aging warehouse. Plaintiffs could have—but did not—object to the Defendants’ final permits in territorial courts. *See* 12 V.I.C. § 206(e) (authorizing review of permit issuance).

 Exercising its authority under the USVI’s SIP, DPNR recently sent letters to Defendants regarding citizen complaints relating to Defendants’ ethanol emissions. *See* Letter from Alicia Barnes, Commissioner, DPNR, to Dan Kirby, Vice President, Diageo USVI (July 8, 2013) (Exhibit 9); Letter from Alicia Barnes, Commissioner, DPNR, to Gary Nelthropp, Vice President, Virgin Islands Rum Ltd. / Cruzan Rum (July 8, 2013) (Exhibit 10). As a result, Defendants and DPNR have begun a dialogue on the issue. Working with DPNR, Defendants hope to find an amicable resolution.

 **B. Plaintiffs**

 The named Plaintiffs own or rent property in subdivisions downwind of Estate Diamond, where Defendants operate their aging facilities.[[6]](#footnote-6) As the Court knows, the wind on St. Croix blows almost exclusively from the East—over HOVENSA, the Rohlsen airport, Estate Diamond, and then Enfield Green and William’s Delight. Exhibit 12. The named Plaintiffs are all to the west of the HOVENSA plant, the Rohlsen Airport, and the rum-aging warehouses, within the same downwind track.

 The named Plaintiffs complain that their properties exhibit stains, which they assert are caused by ethanol emissions emitted from Defendants’ facilities. Compl. ¶ 37. Specifically, they claim that the ethanol emitted from Defendants’ facilities—as opposed to the many other airborne contaminants (such as jet fuel residue from the airport) that have blown over their properties for years—“combine[s] with condensation on Plaintiffs’ property” to catalyze growth of a mold known as *Baudoinia compniacensis*. Compl. ¶¶ 30, 32. All of the named Plaintiffs or their landlords purchased the homes at issue between 1990 and 2007.[[7]](#footnote-7) This is long after rum-aging facilities, which allegedly cause such a “stain,” were operating in Estate Diamond. Compl. ¶ 37.

**III. Rule 12(b)(6) Standard**

 To survive a motion to dismiss, a complaint must demonstrate that the plaintiffs’ claims are more than just “conceivable,” but are in fact “plausible on [their] face.” *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 555 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). In applying this plausibility standard, the Court should disregard all conclusory statements, even when “couched as a factual allegation.” *Twombly*, 550 U.S. at 555 (internal quotation marks and citation omitted). Rather, the question is whether the *facts* pled demonstrate that the claims cross the threshold from “conceivable” to “plausible,” and therefore adequately state a claim for relief.[[8]](#footnote-8) Here, Plaintiffs have not stated a plausible claim for relief.

**IV. Argument**

**A. The Clean Air Act Preempts Plaintiffs’ Common Law Claims**

 A state law claim may be preempted through field preemption or conflict preemption. *North Carolina, ex rel. Cooper v. Tenn. Valley Auth.* (“*TVA*”), 615 F.3d 291, 303 (4th Cir. 2010). “Field preemption” occurs where the scheme of federal regulation is “so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it,” *id.* (quoting *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm.*, 461 U.S. 190, 204 (1983)), while “conflict preemption” precludes claims where state law “interferes with the methods by which the federal statute was designed to reach [its] goal,” *id.* (quoting *Intl. Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987)). Plaintiffs’ Complaint runs afoul of both. As numerous other courts recently have done, this Court should hold that that Plaintiffs’ common law claims are preempted by the CAA’s comprehensive framework for control and abatement of air emissions.

 **1. The CAA Provides A Comprehensive Framework For Regulating Air Emissions**

 The CAA comprehensively and pervasively regulates virtually all of the nation’s air emissions from all sources. *See TVA*, 615 F.3d at 298 (“To say this regulatory and permitting regime is comprehensive would be an understatement.”); *Bell v. Cheswick Generating Station*, 903 F. Supp. 2d 314, 322 (W.D. Pa. 2012), *appeal docketed*, No. 12-4216 (3d Cir. Nov. 16, 2012) (CAA “represents a comprehensive statutory and regulatory scheme”).  The CAA specifically addresses the alleged economic and property effects from air emissions about which Plaintiffs complain, in addition to public health concerns. *See* CAA § 302(h), 42 U.S.C. § 7602(h) (defining “effects on welfare” to include “damage to and deterioration of property” and effects on “vegetation,” “manmade materials,” “economic values,” and “personal comfort and well-being”).

 The Act sets forth an intricate and detailed framework for joint federal and state regulation of air emissions. EPA is tasked with developing National Ambient Air Quality Standards for air emissions that “cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare.” CAA §§ 108(a)(1)(A), 109, 42 U.S.C. §§ 7408(a)(1)(A), 7409. In turn, states are responsible for developing state implementation plans (“SIPs”) to provide for the “implementation, maintenance, and enforcement” of these standards within each state, which must be submitted to and approved by EPA. *Id.* § 110(a)(1), 42 U.S.C. § 7410(a)(1). Pursuant to the CAA, SIPs contain permit programs limiting the amounts and types of emissions that each permit holder is allowed to discharge.  *Id.* §§ 502(d)(1), 504(a), 42 U.S.C. §§ 7661a(d)(1), 7661c(a). SIPs also arm states with the ability to resolve citizen complaints about air emissions even after a permit is issued. *See, e.g.,* 12-9 V.I. R. & Regs. § 204-27(a) (addressing “air pollution nuisances”).

 Once approved by EPA, the provisions of these SIPs and any permits issued pursuant to them are federally enforceable by EPA and private citizens, as well as the applicable state. CAA §§ 113(b)(1), 304(a)(1), 42 U.S.C. §§ 7413(b)(1), 7604(a)(1).

 **2. Plaintiffs’ Claims Conflict With—And Are Preempted By—The CAA’s Comprehensive Regulatory Scheme**

 Recognizing this pervasive, finely crafted regulatory scheme, courts repeatedly have confirmed the CAA’s preemptive effect over common law claims. In *AEP*, the U.S. Supreme Court held that nuisance claims under the federal common law “cannot be reconciled with the decisionmaking scheme Congress enacted” in the CAA. 131 S. Ct. at 2540. Because the Act already “provides a means to seek limits on emissions” that formed the basis of the plaintiffs’ nuisance claims, the Court held that there is “no room for a parallel track” to limit emissions through the federal common law.[[9]](#footnote-9) *Id.* at 2538.

 Numerous other federal and state courts have applied the Court’s reasoning in *AEP* to hold that the CAA also preempts state common law claims. *See, e.g.*, *Bell*, 903 F. Supp. 2d at 321-22. Indeed, *every court* that has recently considered the issue has found that the Act preempts common law claims alleging that emissions regulated under the CAA cause a nuisance. *See Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849 (9th Cir. 2012) (federal common law nuisance claim for damages); *TVA*, 615 F.3d at 301-06 (state common law nuisance claim); *Bell*, 903 F. Supp. 2d at 322-23 (state common law claims for nuisance, negligence, trespass, and strict liability); *Comer v. Murphy Oil USA, Inc.*, 839 F. Supp. 2d 849, 865 (S.D. Miss. 2012) (state common law nuisance, trespass, and negligence claims), *aff’d*, 718 F.3d 460 (5th Cir. 2013); *United States v. EME Homer City Generation, L.P.*, 823 F. Supp. 2d 274, 296-97 (W.D. Pa. 2011) (state common law nuisance claim); *Freeman v. Grain Processing Corp.*, No. LACV 021232, (Muscatine Cnty. (Iowa) Dist. Ct. Mar. 27, 2013) (order granting Defendant’s motion for summary judgment) (state common law nuisance claim) (Exhibit 13).

 Plaintiffs’ common law claims here are likewise preempted. The CAA specifically addresses VOCs, including ethanol emissions. *See, e.g.,* 40 C.F.R. §51.100(s); 12-9 V.I. R. & Regs. §204-20(ddd). Exercising their authority under the CAA and USVI’s SIP, EPA and DPNR did not require the use of any control technology with respect to ethanol emissions from Defendants’ aging warehouses as part of the permitting process.

Moreover, if there is a nuisance of the type that Plaintiffs allege, then the nuisance provision in the USVI’s SIP specifically empowers DPNR to address it. *See* 12-9 V.I. R. & Regs. § 204-27(a) (prohibiting emissions that “cause injury, detriment, nuisance, [or] annoyance” or that “cause injury or damage to business or property”); 12 V.I.C. § 215 (authorizing DPNR to seek administrative and civil penalties and injunctive relief). Indeed, DPNR recently has engaged Defendants regarding their ethanol emissions, and the parties are in discussions. *See supra* at 7 and footnote 12 (discussing letters from DPNR).[[10]](#footnote-10)

Apparently unsatisfied with the permits issued to Defendants—and discontent to let the expert agencies address Defendants’ emissions through the tools in the CAA and USVI’s SIP—Plaintiffs are asking this Court to bypass the carefully crafted regulatory program and create an incompatible regime of regulation by common law. But, as other courts have done, this Court should recognize the “considerable potential mischief" in common law nuisance actions that place generalist courts in the role of primary regulator and apply “the strongest cautionary presumption against them.” *TVA*, 615 F.3d at 303. Allowing Plaintiffs to pursue their common law claims would upset the delicate equilibrium of state and federal authority and improperly insert this Court into the role of the expert executive agencies.

Although their claims are framed as a simple tort action, Plaintiffs are effectively asking the Court to impose additional limits on Defendants’ ethanol emissions beyond those deemed appropriate by EPA and DPNR. In *AEP*, the U.S. Supreme Court recognized Congress’ “prescribed order of decisionmaking”—in which “the first decider under the Act is the expert administrative agency” and courts participate only through “review [of] agency action”—provides a compelling reason to “resist setting emission standards by judicial decree” via tort law. 131 S. Ct. at 2539. The “complex balancing” inherent in the regulation of emissions is “entrust[ed] . . . to EPA in the first instance, in combination with state regulators.” *Id.*

 Congress’ decision to allocate primary regulatory responsibility to specialized executive agencies rather than to the courts reflects the relative expertise and institutional capabilities of these two branches of government. *See TVA*, 615 F.3d at 305 (“[W]e doubt seriously that Congress thought that a judge holding a twelve-day bench trial could evaluate more than a mere fraction of the information that regulatory bodies can consider.”). The appropriate amount of regulation for any particular air emission source “cannot be prescribed in a vacuum: . . . informed assessment of competing interests is required.” *AEP*, 131 S. Ct. at 2539. Recognizing the need for “a very high degree of specialized knowledge in chemistry, medicine, meteorology, biology, engineering, and other relevant fields that agencies rather than courts were likely to possess,” Congress “opted rather emphatically for the benefits of agency expertise” to develop emission standards and controls in place of judicially managed common law doctrines. *TVA*, 615 F.3d at 304-05.

 Unlike courts, executive agencies such as DPNR have the advantage of rulemaking. *See, e.g.*, 5 U.S.C. § 553 (governing federal agency rulemaking); V.I. R. & Regs. Ann. tit. 12 V.I.C. § 204(f) (authorizing DPNR to promulgate rules and regulations “after public comment or hearing on due notice”). The rulemaking process helps inform agency decisions by providing opportunities for input from “the varied and practical perspectives of industry and environmental groups” and has the added benefits of “providing proactive instead of reactive control . . . allowing flexibility in developing rules, and lowering the likelihood of disturbing reliance interests.” *TVA*, 615 F.3d at 305. Likewise, in the permitting process, the agencies are able to explore the scientific issues underlying air emissions, and to collaborate with both industry and the public in making a regulatory decision that balances the respective interests. *E.g.*, CAA § 502(b)(6), 42 U.S.C. § 7661a(b)(6).

 In contrast, courts are ill-suited for developing emission limits and controls. As the Supreme Court observed in *AEP*:

The expert agency is surely better equipped to do the job than individual district judges issuing ad hoc, case-by-case injunctions. Federal judges lack the scientific, economic, and technological resources an agency can utilize in coping with issues of this order. Judges may not commission scientific studies or convene groups of experts for advice, or issue rules under notice-and-comment procedures inviting input by any interested person, or seek the counsel of regulators in the States where the defendants are located. Rather, judges are confined by a record comprising the evidence the parties present. Moreover, federal district judges, sitting as sole adjudicators, lack authority to render precedential decisions binding other judges, even members of the same court.

131 S. Ct. at 2539-40. The Court thus left little doubt as to which branch of government is best suited to determine appropriate limits on emissions.

Despite these constraints, Plaintiffs propose that this Court determine—without reference to the CAA or the views of the EPA and the DPNR—what level of ethanol emissions from Defendants’ permitted operations is appropriate. Deciding Plaintiffs’ common law tort claims would require this Court to usurp the regulatory function that the CAA assigns to EPA and state and territorial regulators. In *AEP*, the Supreme Court held that decisions regarding “what amount of . . . emissions is unreasonable” and “what level of reduction is practical, feasible, and economically viable” were entrusted by Congress to the executive branch. 131 S. Ct. at 2540 (internal quotation marks omitted).

Applying this holding, numerous courts have found that the CAA preempts tort claims such as nuisance and trespass that would require a court to make similar determinations regarding the “reasonableness” of a defendant’s emissions. *Bell*, 903 F. Supp. 2d at 322 (dismissing state common law claims that “would require an impermissible determination regarding the reasonableness of an otherwise government regulated activity”); *Comer*, 839 F. Supp. 2d at 865 (dismissing state common law claims that “hinge[d] on a determination that the defendants’ emissions are unreasonable”); *Freeman*, No. LACV 021232 at 13 (reasonableness of a defendant’s emissions “is a judgment that has been entrusted by Congress to the EPA”).

 Similarly, Plaintiffs here ask this Court to find that Defendants’ ethanol emissions are “unreasonable,” Compl. ¶¶ 83, 115, 130, 134, and that those emissions “can be corrected or abated at reasonable expense,” *id.* ¶¶ 87, 88, 151. These determinations have already been entrusted by Congress to EPA and the DPNR. Accordingly, Plaintiffs’ attempt to bypass those agencies—and to transform this Court into the primary regulator of air emissions in the USVI—“cannot be reconciled with the decisionmaking scheme Congress enacted.” *AEP*, 131 S. Ct. at 2540.[[11]](#footnote-11) Plaintiffs’ claims are preempted and therefore should be dismissed with prejudice under Rule 12(b)(6). *See, e.g., Bell*, 903 F. Supp. 2d at 322-23 (holding plaintiffs’ common law claims are preempted; dismissing with prejudice pursuant to Rule 12(b)(6)).

 **B.** **Even If Not Preempted, Each Count Fails As A Matter Of Law**

Even if Plaintiffs’ claims are not preempted, each count fails as matter of law. As a threshold matter, although Plaintiffs premise each of their counts on the allegation that control technology is reasonably available and Defendants have a duty to implement it, they fail to plead facts plausibly supporting that allegation. For this and the additional reasons described below, these counts should be dismissed.

 **1. Plaintiffs Have Failed To Plausibly Plead A Duty To Control Ethanol Emissions**

Count I of the Complaint alleges a claim for negligence, which is now governed by the *Restatement (Third) of Torts: Liability for Physical and Emotional Harm* (Basic Principles) (2005) (hereinafter “*Restatement Third*”). *See* 1 V.I.C.§ 4; *see also Banks et al. v. Int’l Rental and Leasing Corp. d/b/a Budget Rent A Car,* S. Ct. Civ. No. 2011-0037, 2011 WL 6299025 (V.I. Dec. 15, 2011)*.* A critical element of a negligence claim is a duty of care. *See Nickeo v. Atlantic Tele-Network Co.*, Civ. No. 748/1997, 2003 WL 193435, at \*8 (V.I. Terr. Ct. Jan. 14, 2003) (explaining that, to “sue in negligence, a plaintiff must establish that the individual defendants had a duty of care to the plaintiff”). Here, the Complaint alleges that Defendants have breached a duty to use capture and control technology—specifically, RTO technology—to reduce ethanol emissions. Compl. ¶¶ 28-29, 72; 131-52. But the facts pled by Plaintiffs do not plausibly support such a duty.

As noted above, Plaintiffs do not and cannot allege the existence of any state or federal statute or regulation, local ordinance, or other law requiring Defendants (or any other rum producer) to use capture and control technology at rum aging facilities, much less to use RTO technology. Nor do Defendants’ operating permits require capture and control technology with respect to their rum-aging facilities. *See e.g.,* Exhibit 8. Indeed, Plaintiffs do not plead that any company anywhere has ever implemented such technology for a rum-aging warehouse.[[12]](#footnote-12)

To the contrary, for decades, the EPA consistently has taken the position that there is *no duty* to implement capture and control technology at distilled spirits aging facilities. *See supra at 5-6*. The EPA determined specifically with respect to rum that control technology is not reasonably available for aging facilities when it approved Maryland’s proposed requirements on a Seagram & Sons (“Seagram”) rum facility. In 2001, Maryland decided to adopt a rule defining reasonably available control technology (“RACT”)[[13]](#footnote-13) requirements for distilled spirits facilities. The only facility affected by Maryland’s rule was Seagram’s rum facility. When formulating this RACT rule, Maryland recognized the fundamentals of aging distilled spirits, and how a requirement to change air flows will damage the product. In its Technical Support Document developed to support this RACT rule, the Maryland Department for the Environment noted:

The VOC from the aging operation is released as fugitive emissions and is caused by the breathing of the barrels. The reaction within the barrel and the breathing are part of the aging cycle. Interference with the breathing of the barrels or changing the airflow interfere with the product quality.

MDE Technical Support Document, Control of Volatile Organic Compounds from Distilled Spirits Facilities, COMAR 26.11.19.20, p. 1.

 Maryland sought to have the EPA approve this RACT rule as part of its SIP. The rule imposes good management practice requirements on barrel filling and emptying and on storing empty barrels, but imposes no requirement to capture and control emissions from aging warehouses. In its Federal Register notice accepting this regulation as a SIP amendment, EPA stated:

Neither the proposed nor adopted version of Maryland’s RACT to control VOC emissions from distilled spirits facilities requires that VOCs be controlled from the aging warehouses. The Maryland regulation is not to be construed to mean that the required good operating practices manual extends to the aging process at the affected facility in Maryland.

66 Fed. Reg. 56220 (Nov. 7, 2001). EPA, of course, would not have accepted the rule as part of Maryland’s SIP had it concluded that technology to capture and control aging emissions was reasonably available. To the contrary, for decades, EPA has consistently determined that emissions from aging of distilled spirits, like whiskey and rum, cannot reasonably be captured due to costs and the negative impact on product quality. *See supra* at 6.

 In seeking to impose a newfound duty on Defendants and their rum-aging facilities—contrary to centuries of practice in the USVI and the views of the EPA—Plaintiffs point to the fact that brandy makers in an area of California now utilize RTO technology in response to regulation by a local agency, the San Joaquin Valley Unified Air Pollution Control District (“SJVUAPCD”). *See, e.g.*,Compl. ¶ 144. But there is nothing in the Complaint to *plausibly* suggest that implementation of RTO technology by makers of a separate product in a far-away locality is relevant—much less controlling—with respect to the feasibility of using RTO technology for rum aging in the USVI.[[14]](#footnote-14)

 The *Restatement Third’s* instructions on when, and when not, to recognize a duty also caution against this Court recognizing the new duty that Plaintiffs seek.[[15]](#footnote-15) Comment g. to § 7 (entitled “Duty”) provides:

g. *Deference to discretionary decisions of another branch of government*. Courts employ no-duty rules to defer to discretionary decisions made by officials from other branches of government, especially decisions that allocate resources or make other policy judgments. Courts often use the rubric of duty to hold that it is inappropriate to review these decisions in lawsuits.

In addition, Comment f. to § 7 states:

*f. Institutional competence and administrative difficulties.* Sometimes a particular category of negligence claims would be difficult for courts to adjudicate. Courts may have difficulty gathering evidence or drawing doctrinal lines necessary to adjudicate certain categories of cases. These administrative concerns may support adopting a no-duty rule. For example, when a plaintiff claims that it is negligent merely to engage in the activity of manufacturing a product, the competing social concerns and affected groups would be appropriate considerations for a court in deciding to adopt a no-duty rule.

In this case, as described in detail above, the question of whether Defendants should be required to implement capture and control technology—much less a specific type of technology—has been committed by Congress to the expert federal and state agencies pursuant to the CAA for many of the reasons identified in these Comments. *See AEP*, 131 S. Ct. at 2539-40 (discussing reasons why “[t]he expert agency is surely better equipped to do the job [of regulating air emissions] than individual district judges issuing ad hoc, case-by-case injunctions”). And Congress’ choice makes sense. These agencies, and not a generalist court, are better suited to address the complex scientific and policy questions underlying this issue.

For example: Will capture and control technology disrupt the rum-aging process, as EPA previously has recognized? How much ethanol must be captured to prevent the alleged “rum mold”? What type of capture and control technology will be required? At what cost? What if the capture does, as anticipated, have negative impacts on product quality or characteristics and thus sales? What are the potential implications on the St. Croix economy and other competing social concerns? These questions beg for the judgment of an expert agency acting through the notice and comment and permitting processes—not courts imposing newfound “duties” and injunctions based on amorphous common-law standards and a limited factual record.

 Moreover, Plaintiffs’ Complaint does not address—much less plausibly rebut—the “competing social concerns and affected groups” that weigh heavily in favor of this Court adopting a no-duty rule. *See Restatement Third* § 7 cmt. f. These factors include: (1) the importance of the rum industry to the economy of the Virgin Islands, (2) the history of rum production on St. Croix, (3) the long-established methodologies for aging rum, which Plaintiffs seek to alter; and (4) Defendants’ expectation interests based on the lack of any capture and control requirement in their permits.

 In summary, Plaintiffs’ Complaint fails to plead facts to plausibly support Plaintiffs’ proposed new duty and, in these circumstances, the *Restatement Third* cautions this Court against recognition of such a duty. Plaintiffs’ claim of negligence should be dismissed.[[16]](#footnote-16)

 **2. Plaintiffs Have Not Plausibly Pled A Nuisance Claim**

 In order to plausibly plead a nuisance claim (Count II), Plaintiffs must plead facts showing an invasion is “unreasonable.” *Bermudez v. Virgin Islands Telephone Corp.*, No. SX-10-CV-298, 2011 WL 321000, at \*10 (V.I. Super. Jan. 20, 2011) (citing *Restatement (Second) of Torts* § 822 (1979) (internal citations omitted)). Here, Plaintiffs attempt to plead this element of their claim by alleging that “[r]easonable and cost effective emissions control technology exists” (Compl. ¶ 29) and that “Defendants’ ethanol emissions can be corrected or abated at reasonable expense” (Compl. ¶ 88). When these conclusory allegations are disregarded, as the U.S. Supreme Court commanded in *Twombly* and *Iqbal, and* Judge Gomez confirmed in *Watts*,[[17]](#footnote-17) there is no factual basis alleged in the Complaint to plausibly support that Defendants have acted unreasonably by not implementing control and capture technology. *See supra* at 4-6. Accordingly, the nuisance claim must be dismissed.

Moreover, even if the centuries-old method of aging rum is now deemed a nuisance, Plaintiffs chose to “come to the nuisance” or *volenti non fit injuria*, meaning “to a willing person, injury is not done.” Section 840D of the *Restatement* *(Second) of Torts* provides that coming to the nuisance is “not in itself sufficient to bar [the] action, *but it is a factor to be considered in determining whether the nuisance is actionable*.” *Restatement (Second) of Torts* § 840D (1979) (emphasis added).

Rum production and aging operations have been conducted at Cruzan’s present location for more than 220 years. According to Plaintiffs’ own allegations, the alleged *Baudoinia compniacensis* caused by rum production and aging “is *very* visible on homes, businesses, vehicles, trees/plants and fruits/vegetables and is unsightly and damaging.”  Compl. ¶ 37 (emphasis added).  Plaintiffs, of course, were born well after rum aging was taking place in Estate Diamond, and public records demonstrate that they, or their landlords, moved into the properties at issue here between 1990 and 2007.[[18]](#footnote-18) If such a nuisance existed, it would have been known to Plaintiffs when they purchased real estate or began residing in the area and to the developers of these sub-divisions.

The *Restatement* (*Second) of Torts* provides an analogous illustration:

A operates a brewery in a former residential area in which industrial plants are beginning to appear. The brewery noises, odors and smoke interfere with the use and enjoyment of the land of B adjoining it. C buys the land from B, moves in upon it and brings an action for the private nuisance. The fact that C has come to the nuisance, together with the changing character of the locality, may be sufficient to prevent recovery.

*Restatement (Second) of Torts* § 840D, illus. 3 (1979). This case even more strongly calls for finding that Plaintiffs’ claim is not actionable. This is not a case where rum operations are just “beginning to appear,” as in the illustration above. *Id.* The aging of rum—and thus the release of ethanol and the alleged blackening that Plaintiffs’ claim it causes—has been occurring for centuries in Estate Diamond. Compl. ¶ 37. To the extent there is a nuisance, Plaintiffs have “come to the nuisance” and, for this reason too, this Court should find that their claim is not actionable. *See also Leonard v. Gagliano*, 459 S.W.2d 732, 735-36 (Mo. Ct. App. 1970) (affirming district court’s determination that the defendants’ activities were consistent with the zoning and industrial character of the area, that the plaintiffs chose to come to the nuisance, and that their nuisance claim therefore was not actionable).

 **3**. **Plaintiffs’ Trespass Claims Fail**

Counts III and IV are claims for intentional and negligent trespass. Liability for trespass in the Virgin Islands is governed by Chapter 7 of the *Restatement (Second) of Torts* (§§ 157-166) (1965). *See* 1 V.I.C. § 4. Both trespass claims should be dismissed for two reasons. First, Plaintiffs base their trespass claims—like their other claims—on the alleged availability of capture and control technology and an alleged duty to implement such technology, without alleging any plausible factual support. Second, even accepting Plaintiffs’ factual allegations as true, Defendants have not “physically invaded” their property with “tangible matter.” *See, e.g., Bormann v. Bd. of Supervisors*, 584 N.W.2d 309, 315 (Iowa 1998) (“Trespass comprehends an actual physical invasion by a tangible matter.” (internal quotation marks and citation omitted)).

Plaintiffs’ negligent and intentional trespass claims both rest on the common allegation that “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.” Compl. ¶ 108 (Intentional Trespass) (emphasis added); Compl. ¶ 123 (same allegation with respect to Negligent Trespass); *see also* Compl. ¶¶ 111, 112, 125, 126. But, for the reasons described above, Plaintiffs have failed to plead facts plausibly demonstrating that control technology is reasonably available to capture ethanol from Defendants’ rum-aging facilities. Accordingly, the trespass claims should be dismissed.

In addition, Plaintiffs’ trespass claims fail because, even if Defendants’ ethanol emissions enter into the atmosphere and drift over their land as Plaintiffs allege, that does not constitute a physical intrusion of a tangible item necessary to make out a trespass claim. The “gist of the tort” of trespass is the “intentional interference with rights of exclusive possession.” Dan B. Dobbs, *The Law of Torts* § 50 at 95-96 (2000). Thus, the tort of trespass is committed when a person “enters or causes direct and tangible entry upon the land in possession of another.” *Id.*; *see also Restatement (Second) of Torts* § 158 (Intentional Trespass) (1965) (dealing with “entry” onto land); *id.* § 165 (Negligent Trespass) (same); *Hodge v. McGowan,* 50 V.I. 296 (V.I. 2008) (citing § 158).

The “entry,” moreover, must be through *“tangible*” matter.[[19]](#footnote-19) Thus, the Comments to the *Restatement* sections on both intentional and negligent trespass discuss the physical entry by a person—or by a person causing a tangible item to enter another’s property—like throwing a rock onto another’s property. *See also id.* § 158, illus. 5 (describing the placement of a dam that causes water to back up onto another’s land). But there are no Illustrations—and nothing else in the *Restatement*—suggesting that something invisible like ethanol that can only be detected by air testing can constitute a trespass. Compl. ¶ 103 (ethanol is “identifiable by existing means of air testing”). To the contrary, the traditional rule is that the “intentional introduction onto the land of another of smoke, gas, noise, [and] the like” generally “is not actionable in trespass.” W. Page Keeton *et al*., *Prosser and Keeton on the Law of Torts* § 13, at 71 (5th ed. 1984).

Plaintiffs attempt to avoid dismissal by deeming ethanol “tangible.” Compl. ¶ 103. But particularly under *Twombly*, saying does not make it so. *Twombly,* 550 U.S. at 555 (conclusory statements irrelevant). Moreover, pursuant to 1 V.I.C. § 42 (Words and Phrases), “[w]ords and phrases shall be read with their context and shall be construed according to the common and approved usage of the English language.” And the common meaning of “tangible” does not cover an invisible substance like ethanol. *Black’s Law Dictionary* 1592-93 (9th ed., 2009) explains:

**tangible,** *adj.* (16c) **1.** Having or possessing physical form; CORPOREAL. **2.** Capable of being touched and seen; perceptible to the touch; capable of being possessed or realized. **3.** Capable of being understood by the mind.

 Applying the traditional understanding of trespass and the plain meaning of “tangible,” a number of courts have rejected that invisible particle matters like ethanol drifting from one property onto another can constitute trespass. *See, e.g., Johnson*, 817 N.W.2d at 701 (applying the “traditional formulation of trespass” and rejecting as a matter of law trespass claim based on pesticide sprayed on defendant’s property allegedly drifting onto plaintiff’s property); *Spicer v. City of Norfolk*, 46 Va. Cir. 535, at \*6-7 (Va. Cir. 1996) (holding invisible gases and microscopic particles are not tangible, and thus cannot constitute a trespass).

Trespass is a limited tort dealing with “physical intrusions” and not other “annoyances.” *Restatement (Second) of Torts*  ch. 7, topic 1, intro. note at 276 (1965). The gravamen of Plaintiffs’ complaint is that an invisible particle matter (ethanol) drifted from Defendants’ rum-aging warehouses over their properties, and combined with natural elements to catalyze the growth of *Baudoinia compniacensis*. *See* Compl. ¶¶ 97, 100-101, 118. If Plaintiffs have a claim at all—and for the reasons described above they do not—it sounds in nuisance, not trespass. *See, e.g.*, *Restatement (Second) of Torts* § 821D (1979) (“A private nuisance is a nontrespassory invasion of another’s interest in the private use and enjoyment of land.”); *L’Henri, Inc. v. Vulcan Materials,* Civ. No. 2006-177, 2010 WL 924259 (D.V.I. Mar. 11, 2010) (same). Plaintiffs’ attempt to blur the line between these distinct torts should be rejected.

Accepting the facts in Plaintiffs’ Complaint as true, and disregarding the conclusory allegation that ethanol is “tangible,” Defendants have not caused a tangible item to enter Plaintiffs’ land and interfere with their exclusive right to possession. Accordingly, Counts III and IV must be dismissed.

**4. The Injunctive Relief Count Does Not State A Cause Of Action**

 Finally, Plaintiffs frame their demand that this Court order Defendants to implement control technology as a free-standing cause of action entitled “Injunctive Relief.” In the USVI, however, there is no separate cause of action for “injunctive relief.” Rather, it is only a remedy under Chapter 48 of the *Restatement*. *See Restatement (Second) of Torts*, ch. 48, intro. note at 556 (1965) (“This Chapter deals with the remedy of injunction . . .”).[[20]](#footnote-20) Even if “Injunctive Relief” was a cause of action, moreover, it would fail because it rests on Plaintiffs’ same speculative and deficient allegation that control technology is reasonably available for Defendants’ rum-aging facilities. Compl. ¶¶ 131-52. Count V should be dismissed.

**V. Conclusion**

Plaintiffs request that this Court push aside the expert agencies that Congress delegated to regulate air emissions and impose a newfound duty on the centuries-old rum industry. But that request is preempted by the Clean Air Act. Moreover, Plaintiffs have failed to plead facts, as opposed to labels and conclusions, plausibly supporting the elements of their claims. Because Plaintiffs’ claims are fundamentally flawed—and no amount of re-pleading can fix them—this Court should dismiss the Complaint, and this case, with prejudice.

**Dated:**  July 29, 2013

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**CERTIFICATE OF SERVICE**

 I hereby certify that on this 29th day of July, 2013, I filed the foregoing with the Clerk of the Court, and delivered as indicated to the following:

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1. Rum has always been critical to the St. Croix economy. In the early days, it was a main export. In fact, during the Great Depression, it helped the federal government keep the island functioning. Darwin Creque, *From ‘Poorhouse’ To Prosperity*, V.I. Daily News, Aug. 2, 1965, at 28-29; Charles Hillinger, *Caribbean Rum Trade Blends History With Success*, LA Times (May 25, 1987), *available at* http://articles.latimes.com/1987-05-25/business/fi-1514\_1\_sugar-cane (last accessed July 24, 2013). As noted above, today, rum is the only remaining major production industry on St. Croix. *See, e.g.,* Governor's statement as quoted in *Other Nations' Attack on V.I. Rum Cover-Over is Misguided*, V.I. Daily News, (Apr. 19, 2013), *available at* http://virginislandsdailynews.com/op-ed/other-nations-attack-on-v-i-rum-cover-over-is-misguided-1.1475403 (last accessed July 24, 2013). [↑](#footnote-ref-1)
2. The U.S. Virgin Islands and other territories are assigned the same rights and responsibilities as states under the CAA. CAA § 302(d), 42 U.S.C. § 7602(d) (defining “State” to include “the Virgin Islands” and other territories). When discussing the CAA and its obligations, this memorandum will refer to territories as states.

 [↑](#footnote-ref-2)
3. Letter from Richard C. Hittinger, President, Alliance Envtl. Grp., Inc., to Frank Jon, Envtl. Eng’r, U.S. EPA Region 2 (Mar. 16, 2009) (Exhibit 1); Letter from Richard C. Hittinger, President, Alliance Envtl. Grp., Inc., to Nadine Noorhasan, Dir., U.S.V.I. DPNR, Div. of Envtl. Prot. (Jan. 23, 2009) (Exhibit 2).

 [↑](#footnote-ref-3)
4. “Fugitive emissions” are those which “could not reasonably pass through a stack, chimney, vent, or other functionally equivalent opening.” 40 C.F.R. § 52.21(b)(20); 12 V.I.C. § 202(k). Fugitive emissions are not considered in determining whether a stationary source is a “major source” and thus subject to additional permitting requirements under Title V of the CAA. 12-9 V.I. R. & Regs. § 204-20(hh)(2); *id.* § 206-51(a)(1) (“Any major source” is required to obtain a Title V permit). [↑](#footnote-ref-4)
5. The Court can take judicial notice of—and consider for purposes of this motion to dismiss—the Defendants’ permits and application materials, the EPA and state regulatory documents, Plaintiffs’ property records, and the other public records cited by Defendants. *See* *In re Kelvin Manbodh Asbestos Litigation Series*, No. 324/1997, 2006 WL 1084317, at \*3 (D.V.I. Mar. 6, 2006) (court can consider on a motion to dismiss “matters that the court can take judicial notice of”); *see also* *Papasan v. Allain,* 478 U.S. 265, 268 n.1 (1986) (“Although this case comes to us on a motion to dismiss under Federal Rule of Civil Procedure 12(b), we are not precluded in our review of the complaint from taking notice of items in the public record . . . .”). [↑](#footnote-ref-5)
6. Warranty Deed No. 4126/1992 between 1845 Corporation and Alleyne (Recorded Jul. 21, 1992); Warranty Deed between Robles and Bicette (Recorded Feb. 25, 2005); Warranty Deed between Billman and Blackman (Recorded May 11, 2005); Warranty Deed between Kasdan and John (Recorded June 7, 2007); Warranty Deed between Noel and Grouby (Recorded Oct. 12, 2000); Warranty Deed No. 5986/1990 between Hernandez and Rivera (Recorded Aug. 22, 1990). *See* Exhibit 11. [↑](#footnote-ref-6)
7. Alleyne in 1992, Bicette in 2005, Blackman in 2005, John in 2007, and the owners of the property rented by A. Sanes in 2000 and S. Sanes in 1990.
 [↑](#footnote-ref-7)
8. As Judge Gomez recently explained:

To determine the sufficiency of a complaint . . . a court must take three steps: First, the court must ‘tak[e] note of the elements a plaintiff must plead to state a claim.’ . . . . Second, the court should identify allegations that, ‘because they are no more than conclusions, are not entitled to the assumption of truth’ . . . . Finally, ‘where there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement for relief.’

*Watts v. Blake-Coleman*,No. 2011-61, 2012 WL 1080323, at \*2 (D.V.I. Mar. 29, 2012). [↑](#footnote-ref-8)
9. The Supreme Court did not rule on the CAA’s preemptive effect on state common law claims because no party had addressed the issue in briefing; instead, that decision was reserved for the court on remand. *AEP*, 131 S. Ct. at 2540. Tellingly, however, the *AEP* plaintiffs voluntarily dismissed their state law claims upon remand. *See* *Connecticut v. Am. Elec. Power Co.*, 406 F. Supp. 2d 265 (S.D.N.Y. 2009) (Notice of Voluntary Dismissal). [↑](#footnote-ref-9)
10. In addition, Plaintiffs could bring a citizen suit under the CAA in federal district court to challenge Defendants’ compliance with their operating permits and any standard in the USVI SIP. Before doing so, Plaintiffs would have to provide DPNR with adequate notice and the opportunity to take action. CAA § 304(b)(1)(A), 42 U.S.C. § 7604(b)(1)(A). This ensures that “it is [the agency], not the citizens, who is principally responsible for enforcing the law.” *Citizens for Clean Power v. Indian River Power*, *LLC*, 636 F. Supp. 2d 351, 357 (D. Del. 2009). [↑](#footnote-ref-10)
11. Plaintiffs may argue that their claims are preserved by one of the CAA’s two general savings provisions. Neither savings clause, however, limits the Act’s preemptive effect over common law claims. *See* CAA §§ 304(e) (limiting preemptive effect of requirements “in this section,” *i.e.,* requirements applicable to federal citizen suits), 116 (preserving state authority to adopt more stringent emission standards), 42 U.S.C. §§ 7604(e), 7416. Moreover, a general savings clause “cannot in reason be construed as allowing a common law right, the continued existence of which would be absolutely inconsistent with the provisions of the act.” *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1748 (2011) (“[T]he act cannot be held to destroy itself.”). Indeed, several federal and state courts have considered this issue and held that the CAA’s savings clauses do not preserve state common law claims of the type at issue here. *TVA*, 615 F.3d at 303-04; *Bell*, 903 F. Supp. 2d at 322; *Freeman*, No. LACV 021232 at 19-21. [↑](#footnote-ref-11)
12. DPNR’s recent letters to Defendants raise the possibility of informally resolving citizen complaints by reducing ethanol emissions and helping to clean homes. *See* Letter from Alicia Barnes, Commissioner, DPNR, to Dan Kirby, Vice President, Diageo USVI (July 8, 2013) (Exhibit 9); Letter from Alicia Barnes, Commissioner, DPNR, to Gary Nelthropp, Vice President, Virgin Islands Rum Ltd. / Cruzan Rum (July 8, 2013) (Exhibit 10). But on their face, these letters are merely invitations for DPNR and Defendants to resolve amicably whether and how ethanol emissions should be reduced. The letters are not findings that ethanol emissions control technology is required or feasible or that the type of emissions control requested by Plaintiffs, RTO, is even feasible. The EPA has never concluded that emissions control technology is feasible in connection with rum aging. These letters do not change that fact. As described above, what these letters do make plain is that the agencies charged with regulating air emissions under the CAA—the EPA and DPNR—are doing what Congress intended that they, and not the courts, do. [↑](#footnote-ref-12)
13. The phrase “reasonably available control technology” is interpreted by the EPA to mean the lowest emission limitation that a particular source is capable of meeting by the application of control technology that is reasonably available considering technological and economic feasibility. 44 Fed. Reg. 53762 (Sept. 17, 1979). [↑](#footnote-ref-13)
14. Plaintiffs claim that “[a]ny 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 brandy aging warehouses.” Compl. ¶ 147. But this is precisely the type of conclusory allegation that was rejected as irrelevant and insufficient in *Twombly*, 550 U.S. at 555. Moreover, on the face of the relevant SJVUAPDCD Rule—and as the accompanying Staff Report makes clear—neither SJVUAPCD’s analysis nor the Rule itself extend beyond brandy and wine-aging. *See* SJVUAPCD Rule 4695, 2.0 (“Applicability: This rule shall apply to brandy aging and wine aging operations.”), *available at* http://www.valleyair.org/rules/1ruleslist.htm (last accessed July 24, 2013); Final Draft Staff Report for New Draft Rule 4695, at 3 (Aug. 9, 2009) (”[W]hiskey aging is not considered or included in this rule development process”) (Exhibit 14). [↑](#footnote-ref-14)
15. Plaintiffs’ request that this Court order Defendants to abate the alleged emissions by requiring Defendants to install an emissions control system is a claim for equitable relief that would be decided by this Court, not a jury. *See University of Virgin Islands v. Petersen-Springer*, 232 F. Supp. 2d 462 (D.V.I. 2002) (citing *Newfound Management Corp. v. Lewis*, 131 F.3d 108, 115 (3d Cir. 1997) (“Although actions at law entitle a party to a jury trial, cases in equity do not.”)). [↑](#footnote-ref-15)
16. Plaintiffs also appear to assert a claim for negligence *per se* based on the alleged violation of the civil and criminal statutes regarding private and public nuisances, 28 V.I.C § 331 and 14 V.I.C. §§ 1461-1462. *See* Compl. ¶ 71. But these statutes are irrelevant to the negligence claim. These statutes are not designed to protect against a particular type of conduct or a certain class of individuals. *See Restatement Third* §14 (negligence *per se* only applies where the statute at issue “is designed to protect against the type of accident the actor’s conduct causes, and if the accident victim is within the class of person the statute is designed to protect”). Nor do they provide any sort of standard or structure that would aid the negligence determination. *See* *id.* §14 cmt. f (with respect to “[s]tatutes that duplicate the common law” that courts “more frequently . . . reject negligence *per se*, recognizing its redundancy and appreciating that it does not serve its typical function of simplifying or providing structure to the rendering of negligence determinations”). To the extent that Plaintiffs claim negligence *per se*, that claim should be rejected. [↑](#footnote-ref-16)
17. Judge Gomez admonished in *Watts,* 2012 WL 1080323, at \*1, that, in ruling on a Rule 12(b)(6) motion, “the court should identify allegations that, ‘because they are no more than conclusions, are not entitled to the assumption of truth’ . . . .” This admonition is particularly applicable to Count II, which rests on numerous conclusory statements, without specific facts to support those conclusions.

 [↑](#footnote-ref-17)
18. *See supra* n. 6, and accompanying text. [↑](#footnote-ref-18)
19. *See, e.g., Johnson v. Paynesville Farmers Union Cooperative Oil Co.,* 817 N.W.2d 693, 701 (Minn. 2012)(“Our case law is consistent with this traditional formulation of trespass because we have recognized that a trespass can occur when a person or tangible object enters the plaintiff's land.”); *City of Bristol v. Tilcon Minerals, Inc.*, 931 A.2d 237, 258 (Conn. 2007) (“[B]ecause it is the right of the owner in possession to exclusive possession that is protected by an action for trespass, it is generally held that the intrusion of the property be physical and accomplished by tangible matter.”); *Bormann*, 584 N.W.2d at 315 (“Trespass comprehends an actual physical invasion by a tangible matter.” (quoting *Ryan v. City of Emmetsburg*, 4 N.W. 2d 435, 438 (Iowa 1942))); *Adams v. Cleveland-Cliffs Iron Co.*, 602 N.W.2d 215, 222 (Mich. App. 1999) (“[W]e prefer to respect the traditional requirement of a direct invasion and agree with Prosser and Keeton, supra at § 13, p. 72, that ‘[t]he historical requirement of an intrusion by a person or some tangible thing seems the sounder way to go about protecting the exclusive right to the use of property.’ Recovery for trespass . . . is available only upon proof of an unauthorized direct or immediate intrusion of a physical, tangible object onto land over which the plaintiff has a right of exclusive possession.”). [↑](#footnote-ref-19)
20. By analogy, courts applying Virgin Islands law routinely strike separate counts that seek punitive damages, which also is merely a remedy. *See, e.g., Abraham v. St. Croix Renaissance Grp., L.L.L.P*, Civ. No. 2008-071, 2013 WL 2128539, at \*2 n.3 (3d Cir. May 17, 2013) (a count denominated “Punitive Damages” is not a freestanding cause of action); *Galloway v. Islands Mech. Contractor, Inc.*, Civ. No. 08-cv-71, 2013 WL 163811, at \*1 (D.V.I. Jan. 14, 2013) (punitive damages is a remedy, not a cause of action). [↑](#footnote-ref-20)