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.*	**Case No.: SX 2013-CV-143** **CLASS ACTION** **JURY TRIAL DEMANDED**

DEFENDANTS DIAGEO USVI, INC. AND CRUZAN VIRIL, LTD.'S REPLY TO PLAINTIFFS' MEMORANDUM IN OPPOSITION TO THE RULE 12(b)(6) JOINT MOTION TO DISMISS

Defendants Diageo USVI, Inc. ("Diageo USVI") and Cruzan VIRIL, Ltd. ("Cruzan") respectfully submit this reply memorandum in support of their joint motion to dismiss the Complaint pursuant to Rule 12(b)(6) for failing to state a claim upon which relief can be granted.

In Plaintiffs' Opposition to Defendants' Motion to Dismiss, Plaintiffs point to three recent cases to suggest the federal Clean Air Act ("CAA" or "Act") does not preempt state common law claims. But Plaintiffs cannot deny that the majority view in federal and state courts is that the CAA preempts state common law claims. This majority view is the correct one: the patchwork system of judicial regulation that Plaintiffs propose is antithetical to the detailed and comprehensive regulatory scheme designed by Congress in the CAA.

Plaintiffs argue that Defendants' remaining challenges to their common law claims raise factual issues for discovery. Pls. Opp'n at 2. Plaintiffs, however, are required to *plead facts* plausibly demonstrating each element of their claims *before* they get discovery. Plaintiffs' claims do not meet the plausibility threshold. For this, and other reasons further described below, their common law claims should be dismissed.

I. *The majority view in state and federal courts is that the CAA preempts common law claims*

Plaintiffs seek an injunction imposing additional emission control requirements on Defendants' practices for aging rum in order to limit their ethanol emissions, which are regulated under the CAA and authorized by permits issued by the USVI Department of Planning and Natural Resources ("DPNR"). The CAA establishes a comprehensive and pervasive regulatory scheme for controlling virtually all air pollutant emissions throughout the country. Recognizing the inherent conflict between this finely crafted administrative program and a patchwork system of case-by-case common law regulation by injunction, with only two exceptions, *every* court that has recently considered the issue has held that the CAA preempts common law claims allegedly arising from emissions regulated under the CAA.

As described in Defendants' prior memorandum, a host of federal and state courts have consistently held that the CAA preempts common law claims. *See, e.g.*, *Am. Elec. Power Co., Inc. v. Connecticut*, 131 S. Ct. 2527 (2011) ("*AEP*") (federal common law nuisance); *Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849 (9th Cir. 2012) (federal common law nuisance); *North Carolina, ex rel. Cooper v. Tenn. Valley Auth.*, 615 F.3d 291 (4th Cir. 2010) ("*TVA*"), *cert. dismissed*, 132 S. Ct. 46 (2011) (state common law nuisance); *Comer v. Murphy Oil USA, Inc.*, 839 F. Supp. 2d 849

(S.D. Miss. 2012), *aff'd*, 718 F.3d 460 (5th Cir. 2013) (state common law nuisance, trespass, and negligence); Ruling on Defendant's Motion for Summary Judgment, *Freeman v. Grain Processing Corp.*, No. LACV 021232, (Muscatine Cnty. (Iowa) Dist. Ct. Mar. 27, 2013) (dismissing state common law nuisance claim). Just three months ago, in a case factually similar to this one, a Kentucky state court held that the CAA prohibits courts from applying common law claims to "require the Defendants [to] conform to a different or higher standard of acceptable practices" than have been imposed by the expert state and federal agencies through the CAA. *Merrick v. Brown-Forman Corp.*, Case No. 12-CI-3382 (Jefferson Cir. Ct., Div. 9, July 30, 2013) ("*Brown-Forman*") at 4 (cited in Defs. Notice of Supplemental Authority, Doc., Aug. 2, 2013).

These cases are correct. As the Fourth Circuit held in *TVA*, allowing common law nuisance claims would permit "an ill-defined omnibus tort of last resort" to interfere with the CAA's "comprehensive" regulatory system that "represents decades of thought by legislative bodies and agencies . . . ." 615 F.3d at 302, 298. Such interference would "scuttle the nation's carefully created system" and lead to "a balkanization of clean air regulations and a confused patchwork of standards, to the detriment of industry and the environment alike." *Id.* at 296.

Plaintiffs' Opposition does not address or dispute the significance of these foundational cases.[1] Nor do Plaintiffs dispute that deciding their common law tort claims would require this Court to usurp the regulatory function that the CAA assigns to executive agencies, *see AEP*, 131 S. Ct. at 2540, or that courts generally are ill-equipped to determine appropriate emission control requirements, *see id.* at 2539-40.

[1] Plaintiffs' Opposition does suggest that the *Brown-Forman* decision was undermined by recent cases. Pls. Opp'n at 2. But, as described below, the recent cases on which Plaintiffs rely are either irrelevant or based on faulty analysis.

Indeed, Plaintiffs completely ignore the fact that USVI regulations implementing the CAA *specifically empower* the DPNR – and not private litigants – to address nuisances allegedly caused by emissions. *See* Defs. Mem. Supp. Mot. Dismiss at 12.

Instead, Plaintiffs submit three recent decisions – one of which is completely inapposite – without explaining why this Court should adopt their minority view. If anything, the conflict between these cases allowing common law claims to proceed and the majority of courts that have reached the opposite conclusion illustrates the inherent danger in permitting common law claims against sources otherwise regulated by the CAA.

A. The Second Circuit's *MTBE* decision in a liquid spill case is not on point

The Second Circuit decision cited by Plaintiffs is simply irrelevant to this case. *See In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig.*, 725 F.3d 65 (2d Cir. 2013). There, plaintiffs' common law claims were based on the harmful effects of liquid spillage of the gasoline fuel additive MTBE into groundwater from the defendant's gasoline handling and storage, rather than on airborne emissions. *Id.* at 78. Defendant countered that, because the CAA required an oxygenate to be added to its gasoline, *all* common law tort claims in any way related to its use of MTBE to fulfill that requirement were preempted by the CAA. *Id.* at 95. The court held that the CAA's fuel additive requirement did not preempt plaintiffs' state common law claims because (1) the Act did not require or authorize the defendant to use MTBE as opposed to another additive, and (2) the tortious conduct of spilling a liquid extended far beyond the scope of activities contemplated by the CAA. *Id.* at 97-104. In other words, there was no preemption because the CAA regulates emissions, not spillage.

Here, Defendants' allegedly tortious conduct – the emission of ethanol from their rum aging warehouses and other facilities – falls directly within the class of activities regulated by the CAA. Furthermore, unlike the defendant's use of harmful chemicals in *MTBE*, Cruzan's and Diageo USVI's ethanol emissions are *explicitly authorized* by permits issued under the CAA by the DPNR. *See* Defs. Mem. Supp. Mot. to Dismiss at 7 (citing construction and operating permits). Accordingly, *MTBE* is inapposite.[2]

B. The Circuit Court in *Bell* misapplied federal precedent on preemption

Plaintiffs cite a recent Third Circuit decision holding that the CAA does not preempt state common law claims against an electric utility plant based on particulate emissions. *See Bell v. Cheswick Generating Station*, No. 12-4216, 2013 WL 4418637 (3d Cir. Aug. 20, 2013), *rev'g* 903 F. Supp. 2d 314 (W.D. Pa. 2012). Since the Supreme Court's holding in *AEP*, *Bell* is the first and *only* federal court decision to conclude that the CAA does not preempt common law nuisance claims allegedly arising from emissions regulated under the CAA. While the Third Circuit panel does not acknowledge it, its decision is diametrically opposed to the Fourth Circuit's decision in the leading CAA preemption case, *TVA*. The decision in *Bell* is flawed, and Defendants respectfully submit that its reasoning should be rejected.

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[2] Plaintiffs cite another irrelevant case from the Sixth Circuit, *Her Majesty the Queen in Right of the Province of Ontario v. Detroit*, 874 F.2d 332 (6th Cir. 1989), to assert that "the CAA does not preempt state causes of action under the law of the source state." Pls. Opp'n at 7. This assertion is misleading to the extent that it refers to the *common* law of the source state. *Her Majesty the Queen* did not involve tort claims such as those asserted here, but rather state *statutory* claims brought under the Michigan Environmental Policy Act, a state environmental statute implementing the CAA. 874 F.2d at 337. States are free to adopt statutes and regulations that are more stringent than federal requirements. *See* CAA § 116, 42 U.S.C. § 7416. *Her Majesty the Queen* is thus inapposite, because here, Plaintiffs are bringing common law claims and asking this Court to ignore the specific requirements of permits issued by DPNR under the authority of the CAA and to bypass the USVI's implementing regulations directing DPNR to address alleged nuisances.

The court in *Bell* misapplied the Supreme Court's holding in *Int'l Paper Co. v. Ouellette*, 479 U.S. 481 (1987). The Court in *Ouellette* held that the Clean Water Act ("CWA") preempts tort claims against sources of water pollution based on the common law of a state affected by water pollution (the "affected state"), but does not generally preempt claims under the common law of the state where the source is located (the "source state"). *Bell*, 2013 WL 4418637 at *5. The court in *Bell* conducted a textual comparison between the savings clauses in the CWA and the CAA and held that "there is no meaningful difference between them."[3] *Id.* at *6. Consequently, it held that *Ouellette* dictated that state tort law was not preempted. Yet the holding in *Ouellette* was not based on a textual analysis of the CWA's savings clauses, which the Court found to be, at best, inconclusive. *Id.* at *5 (recognizing "the text of the [CWA's savings] clauses did not provide a definitive answer" to the preemption question in *Ouellette*) (citing *Ouellette*, 479 U.S. at 492, 497). Instead, *Ouellette* held that affected state common law claims were preempted based on the *effect* of allowing such claims to proceed in the context of the CWA's overall regulatory framework. 479 U.S. at 493 ("Given that the Act itself does not speak directly to the issue, the Court must be guided by the goals and policies of the Act in determining whether it in fact pre-empts an action based on the law of an affected state."), *id.* at 494 (State law is "preempted if it interferes with the methods by which the federal statute was designed to reach [its] goal.").

[3] This conclusion is unsupported by the statutory language it purports to rely upon. There is a crucial difference between the relevant savings clause in the CWA, which preserves "any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States," 33 U.S.C. § 1370, and the CAA's saving clause, 42 U.S.C. § 7416, which does not contain similar language. Thus, even if *Ouellette's* textual analysis of the CWA had been relevant to its outcome, it should not control the court's analysis of the CAA in *Bell*.

Specifically, the Supreme Court in *Ouellette* "examin[ed] the CWA as a whole, its purposes and its history" and determined that affected state common law claims were preempted because "the inevitable result" of allowing such claims "would be a serious interference with the achievement of the full purposes and objectives of Congress." *Id.* at 493 (citation and internal quotation marks omitted). Notably, despite its finding that the CWA would not generally bar source state nuisance claims, the Court cautioned that even source state law would be preempted to the extent that it "would frustrate the carefully prescribed CWA regulatory system." *Id.* at 499 n.20 (noting that "the preemptive scope of the CWA necessarily includes *all* laws that are inconsistent with the full purposes and objectives of Congress") (citation and internal quotation marks omitted). By myopically focusing on the text of the CAA's savings clauses, *Bell* improperly abandoned this functional preemption analysis that was at the heart of the Supreme Court's decision in *Ouellette*.

Unlike the Third Circuit in *Bell,* the Fourth Circuit in *TVA* correctly applied the functional analysis from *Ouellette* and held that the CAA generally preempts source state as well as affected state common law claims. 615 F.3d at 306. As the Fourth Circuit explained, the Supreme Court in *Ouellette* "was emphatic that a state law is preempted if it interferes with the methods by which the federal statute was designed to reach its goal, admonished against the toleration of common-law suits that have the potential to undermine the regulatory structure, and singled out nuisance standards in particular as vague and indeterminate." *Id.* at 303 (internal alterations and quotation marks omitted). In short, "*Ouellette* recognized the considerable potential mischief in those nuisance actions seeking to establish emissions standards different from federal

and state regulatory law and created the strongest cautionary presumption against them." *Id.*

In *TVA*, the Fourth Circuit followed the Supreme Court's lead from *Ouellette* and analyzed the plaintiffs' common law nuisance claims in the context of their functional compatibility with the CAA's purposes, methods, and allocation of state and federal responsibility, concluding that the state law claims were preempted. *Id.* at 301-06. Defendants respectfully submit that this Court should follow the reasoned analysis in *TVA*.

As this Court is aware, the Third Circuit's interpretation of federal law is not binding on the courts of the U.S. Virgin Islands, especially when, as here, it is "at odds with the holdings of other circuit courts." *See, e.g.*, *Yusuf v. Hamed*, No. 2013-0040, 2013 WL 5429498 at *3 n.3 (V.I. Sup. Ct. Sept. 30, 2013). Pursuant to the Revised Organic Act, courts established by the U.S. Virgin Islands under local law have the same relationship to federal courts as state courts do. 48 U.S.C. § 1613. State courts (and this Court) are not bound by lower federal courts on issues of federal law.[4] Furthermore, even where a state court looks to federal courts as persuasive authority on a federal question, the state court does not owe special deference to any federal circuit court "merely because [it] lies within the geographical limits of" that circuit, and

[4] *Johnson v. Williams*, 133 S. Ct. 1088, 1090 (2013) (stating "the views of the federal courts of appeals do not bind a State Supreme Court when it decides a federal constitutional question"); *Surrick v. Killion*, 449 F.3d 520, 535 (3d Cir. 2006) ("[D]ecisions of the federal district courts and courts of appeal[s], including those of the Third Circuit Court of Appeals, are not binding on Pennsylvania courts, even when a federal question is involved.") (internal quotation marks omitted); *Hall v. Pa. Bd. of Prob. and Parole*, 851 A.2d 859, 865 (Pa. 2004) (stating "we are not obligated to follow the decisions of the Third Circuit on issues of federal law"); *Dewey v. R.J. Reynolds Tobacco Co.*, 577 A.2d 1239, 1244 (N.J. 1990) ("Decisions of a lower federal court are no more binding on a state court than they are on a federal court not beneath it in the judicial hierarchy.") (internal quotation marks omitted).

the state is free to adopt another circuit's more persuasive interpretation. *Barstow v. State*, 742 S.W.2d 495, 500-01 (Tex. Ct. App. 1987) (Fifth Circuit is only "as persuasive as its logic").[5]

Accordingly, Defendants respectfully submit that this Court should reject the Third Circuit's incomplete textual analysis in *Bell* and follow the Supreme Court's functional conflict preemption analysis laid out in *Ouellette*, as the Fourth Circuit did in *TVA*, to find that Plaintiffs' common law claims are preempted by the CAA.

C. The Kentucky state court ruling in *Buffalo Trace* demonstrates that common law suits are incompatible with the CAA's regulatory program

Plaintiffs also cite a recent Kentucky state court decision in *Mills v. Buffalo Trace Distillery*, Civ. Action No. 12-CI-00743 (Franklin Cir. Ct., Div. II Aug. 28, 2013) ("*Buffalo Trace*"), allowing common law claims to proceed based on ethanol emissions from the defendant's whiskey aging operations permitted under the CAA. *Buffalo Trace* is a companion case to *Brown-Forman*, in which a state court reached the opposite conclusion and dismissed identical claims brought by the same plaintiffs against neighboring whiskey producers. *See* Defs. Notice of Supplemental Authority. The court in *Buffalo Trace* followed *Bell* and relied on its incomplete analysis of preemption to find that the CAA did not preempt the plaintiffs' common law claims. For the reasons described above, this Court should decline to follow *Buffalo Trace* as well.

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[5] *See also Debtor Reorganizers v. State Bd. of Equalization*, 130 Cal. Rptr. 64, 67 (Cal. Ct. App. 1976) ("As between the decisions of the Ninth Circuit and that of the Fifth Circuit, no primacy inheres in the former, so the persuasiveness of the conflicting views must depend upon the validity of the arguments made therein.").

In fact, the decision in *Buffalo Trace* only confirms the wisdom of the Fourth Circuit's reasoning in *TVA* and other federal and state decisions finding common law claims preempted by the CAA. As those cases recognized, allowing courts and juries to impose requirements limiting allegedly tortious emissions through private common law litigation will create a patchwork of inconsistent and unpredictable emission control requirements for sources that are already regulated by the CAA. *See, e.g.*, *TVA*, 615 F.3d at 298 (In the face of inconsistent common law rulings, "it would be increasingly difficult for anyone to determine what standards govern.").

The conflicting results in *Brown-Forman* and *Buffalo Trace* illustrate perfectly the chaotic effects of allowing common law nuisance claims against sources otherwise regulated by the CAA, as the Fourth Circuit predicted in *TVA*. By allowing the plaintiffs' claims to proceed, the court in *Buffalo Trace* created a judicial regulatory scheme in which similar whiskey aging facilities located within miles of each other (Brown-Forman in Jefferson County and Buffalo Trace in Franklin County) could be subject to wholly different emission control requirements imposed by judges and juries through private litigation, just as the *TVA* court warned. *See TVA*, 615 F.3d at 302 ("We are hardly at liberty to ignore the Supreme Court's concerns and the practical effects of having multiple and conflicting standards to guide emissions."). Accordingly, as with *Bell,* Defendants respectfully submit that *Buffalo Trace* was incorrectly decided and should not be followed.[6]

[6] The claims that Plaintiffs present to this Court are part of a coordinated collateral attack on permits issued pursuant to the CAA by state and territorial regulators to distilled spirits facilities. In addition to this case, the same counsel representing Plaintiffs before this Court have filed three suits in state and federal courts in Kentucky that assert common law claims related to ethanol emissions from whiskey facilities and ask the respective courts to impose certain

In short, without preemption, emission sources will be subject to requirements imposed solely by individual judges and juries applying a vague nuisance standard on a case-by-case basis, rather than by expert regulatory agencies with public input. This chaotic result would defeat the comprehensive regulatory system that Congress created in the CAA. Therefore, Defendants respectfully submit that Plaintiffs' claims are preempted and must be dismissed.

II. *Plaintiffs misapply the Banks ruling regarding USVI law, and in any event, the decision has no bearing on this motion*

In addition to being preempted, Defendants' claims should be dismissed for a number of other reasons that Plaintiffs' Opposition does not rebut. As an initial matter, Plaintiffs argue that Defendants "appear to have misstated the law in regard to the applicability of the Restatement (Third) of Torts." Pls. Opp'n at 8 (citing *Banks v. Int'l Rental & Leasing Corp.,* 55 V.I. 967, 976 (V.I. 2011)). However, *Banks* does not prevent this Court from following the provisions of the *Restatement (Third) of Torts: Liability for Physical and Emotional Harm* (Basic Principles) (2005) (hereinafter "Restatement Third") unless the Supreme Court has issued a "considered decision" adopting a particular section of the Restatement Third, as Plaintiffs suggest. *Id.* at 9. While the Court in *Banks* noted that 1 V.I.C. § 4 did not compel it "to mechanically apply the most recent Restatement", *Banks*, 55 V.I at 976, the Court acknowledged that "a strong preference exists for following the most recent Restatement over an older version", *id.* at 982 (citing *Varlack v. SWC Caribbean, Inc.*, 550 F.2d 171, 180 (3d Cir. 1977)). Indeed, the Court noted the power of the Superior Court to help develop the common law of the Virgin Islands, holding:

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capture and control technology on those facilities. *See Buffalo Trace; Brown-Forman*; *Merrick v. Diageo Americas Supply, Inc.*, No. 12-CV-334-CRS (W.D. Ky., filed June 15, 2012).

> Nevertheless, even in the absence of the historical note, we would find that section 4 does not deprive this Court—or, in the absence of binding precedent, the Superior Court—of the ability to shape the common law.

Id. at 977-78. Thus, this Court has full authority to follow the view of the common law that it deems most appropriate, including the Restatement Third, without having to wait on the Supreme Court to make an initial determination as to each section of the Restatement Third.

In any event, it is of no consequence in this case whether the Court adopts of the *Restatement (Second) of Torts* (1979) (hereinafter "Restatement Second") or the Restatement Third. The only count to which the issue is relevant is the negligence count (Count I), as the Restatement Third does not address the claims for nuisance, trespass, or injunctive relief, which are governed by the Restatement Second. With regard to negligence, the cited provisions of the Restatement Third are not novel or a departure from the rules established in the Restatement Second. Instead, with regard to negligence, the Restatement Third essentially reorganizes and clarifies several prior sections of the Restatement Second. *See* Table 1 to the Restatement Third at 643-45. Thus, unlike *Banks* – where a strict liability issue not recognized in the Restatement Second but recognized in the new Restatement Third was before the court – none of the "duty" language Defendants quote from § 7 of the Restatement Third is novel or a departure from the general provisions of the Restatement Second.

III. *Plaintiffs have failed to meet Twombly's plausibility requirement and cannot sustain their negligence claim*

Plaintiffs must plead facts *plausibly* supporting a duty to implement capture and control technology. *See Twombly*, 550 U.S. at 555 (plaintiff must plead facts demonstrating claim is plausible). Plaintiffs argue that "Diageo and Cruzan take the

position that the only possible source of a duty" comes from "their permits issued in conjunction with the CAA." Pls. Opp'n at 9. This mischaracterizes Defendants' position.

Defendants do not rely solely on the fact that their permits impose no duty to capture ethanol emissions. Rather, a whole host of facts demonstrate that Plaintiffs' suggested duty is not *plausible.* Specifically:

- The EPA consistently has taken the position that there is no duty to implement capture and control technology, Defs. Mem. Supp. Mot. Dismiss at 18[7];
- Defendants' operating permits do not require the use of capture and control technology, Defs. Mem. Supp. Mot. Dismiss at 18;
- There is no federal, state, or local ordinance requiring Defendants to use capture and control technology at rum aging facilities, Defs. Mem. Supp. Mot. Dismiss at 18; and
- The Maryland Department for the Environment has determined that control technology is not reasonably available for rum aging facilities, and EPA has accepted that determination. Defs. Mem. Supp. Mot. Dismiss at 18-20.

Instead of addressing these facts, Plaintiffs recite a list of eleven "factual allegations" that they say support a duty to implement capture and control technology. Pls. Opp'n at 11. But not one of them plausibly suggests that these technologies are

[7] Plaintiffs "dispute Defendants' claim that the EPA has consistently taken the position" that there is "no duty to implement capture and control technology at distilled spirits aging facilities." Pls. Opp'n at 13 n.4. But Plaintiffs provide no basis for their "dispute." Plaintiffs also claim that the public documents attached to the Complaint "should not be considered on a Rule 12(b)(6) motion." Pls. Opp'n at 11. But they again offer no basis for this assertion. As discussed in Defendants' memorandum, this Court can take judicial notice of Defendants' permits, the EPA and state regulatory documents, and the other public records cited by Defendants. Defs. Mem. Supp. Mot. Dismiss at 5 and n.5.

feasible for rum production and aging facilities like those at issue here.[8] Pls. Opp'n at 11-12. Indeed, Plaintiffs' Opposition confirms that the alleged "duty" here rests on nothing more than the fact that control 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 speculation is not enough to plead a plausible claim. *See Twombly*, 550 U.S. at 556.

Plaintiffs also do not rebut the additional reasons cited by Defendants that caution this Court against recognition of a duty.[9] Defs. Mem. Supp. Mot. Dismiss at 21-22. Specifically, as stated in Restatement Third § 7 cmt.g, "Courts employ no-duty rules to defer to discretionary decisions made by officials from other branches of government." In addition, they weigh the "[i]nstitutional competence," "administrative difficulties," and "competing social concerns" in determining whether to recognize a duty. *Id.* cmt. f. Here, DPNR and EPA have made a scientific and policy judgment not to impose capture and control technology, and a host of administrative difficulties and competing social concerns caution against this Court imposing a duty and inserting itself as the regulator. Defs. Mem. Supp. Mot. Dismiss at 21-22.

For all these reasons, the Court should reject that Plaintiffs have plausibly pled a duty for Defendants to capture and control ethanol emissions.

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[8] Accompanying Plaintiffs' Complaint was an affidavit by Richard G. Whitford. Plaintiffs rely on this affidavit in both their Complaint and Opposition to support their claim that control technology is reasonably available for Defendants' rum production and aging facilities. But on its face this affidavit only discusses *brandy* and *whiskey*—not rum. *See, e.g.*, Aff. ¶ 13 ("I am aware of the various whiskey aging warehouse designs in use today. I have reviewed photographs of whiskey aging warehouses at issue in the Kentucky litigation and utilized by Scotch whisky makers in Scotland, United Kingdom."). This affidavit is thus irrelevant.

[9] Whether Plaintiffs have pled a duty is a question for the Court. "In an action for negligence the court determines . . . whether such facts give rise to any legal duty on the part of the defendant." Restatement Second § 328B.

IV. *Plaintiffs do not plead that Defendants' conduct is "unreasonable" to support the private nuisance claims*[10]

Plaintiffs' Complaint claims that Defendants' ethanol emissions are unreasonable under the Restatement Second primarily because "[r]easonable and cost effective emissions control technology exists." Compl. ¶ 29. There is nothing in the Complaint or Plaintiffs' Opposition that plausibly supports that contention. *See supra at pp. 12-13.*

Moreover, the Restatement Second – which Plaintiffs agree is binding on this Court with respect to the nuisance claim[11] – states that "coming to the nuisance" 'is *"a factor to be considered in determining whether nuisance is actionable."* Restatement Second § 840D (emphasis added). As Defendants previously noted, "rum production and aging operations have been conducted at Cruzan's present location for more than 220 years." Defs. Mem. Supp. Mot. Dismiss at 24. And the Opposition does not dispute that *all* the Plaintiffs purchased their properties in or after 1990, two *centuries* after the rum production – and the alleged "*very* visible" black mold that comes with it – had begun.[12]

Moreover, the cases cited by Plaintiffs – *Schott v. Appelton Brewery Co.*, 205 S.W.2d 917 (Mo. Ct. App. 1947), and *Powell v. Superior Portland Cement Co.*, 129 P.2d

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[10] Plaintiffs have conceded that there cannot be a public nuisance by failing to respond to this aspect of Defendants' 12(b)(6) memorandum. *See e.g., Marx v. Georgia Dep't of Corr.*, Civ. Action No. 7:12-CV-92 (HL), 2013 WL 5347395, *5 (M.D. Ga. Sept. 23, 2013).

[11] Pls. Opp'n at 9.

[12] Plaintiffs suggest that there has been a change of circumstances resulting in "major increases in the rum operations." Pls. Opp'n at 19. Specifically, Plaintiffs argue: "Defendants do not mention the size of Cruzan's operations over the years and do not mention Diageo's recent move of all its rum aging operations to St. Croix." *Id.* However, the reason that Defendants "do not mention" these facts in their Motion to Dismiss is that Plaintiffs' Complaint does not plead them, much less suggest the alleged "rum mold" has somehow just arrived because of these events.

536 (Wash. 1942) – support Defendants' position that the private nuisance claim should be dismissed. As Plaintiffs explain regarding *Appelton*:

> The Appelton Brewery had been operating in the village as long as anyone could remember. The plaintiff bought the adjacent property and built a house six years before filing suit alleging that the brewery's coal fired power plant was dumping fly ash on his property causing an interference with his use and enjoyment of his property. The additional factor which allowed the recent acquisition of the neighboring property to be a factor in barring the claim was the fact that the brewery installed many additional appliances and complied with every suggestion and piece of advice that experts recommended . . . in its efforts to reduce the particulate matter released by its smokestacks.

Pls. Opp'n at 21. This case follows the facts of *Appelton* almost precisely. Rum production and aging has been a part of St. Croix for more than 200 years, just as the Appelton brewery had been operating "as long as anyone could remember." Plaintiffs here all purchased their properties between 1990 and 2007, just as the plaintiff in the *Appelton* case had "bought the adjacent property and built a house" not long before filing suit and long after the brewery began operating. Defendants here have complied with every rule, regulation, and permitting requirement, and followed the position of the expert agencies, which have repeatedly confirmed that that there are no feasible control technologies. Thus, Defendants have met the "additional factor" in *Appelton* that "allowed the recent acquisition of the neighboring property to be a factor in barring the claim."[13]

In light of Plaintiffs coming to the alleged nuisance – and their failure to plausibly plead any feasible method to capture ethanol emissions allegedly causing that nuisance – the nuisance claim should be dismissed.

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[13] Defendants' position is similarly supported by *Powell*. As in *Powell*, Defendants have followed the position of the expert agencies; today, rum is the only major production industry in St. Croix, Defs. Mem. Supp. Mot. Dismiss at 3; and plaintiffs moved to their respective residences near the aging facilities nearly 200 years after rum production began in St. Croix.

V. *An "invisible vapor" cannot constitute a physical intrusion of another's property supporting a claim of trespass*

Plaintiffs agree that the Restatement Second governs the trespass claims raised in this case pursuant to 1 V.I.C. § 4 and the local case law adopting these provisions. Pls. Opp'n at 9; *see, e.g., Hodge v. McGowan,* 50 V.I. 296 (V.I. 2008) (citing § 158 of the Restatement Second). Plaintiffs cite various cases that they claim support their argument that an invisible vapor acting as a catalyst, rather than as the injurious substance itself, can constitute a trespass. These cases, however, extend trespass beyond its traditional limits embodied in the Restatement Second and blur the line between a nuisance and trespass established in the Restatement Second.

Section 821D of the Restatement Second states: "A private nuisance is a *nontrespassory invasion* of another's interest in the private use and enjoyment of land." (emphasis added). Moreover, as noted in part in Cmt. d. to this section:

> A trespass is an invasion of the interest in the exclusive possession of land, as by entry upon it. (See §§ 157-166). A nuisance is an interference with the interest in the private use and enjoyment of the land, and does not require interference with the possession.

Id. cmt. d ("Trespass distinguished"). Thus, as one court recently explained, "[t]raditionally, trespasses are distinct from nuisances: '[t]he law of nuisance deals with indirect or intangible interference with an owner's use and enjoyment of land, while trespass deals with direct and tangible interferences with the right to exclusive possession of land.'" *Johnson v. Paynesville Farmers Union Co-op. Oil Co.*, 817 N.W.2d 693, 704 (Minn. 2012), *cert. denied*, 133 S. Ct. 1249 (2013) (quoting Dan B. Dobbs, *The Law of Torts* § 50 at 96 (2000)).

The cases cited by Plaintiffs either do not rely on the Restatement Second's definition of trespass, or go beyond the traditional understanding of trespass in favor of an alternative view that has not been adopted in the Virgin Islands. For example, Plaintiffs rely heavily on case law from Kentucky. But Kentucky courts do not adopt the Restatement Second's view of trespass. *Cf.* W. Page Keeton et al., *Prosser & Keeton on the Law of Torts*, § 13, at 71 (5th ed.1984) ("While it is generally assumed and held that a personal entry is unnecessary for a trespass, the defendant's act must result in an invasion of tangible matter. . . . It is [] reasonably clear that the mere intentional introduction onto the land of another of smoke, gas, noise, and the like . . . are considered in connection with a private nuisance, is not actionable as a trespass.") (citations omitted). Plaintiffs specifically cite two cases related to the release of uranium enriched material in Kentucky, where the federal court asked the Kentucky Supreme Court to answer a question of state law. *Smith v Carbide & Chems. Corp.*, 507 F.3d 372, 377 (6th Cir 2007). In its response, the Kentucky Supreme Court did not rely on the Restatement Second in finding that the contamination of groundwater by plutonium could constitute a trespass. *Smith v. Carbide and Chemicals Corp.,* 226 S.W.3d 52 (Ky. 2007). The other Kentucky case cited, *Brockman v. Barton Brands, Ltd.,* No. 3:06CV-332-H, 2012 WL 231738 (W.D. Ky. Jan. 14, 2010), also did not address the Restatement Second. The same is true for the case Plaintiffs cite from the Fifth Circuit, *Stevenson v. E.I, DuPont de Nemours & Co.*, 327 F.3d 400, 406 (5th Cir. 2003), which relies on language specific to Texas law.

Plaintiffs cite cases that do not adopt the Restatement Second's view of trespass, and thus hold that entry of an intangible object is sufficient for trespass. *See In re TVA*

Ash Spill Litig., 805 F. Supp. 2d 468, 483-84 (E.D.Tenn. 2011) (discussing Tennessee case law adopting the view that entry of intangible matter is sufficient to give rise to a trespass); *Borland v. Sanders Lead Co., Inc.*, 369 So. 2d 523, 527-28 (Ala. 1979) (acknowledging that "[t]he view recognizing a trespassory invasion where there is no 'thing' which can be seen with the naked eye undoubtedly runs counter to the definition of trespass expressed in some quarters. 1 Restatement, Torts s 158, Comment H (1934); Prosser, Torts s 13 (2d Ed. 1955).'").[14]

In a recent and thorough opinion, the Minnesota Supreme Court in *Johnson* considered the competing "traditional" view adopted by the Restatement Second (intangible matter cannot give rise to trespass) and the alternative view (intangible matter can give rise to trespass). *Johnson v. Paynesville Farmers Union Co-op. Oil Co.*, 817 N.W.2d 693, 704-05 (Minn. 2012) *cert. denied*, 133 S. Ct. 1249 (2013). There, the Court held that that the "traditional" view was correct because, among other reasons, the alternative view blurred the distinction between nuisance and trespass established in the Restatement Second. *Id.* at 704. Here, too, the Court should follow the reasoning of *Johnson* and reject Plaintiffs' attempt to conflate these two separate torts and go beyond the Restatement Second.

VI. *Injunctive relief is a remedy available if Plaintiffs can sustain their other counts, not a separate cause of action, and therefore should be dismissed*

Plaintiffs argue that Count V should remain even though it only seeks a remedy and does not state a separate cause of action. *See* Pls. Opp'n at 25, citing *Beachside*

[14] Plaintiffs likewise cite cases from Colorado that reject the traditional understanding of trespass. *See Cook v. Rockwell Int'l Corp.*, 273 F. Supp. 2d 1175, 1200-01 (D. Colo. 2003) (noting that Colorado Supreme Court adopted the alternative view in *Public Serv. Co. of Colo. v. Van Wyk*, 27 P.3d 377, 390 (Colo. 2001)). Plaintiffs also cite a 1944 case, *McNeill v, Redington*, 154 P.2d 428, but the Restatement Second was adopted well after that date.

Assoc. v. Bayside Resort, Inc., Case No. ST-O7-CV-0000626, 2011 V.I. Lexis 68 (Super. Ct. St. Thomas & St. John, Nov. 25, 2011)). That case, however, does not address whether a request for injunctive relief is appropriate as a separate count. Rather, the court in that case merely acknowledged that the request for injunctive relief filed as a counterclaim, was not ripe for the court at the time. *Beachside Assocs.,* 2011 V.I. LEXIS 68, at *20. Moreover, as *Beachside Assocs.* reflects, a court must consider four prongs in determining whether injunctive relief is appropriate:

> (1) the moving party has shown actual success on the merits; (2) the moving party will be irreparably injured by the denial of injunctive relief; (3) the granting of the permanent injunction will result in even greater harm to the defendant; and (4) the injunction would be in the public interest.

Id. (quoting *Kendall v. Russell*, Civil No. 2007-126, 49 V.I. 602, 618 (D.V.I. 2008)). Count V does not even include these specific allegations. Thus, even if the injunctive relief "count" is proper, it still must be dismissed for failing to state a claim.

Although injunctive relief may be available to Plaintiffs *as a remedy* if they prevail on the merits of their other claims, it is not an independent count. Therefore, Count V must be dismissed.

CONCLUSION

Plaintiffs' common law claims are preempted by the CAA and no plausible set of facts exist to support these claims. The Court should dismiss the Complaint with prejudice.

Dated: October 28, 2013

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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of October, 2013, I filed the foregoing with the Clerk of the Court, and delivered as indicated to the following:

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