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

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-143

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS CRUZAN VIRIL, LTD. AND DIAGEO USVI'S JOINT RULE 12(F) MOTION TO STRIKE OR, IN THE ALTERNATIVE, FOR A MORE DEFINITE STATEMENT UNDER RULE 12(E) AND PROPOSED ORDERS

INTRODUCTION

Defendants operate rum production and aging facilities on the Island of St. Croix. Plaintiffs filed a class action alleging Defendants' operations release large amounts of ethanol which penetrate well beyond the boundaries of their properties onto Plaintiffs' properties. This penetrating ethanol creates an ethanol rich incubator triggering rapid overgrowth of *Baudoinia compniacensis*, an unsightly and destructive fungus, on Plaintiffs' property.

On July 26, 2013, Defendants filed both a Rule 12(b)(6) Motion to Dismiss and a Rule 12(f) Motion to Strike. The Rule 12(f) Motion to Strike asks this court to strike the class allegations from Plaintiffs' Complaint on the theory that Plaintiffs "have not attempted to plead a threshold element for class certification under Rule 23 – the geographic scope of their purported classes." (Defendants' Memorandum in Support of Their Motion to Strike, p.1).

ARGUMENT

I. DEFENDANTS' ARGUMENTS DO NOT RAISE GROUNDS SUFFICIENT TO STRIKE ANY PART OF THE COMPLAINT UNDER RULE 12(F)

Fed. R. Civ. P. 12(f) states:

> The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. The court may act:
> (1) on its own; or
> (2) on motion made by a party either before responding to the pleading or, if a response is not allowed, within 21 days after being served with the pleading.

Motions to strike are highly disfavored and are rarely granted. George v. Wenhaven, Inc., Case No. ST-12-CV-34, 2012 V.I. LEXIS 66, *7 n17 (Super. Ct. VI St. Thomas & St. John Sept. 28, 2012); Merchants Commercial Bank v. Tillet, 55 V.I. 121, 124 (Super. Ct. VI St. Thomas & St. John 2011); Government Guar. Fund v Hyatt Corp., 34 VI 257, 261, 166 F.R.D. 321 (DCVI 1996). Such motions should not be granted unless the allegations in question have no relation to the controversy or are clearly prejudicial to the moving party. Id. The movant has the burden of demonstrating that no evidence in support of the allegations would be admissible, that the allegations have no bearing on issues in case, and that to permit the allegations to stand would result in prejudice to the movant. Berke v Presstek, Inc., 188 F.R.D. 179, 180 (DNH 1998). Any doubts must be resolved against the motion and in favor of the allegations of the pleading. Walmac Co. v. Isaacs, 15 F.R.D. 344, 345 (D.R.I. 1954)

Class allegations are not a defense. Thus, a motion to strike a class definition is not a motion to strike an insufficient defense from a pleading. Further, Plaintiffs' class allegations are related to the controversy. Thus, they are not immaterial. Defendants' motion does not argue that the class allegations are redundant, impertinent, or scandalous matter. Thus, Defendants' arguments do not fit within the subjects for a motion to strike as set out in Fed. R. Civ. P. 12(f).

II. STRIKING THE CLASS ALLEGATIONS OR TREATING DEFENDANTS' MOTION AS AN EARLY MOTION TO DENY CLASS CERTIFICATION WOULD BE PREMATURE

On rare occasions, a District Court may have the authority to strike class action allegations prior to discovery when presented with a Rule 12(b)(6) motion. S. Broward Hosp. Dist. v MedQuist, Inc., 516 F.Supp. 2d 370, 401 (D.C.N.J. 2007) affd (2007, CA3 NJ) 258 Fed Appx 466 (3rd Cir. 2007) citing Clark v. McDonald's Corp., 213 F.R.D. 198, 205 n.3 (D.N.J. 2003). However, class allegations should only be struck "in those rare cases where the complaint itself demonstrates that the requirements for maintaining a class action cannot be met." Id. citing In re Ford Motor Co. Ignition Switch Prods. Liab. Litig., 174 F.R.D. 332, 338 (D.N.J. 1997). "[T]he better course is to deny such a motion because 'the shape and form of a class action evolves only through the process of discovery.'" 516 F. Supp. 2d at 401-402 quoting Gutierrez v. Johnson & Johnson, Inc., 2002 U.S. Dist. LEXIS 15418, *16 (D.N.J. Aug. 12, 2002) (citing Abdallah v. Coca-Cola Co., 1999 U.S. Dist. LEXIS 23211 (D. Ga. July 16, 1999)); see also 7AA Charles Alan Wright, Arthur R. Miller & Mary K. Kane, Federal Practice and Procedure Civil § 1785.3 (3d 2005) (the practice employed in the overwhelming majority of class actions is to resolve class certification only after an appropriate period of discovery).

Some courts have occasionally treated a defendant's motion to strike class allegations as an early motion to deny class certification under Fed. R. Civ. P. 23. See e.g., Bearden v. Honeywell Int'l, Inc., 720 F.Supp. 2d 932, (MD Tenn 2010) citing Smith v. Bayer Corp. (In re Baycol Prods. Litig.), 593 F.3d 716, 721 n.2 (8th Cir. 2010). However, Defendants' motion is clearly not a motion to deny class certification as they seek alternative relief in the form of a more definitive statement as to the class definition. They do not claim, as the defendants did in Bearden, that it is not possible to maintain a class action on the causes of action alleged in the

complaint. Bearden., 2010 U.S. Dist. LEXIS 28331, *28-31.

Even if Defendants' Motion to Strike could be construed as a motion to deny class certification, it would be premature at this stage of the proceedings. A District Court should defer decision on class definition and certification issues and allow discovery unless "the existing record" is sufficiently developed to decide class issues. In re Am. Med. Sys., 75 F.3d 1069, 1086 (6th Cir. 1996).[1]

> [I]t is essential that a plaintiff be afforded a full opportunity to develop a record containing all the facts pertaining to the suggested class and its representatives. It is seldom, if ever, possible to resolve class representation questions from the pleadings, and where facts developed during discovery proceedings are inadequate, an evidentiary hearing should be held on the request of the parties or, if necessary for a meaningful inquiry into the requisites of Rule 23, by the court sua sponte.

International Woodworkers of America, etc. v Chesapeake Bay Plywood Corp., 659 F2d 1259, 1268 (4th Cir. 1981); see also NOW, Farmington Valley Chapter v Sperry Rand Corp., 88 F.R.D. 272, 276-277 (D. Conn. 1980); East Texas Motor Freight System, Inc. v. Rodriguez, 431 U.S. 395, 405-06 (1977) (some discovery is clearly desirable before there is a decision on class certification). Detailed class definitions often require extensive consideration of ultimate factual issues, and thus, such definitions may be more appropriately deferred even until completion of trial on merits. Freeman v Motor Convoy, Inc., 68 F.R.D. 196, 206 (ND Ga 1975) affd 700 F2d 1339(11th Cir. 1983)

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1 There are two situations where it may be appropriate to consider a motion to strike under Rule 23 rather than Rule 12(f). First, there are some causes of action which cannot be plead as class actions. Lunsford v United States, 418 F.Supp. 1045, 1050 (DSD 1976). Second, it is occasionally possible to determine from the pleadings alone that the numerosity, commonality, typicality and adequacy requirements of Fed. R. Civ. P. 23(a) cannot possibly be met. Palmer v Combined Ins. Co. of Am., 2003 U.S. Dist. LEXIS 2534, *4-5, 91 BNA FEP Cas 129 (N.D. Ill. 2003). In such cases, a court may find it appropriate to strike class allegations before commencing discovery. Id. Neither situation applies to the present case.

III. PLAINTIFFS' COMPLAINT DEFINES THE CLASSES SUFFICIENTLY FOR THE CURRENT STAGE OF THE PROCEEDINGS

If it were appropriate to consider Defendants' Motion to Strike as an early motion to deny class certification, this court would not be restricted to considering the allegations of the Complaint. The Court may look beyond the pleadings to determine whether the requirements of Rule 23 are met. Szabo v. Bridgeport Mach., Inc., 249 F.3d 672, 677 (7th Cir. 2001) citing General Telephone Co. v. Falcon, 457 U.S. 147, 160 (1982). "Because class certification is subject to later modification, a court should err in favor of, and not against, allowing maintenance of the class action." Daigle v. Shell Oil Co., 133 F.R.D. 600, 602 (D. Colo. 1990) citing Esplin v. Hirschi, 402 F.2d 94, 99 (10th Cir. 1968). See also Hopkins v. Kan. Teachers Cmty. Credit Union, 265 F.R.D. 483, 486 (W.D. Mo. 2010) (any doubt as to whether plaintiff has met burden of showing class certification requirements should be resolved in favor of certification).

The Motion to Strike is based on a single argument that the descriptions of the classes in Plaintiffs' Complaint are fatally flawed because they contain the words "[a]ll citizens of the United States Virgin Islands … on St. Croix in the vicinity, the exact radius of which is to be determined, of Defendants' alcoholic beverage production operations on St. Croix." [Complaint at ¶58]. According to Defendants' arguments, the presence of the words "in the vicinity, the exact radius of which is to be determined" in each class definition prevents the existence of an identifiable class which is an implicit requirement under Fed. R. Civ. P. 23. [Defendants' Memorandum of Law in Support of Motion to Strike, pp. 1-4]. Defendants argue Plaintiffs are not entitled to any discovery unless and until they specify exact geographic boundaries for the membership of each alleged class. Id. at p.5.

However, there is no requirement, explicit or implicit, in Rule 23 that plaintiffs provide class definitions in their complaints specifying exact geographic boundaries for the classes. An identifiable and definite class exists and is ascertainable as long as it is defined in terms of objective criteria, like a defendant's conduct, as opposed to subjective criteria such as the state of mind of the parties. National Organization for Women v. Scheidler, 172 F.R.D. 351 (N.D. Ill. 1997), Gomez v. Illinois St. Bd. of Educ., 117 F.R.D. 394, 397 (N.D. Ill. 1987) (All Spanish-speaking children enrolled or eligible to enroll in Illinois public schools who should have been, should be, or have been, assessed as limited English proficient is based on objective criteria) and Alliance to End Repression v. Rochford, 565 F.2d 975, 977 (7th Cir. 1977); See also In re Initial Pub. Offering Sec. Litig., 227 F.R.D. 65, 87 (SDNY 2004) vacated and remanded on other grounds 471 F3d 24 (2d Cir. 2006) citing Clay v. American Tobacco Co., 188 F.R.D. 483, 490 (S.D. Ill. 1999); Zapka v. Coca-Cola Co., No. 99 Civ. 8238, 2000 U.S. Dist. LEXIS 16552, *7-8, 2000 WL 1644539, at *2 (N.D. Ill. Oct. 27, 2000) (those deceived by defendant's advertisement into believing product did not contain saccharin is based on subjective criteria). The initial definition may include members who have not been injured or do not wish to pursue claims against the defendant. Zapka, 2000 U.S. Dist. LEXIS 16552, *7, Elliott v. ITT Corp., 150 F.R.D. 569, 575 (Ill. 1992).

"Class members need not be ascertained prior to certification." In re Initial Pub. Offering Sec. Litig., 227 F.R.D. at 87 quoting Rios v. Marshall, 100 F.R.D. 395, 403 (S.D.N.Y. 1983); Stewart v Associates Consumer Discount Co., 183 F.R.D. 189 (E.D. Pa. 1998); Carpenter v Davis, 424 F2d 257, 260 (5th Cir. 1970). It is sufficient if "the exact membership of the class [is] ascertainable at some point in the case.'" Id. As long as membership in the class can be ascertained once the fact finder has made its final findings, the class definition is sufficiently

definite and class members are sufficiently ascertainable. Koch v Hicks (In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig.), 241 F.R.D. 185 (S.D.N.Y. 2007) The requirement for class certification is ascertainability, not ascertainment or ascertainability with ease. 227 F.R.D. at 99, 103-104 citing Dunnigan v. Metropolitan Life Ins. Co., 214 F.R.D. 125 (S.D.N.Y. 2003). "Plaintiffs in a class action meet their burden by pleading a class whose membership is ascertainable, even if actual ascertainment might prove 'slow and burdensome.'" 227 F.R.D. at 99 citing Dunnigan, 214 F.R.D. at 136. At the class certification stage,

> plaintiffs need not present an airtight method of identifying every class member who may be entitled to a recovery. Rather, the goal at this stage is to define a class that excludes, with broad strokes, segments of the proposed class that are not so entitled.

Id citing Dorchester Investors v. Peak Trends Trust, No. 99 Civ. 4696, 2002 U.S. Dist. LEXIS 3067, 2002 WL 272404, at *6 (S.D.N.Y. Feb. 26, 2002).

Sometimes one of the objective criteria for defining a class is stated by reference to geographic boundaries. In other cases, however, the class is defined by objective criteria other than geographic boundaries such as exposure to a particular substance. Brockman v. Barton Brands, Ltd., 2007 U.S. Dist. LEXIS 86732, *6 (W.D. Ky. Nov. 20, 2007)0. What is important is the existence of a reasonable relationship between the objective criteria used to define the class and the defendants' allegedly harmful activities. Id.

Numerous class action cases involving environmental torts or property damage have found class definitions sufficient which do not use precisely defined geographic boundaries. In Ludwig v. Pilkington N. Am., Inc., No. 03 Civ. 1086, 2003 U.S. Dist. LEXIS 20240, 2003 WL 22478842, at *5 (N.D. Ill. Nov. 4, 2003), the class was defined "as all persons who reside or own property in [the village of] Naplate." The court found residency or ownership of property in the village of Naplate to be a sufficient objective criteria for defining the class of plaintiffs suing the

owner/operator of a glass manufacturing facility in an "adjacent" community for causing environmental harm to their community and property by negligently, recklessly, and/or intentionally disposing of arsenic containing waste in multiple quarries located on the defendants' property as well as in off-site "adjacent" areas over a period of over 70 years. See also Sterling v. Velsicol Chem. Corp., 855 F.2d 1188 (6th Cir. 1988) (class properly certified where members were described as "liv[ing] in the vicinity of the landfill" which was the source of the alleged pollutants causing their damages).

Residents and property owners near an Exxon station using underground gas tanks filed a class action against Exxon and the station owner asserting claims based on public nuisance, private nuisance, trespass, negligence, and strict liability for an abnormally dangerous activity in Koch v Hicks, supra. The Southern District of New York found the following class description to be sufficient for certification:

> This class consists of all persons owning real property in the vicinity of the Crossroads Exxon who have suffered a legally cognizable injury due to the contamination, including (1) those homeowners who have experienced interference with the quiet enjoyment of their property by the actual or threatened presence of MTBE and other gasoline constituents on/in their land and in their water supply wells; (2) those homeowners whose wells have or have had detectable levels of MTBE and other gasoline constituents and whose property requires restoration or remediation; and/or (3) those homeowners whose properties have suffered diminution in market value as a result of MTBE contamination emanating from the Crossroads Exxon.

241 F.R.D. at 193. The Koch Court rejected arguments virtually identical to the arguments made by Defendants in the present case saying:

> Defendants argue that the proposed class is not ascertainable because Plaintiffs concede "the exact shape and size of the affected area has not been delineated at this stage of the litigation." Plaintiffs "believe the affected area comprises the contaminated area plus a buffer zone less than 20 square miles in size." ... Defendants' argument is flawed because Rule 23 does not require that Plaintiffs identify every member at this stage -- it is the class, not each member, that must be ascertained. In fact, it would be impossible in this case, and many others, to

> identify each member of the proposed class at class certification because that determination depends upon the jury making certain findings of fact upon which the class definition depends. For example, to ascertain the identify [sic] of class members, a jury will first need to decide how the MTBE spread after the underground storage tank leaked it into the ground. ... The ascertainability of a class depends on whether there will be a definitive membership in the class once judgment is rendered. Indeed, the Fourth Circuit has held that "[w]here the plaintiff has demonstrated that the class of persons he or she wishes to represent exists, that they are not specifically identifiable supports rather than bars the bringing of a class action, because joinder is impracticable." In this case, the Homeowner Subclass is ascertainable because Plaintiffs have defined it in objective terms, and the Court will be able to determine the members of the class once a jury makes its findings of fact. The ascertainability requirement is therefore satisfied.

241 F.R.D. at 194-196 (footnotes with citations to authority omitted)

In Sterling v. Velsicol Chem. Corp., supra, the Sixth Circuit upheld the certification of a class whose members "lived in the vicinity of the landfill" which was the source of the alleged contamination. The court explained that where the defendant's liability can be determined on a class-wide basis because the cause of injury is a single course of conduct which is identical for each class member, certification is particularly appropriate as a class action may be the best suited vehicle to resolve such a controversy. The use of a class action would avoid duplication of judicial effort and prevent separate actions from reaching inconsistent results with similar, if not identical, facts. 855 F.2d at 1197. See also Koch, 241 F.R.D. at 195 (class actions particularly well suited to resolving multiple claims from a single source of harm or course of conduct)

Defendants' arguments focus solely on paragraph 58 of the Complaint as providing a definition of the classes which is allegedly too vague. Paragraph 58 specifies that all potential class members will own, rent or lease real or personal property, vehicles or plants on the Island of St. Croix. There is additional information in other paragraphs of the Complaint which provide information further refining the identity of potential class members. All class members will

have experienced an accumulation of rum fungus on real or personal property or plants which they own, rent, lease, or harvest. (Complaint at ¶¶ 3-5) The accumulation of rum fungus will have been caused by exposure of each class member's property to uncontrolled ethanol releases from Defendants' operations. (Complaint at ¶¶ 24-27, 30, 33-34, 36) The injury or damage suffered by class members will result from the accumulation of rum fungus caused by the ethanol released from Defendants' operations. (Complaint at ¶¶ 45, 47-48) These are all objective criteria directly related to Defendants' conduct which distinguish class members from the general public and also result in class members being ascertainable. When the Complaint is reviewed as a whole, it alleges sufficient objective criteria identifying the proposed classes.

IV. IF THE COURT SHOULD FIND PLAINTIFFS' CLASS ALLEGATIONS TO BE INSUFFICIENT, LEAVE SHOULD BE GRANTED FOR PLAINTIFFS TO FILE AN AMENDED COMPLAINT

"[A]ny deficiency in respect to pleading a class action is subject to correction by amendment." Harris v. Palm Springs Alpine Estates, Inc., 329 F.2d 909, 913 (9th Cir. 1964) quoting Warner v. First Nat. Bank, 236 F.2d 853, 858 (8th Cir. 1956). See also Jiron v. Sperry Rand Corp. (Sperry-Univac), 423 F. Supp. 155, 167 (D. Utah 1975). Accordingly, if this court should find that the allegations of paragraph 58 of the Complaint would prevent the classes from being certified, Plaintiffs seek leave of this court to amend the Complaint to correct any deficiency.

Plaintiffs submit with this response a proposed Amended Complaint (Exhibit 1) which seeks to address Defendants' objections to the "in the vicinity, the exact radius of which is to be determined" language in paragraph 58 of the Complaint. The proposed Amended Complaint eliminates this language and instead uses two other objective criteria based on Defendants' conduct to identify which citizens of St. Croix are members of the proposed class. These two

criteria are exposure of class members' real and/or personal property to ethanol released from Defendants' operations and the accumulation of rum fungus on the real and/or personal property of the proposed class members. The initial Complaint had already made allegations of these facts in parts of the Complaint other than the section labeled "Class Action Allegations," so there would be no prejudice to Defendants' in making the proposed clarifications to the Complaint. (See Complaint at ¶¶ 3-5, 24-27, 30, 33-34, 36, 45, 47-48).

CONCLUSION

Fed. R. Civ. P. 23 specifically anticipates that the class definition initially plead in a class action complaint will not be as fully refined as the final class definition used in determining rights at the end of the class suit. The "shape and form of a class action evolves only through the process of discovery." S. Broward Hosp. Dist., 516 F.Supp. 2d at 401-402. This is not one of "those rare cases where the complaint itself demonstrates that the requirements for maintaining a class action cannot be met." Id. Accordingly, Defendants' Motion to Strike should not be granted.

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By my signature above, I certify that on October 9, 2013 a true and correct copy hereof was mailed and emailed to:

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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 themselves and all others similarly situated, Plaintiffs, v. DIAGEO USVI, INC. and CRUZAN VIRIL, LTD., Defendants.	SX-13-CV-143

FIRST AMENDED COMPLAINT

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NOW COME Ryan and Enid V. Alleyne, Michael Bicette, Marco Blackman, Anistia and George John, Suzie Sanes and Alicia Sanes on behalf of themselves and all other citizens of St. Croix, United States Islands similarly situated, by and through their attorneys, Colianni & Colianni, William F. McMurry, Esq. and Morris & Player PLLC, and state in support of their Amended Class Action Complaint and Jury Demand against Defendants, Diageo USVI, Inc., d/k/a Project 1, Inc. ("Diageo") and Cuzan Viril, LTD ("Cruzan") as follows:

NATURE OF THE ACTION

1. Plaintiffs hereby incorporate by reference each and every allegation contained in her prior complaints as if specifically pled herein.

Exhibit 1

2. 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 in St. Croix has been damaged due to Defendants' operations.

3. As further set forth herein, 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 in St. Croix.

4. 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.

5. 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.

6. 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.

7. 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 in St. Croix as a result of Defendants' conduct described herein.

8. 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 in St. Croix and are citizens of the United States Virgin Islands.

9. There are many citizens in estates surrounding Defendants' facilities in 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 Federal Rule of Civil Procedure 23.

10. 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.

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

12. 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

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

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

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

16. 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.

17. 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.

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

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

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

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

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

23. Two-thirds or more 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

24. Defendants are companies engaged in the commercial production of alcoholic beverages.

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

26. 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)."

27. 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.

28. 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.

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

30. Reasonable and cost effective emissions control technology exists.

31. 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.

32. 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.

33. 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."

34. 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.

35. 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.

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

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

38. 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.

39. 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.

40. 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.

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

42. 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.

43. 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.

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

45. Defendant Diageo ferments, distills, ages/stores, and dumps alcohol for mass transportation in 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.

46. 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.

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

48. 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.

49. 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 one thousand (1,000) residents are affected by the Defendants' emission of ethanol.

50. 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 (if any) potential buyers will be willing to pay for the affected real and personal property.

51. 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.

52. 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.

53. 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.

54. 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.

55. 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.

56. At all times material hereto, Suzie 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.

57. 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.

58. 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

59. 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 in St. Croix and whose real property has sustained the accumulation of rum fungus as a result

of Defendants' alcoholic beverage production and aging operations in St. Croix; and

b. All citizens of the United States Virgin Islands who rent or lease real property in St. Croix and whose rented or leased property has sustained the accumulation of rum fungus as a result of Defendants' alcoholic beverage production and aging operations in St. Croix; and

c. All citizens of the United States Virgin Islands who own motorized vehicles in St. Croix and whose vehicles have sustained the accumulation of rum fungus as a result of Defendants' alcoholic beverage production and aging operations in 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 in St. Croix and whose ornamental trees, shrubs and plants and/or fruit and vegetable-bearing trees have sustained the accumulation of rum fungus as a result of Defendants' alcoholic beverage production and aging operations in St. Croix; and

e. All citizens of the United States Virgin Islands who harvest fruit and vegetables from rented or leased real property in St. Croix and whose fruit and vegetables have sustained the accumulation of rum fungus as a result of Defendants' alcoholic beverage production and aging operations in 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.

60. 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 one thousand (1,000) members in the Class.

61. 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.

62. 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.

63. 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.

64. 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.

65. 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 AND GROSS NEGLIGENCE

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

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

68. "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 "A" attached hereto.**

69. 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.

70. 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.*

71. It was reasonably foreseeable that Defendants' failure to properly construct, maintain, and/or operate it 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.

72. 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 in St. Croix.

73. 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.

74. 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).

75. 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.

76. 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.

77. 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 one thousand (1,000) residents of St. Croix, United States Virgin Islands are affected by the Defendants' emission of ethanol.

78. Plaintiffs and all other citizens of the United States Virgin Islands who have similarly suffered injury to their real and personal property in 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.

79. 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.

80. 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

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

82. Plaintiffs and all other citizens of the United States Virgin Islands suffering similar injury to their real and personal property in 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 in St. Croix, United States Virgin Islands as set forth herein above.

83. 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 ofethanol would not render it unfeasible to continue conducting the activity.

84. 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.

85. In the alternative, the Defendants should have known that the formation of a black mold or fungus appearing substance would result form 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.

86. 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.

87. 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.

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

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

90. 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 in St. Croix.

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

92. 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.

93. 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.

94. 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 one thousand (1,000) residents of St. Croix, United States Virgin Islands are affected by the Defendants' emission of ethanol.

95. Plaintiffs and all other citizens of the United States Virgin Islands who have similarly suffered injury to their real and personal property in 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.

96. 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

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

98. "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 "A" attached hereto.**

99. 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.

100. 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.*

101. 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.

102. 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.

103. 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 of Plaintiffs and all other similarly situated citizens of United States Virgin Islands, constituting a continuing trespass.

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

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

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

107. 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.

108. 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 in St. Croix.

109. 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.

110. 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).

111. 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.

112. 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.

113. 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.

114. 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 one thousand (1,000) residents of St. Croix, United States Virgin Islands are affected by the Defendants' emission of ethanol.

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

116. 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

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

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

119. "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 "A" attached hereto.**

120. 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.

121. 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.*

122. It was reasonably foreseeable that Defendants' failure to properly construct, maintain, and/or operate it 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.

123. 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 in St. Croix.

124. 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.

125. 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).

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 knew that their conduct was causing the accumulation of fungus to occur on Plaintiffs' real and personal property.

127. 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.

128. 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 one thousand (1,000) residents of St. Croix, United States Virgin Islands are affected by the Defendants' emission of ethanol.

129. Plaintiffs and all other citizens of the United States Virgin Islands who have similarly suffered injury to their real and personal property in 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.

130. 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.

131. 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

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

133. As a direct and proximate result of the Defendants' alcoholic beverage production operations in 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.

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

135. 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.

136. 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.

137. 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.

138. RTO's require no operational costs for fuel because they are fueled by the very ethanol they are designed to convert to CO2 and water vapor.

139. 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.

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

141. 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, Paragraph 5, Exhibit B)

142. "During the early stages of the design, numerous meetings were held with the scientists and engineers from the consortium [Four (4) 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, Paragraph 6, Exhibit B)

143. "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." (Whitford Affidavit, Paragraph 10, Exhibit B)

144. 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. (See Whitford Affidavit, Paragraph 12, Exhibit B)

145. To date, six (6) 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. (See Whitford Affidavit, Paragraph 12, Exhibit B)

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

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

148. 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.

149. A reduction of ethanol emissions by 100% with a destructive rate efficiency would abate the nuisance or continuing trespass for all Plaintiffs and others similarly situated.

150. 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.

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

152. 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.

153. 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.

154. 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 enter an order of permanent injunction to avoid a permanent nuisance.

155. 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, prejudgment interest, a trial by jury and for all other relief to which they may appear properly entitled.

COLIANNI & COLIANNI, LLC
Attorneys for Plaintiffs

DATED: October 10, 2013

By: _____

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CERTIFICATE OF SERVICE

By my signature above, I certify that on October 10, 2013 a true and correct copy hereof was mailed and emailed to:

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

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 2013-CV-143

ORDER

The Defendants having moved this Court to strike from Plaintiffs' Complaint certain class action allegations or in the alternative to require Plaintiffs to provide a more definite statement with respect to the class action allegations and the Court having heard argument of counsel and being sufficiently advised in the premises;

IT IS HEREBY ORDERED AND ADJUDGED that the Defendants' motions are overruled and Defendants shall have 10 days from the date of this Order to file an Answer to Plaintiffs' Complaint.

SO ORDEREDED this ____ day of _____, 2013.

DOUGLAS A. BRADY
Judge of the Superior Court

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

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 2013-CV-143

ORDER

The Plaintiffs having moved this Court for leave to file a First Amended Complaint and the Court having granted the Defendants' Motion for More Definite Statement:

IT IS HEREBY ORDERED AND ADJUDGED that Plaintiffs' First Amended Complaint, tendered with their Response to Defendants' Motion for More Definite Statement, is filed of record and the Defendants shall have 10 days from the date of entry of this Order to file their Answer.

SO ORDEREDED this ____ day of _____, 2013.

DOUGLAS A. BRADY
Judge of the Superior Court