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.

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(f) MOTION TO STRIKE OR, IN THE ALTERNATIVE, FOR A MORE DEFINITE STATEMENT UNDER RULE 12(e)

Defendants Diageo USVI, Inc. ("Diageo USVI") and Cruzan VIRIL, Ltd. ("Cruzan") respectfully submit this reply memorandum in support of their joint motion to strike Plaintiffs' class action claims pursuant to Rule 12(f) of the Federal Rules of Civil Procedure, or in the alternative, for a more definite statement under Rule 12(e) of the Federal Rules of Civil Procedure. For the reasons described in Defendants' Motion, and as further explained below, the Complaint's attempt to plead classes—the scope of which are "to be determined"—should be rejected. Compl. ¶¶ 58 a-e. Plaintiffs should be required to replead and define the scope of their purported classes.

I. *Plaintiffs Must Plead a Plausible Class Definition in Their Complaint*

Plaintiffs spend most of their opposition brief ("Opposition") arguing that the Court should not "deny class certification" under Rule 23 and that, perhaps in the long run,

they will be able to satisfy the elements of Rule 23. *See* Pls. Opp'n to Strike at 5-10. Defendants, however, are not seeking an order denying class certification under Rule 23 at this time. Rather, Defendants are seeking an order that Plaintiffs failed to comply with Rule 8(a)(2), which requires them to plausibly plead their class allegations in the first instance.

Plaintiffs, however, do not even address the requirement, reflected in Rule 8(a)(2), that Plaintiffs must give Defendants notice of their claims and provide facts plausibly showing that they are entitled to relief. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). As Defendants stated in their Motion—and Plaintiffs do not contest in their Opposition—this requirement applies to class allegations, just as it does to merits allegations. In *Nicholas v. CMRE Fin. Servs., Inc.*, Civ. Action No. 08-4857 (JLL), 2009 WL 1652275 (D.N.J. June 11, 2009), for example, the court rejected similarly vague class allegations based on Rule 8(a)(2). *Id.* at *4. There, as here, the plaintiffs' complaint did not provide the defendants basic notice of the scope of the proposed class and therefore deprived the defendants of the ability to prepare their defenses to the class allegations. *Id.* As the court explained: "After *Twombly*, courts in [the Third] circuit have found that class allegations must also comply with Rule 8(a) in order to proceed to class discovery." *Id.* (citing *Hodczak v. Latrobe Specialty Steel Co.*, Civ. Action No. 08-649, 2009 WL 911311, at *9 (W.D. Pa. Mar. 31, 2009); *Smith v. Lyons, Doughty & Velduius, P.C.*, Civ. Action No. 07-5139, 2008 WL 2885887, at *5 (D.N.J. July 23, 2008)). The court therefore ordered Plaintiffs to clarify their class definition. *Id.*

Plaintiffs' decision to "punt" on the scope of their purported classes is not a mere technicality. The purpose of a complaint is to provide notice of the parameters of a plaintiff's case so that the defendant can plan its defense and discovery can be conducted in an efficient manner. *Taylor v. Sanders*, No. 12-3890, 2013 WL 4010249, at *2 (3d. Cir. Aug. 7, 2013) ("To satisfy this requirement, a claim must be described in sufficient detail to provide 'fair notice of what the . . . claim is and the grounds upon which it rests.'") (citation omitted); *see also Washington v. Colorado State Univ.*, 405 F. App'x 288, 289-90 (10th Cir. 2010) ("Rule 8 serves the vital purpose of enabling the court and defendants 'to know what claims are being asserted and to be able to respond to those claims.'") (citation omitted). That principle applies no less to class allegations. This case proves the point: as written, the proposed class definitions do not provide Defendants, even in broad terms, basic notice of who is alleged to be harmed by their conduct and who are putative plaintiffs in this case. Thus, based on the current Complaint, Defendants will not be able to appropriately tailor their defense to the class claims, and discovery would be boundless, inefficient, and costly.

It is no answer to say, as Plaintiffs do, that discovery will work it out. Pls. Opp'n to Strike at 11. Plaintiffs must plead a plausible class claim *before* getting discovery. As another district court in the Third Circuit said:

> While discovery may be appropriate in certain cases prior to the notice phase to assist the plaintiffs in identifying potential class members, that does not relieve plaintiffs of their obligation of filing a properly pled complaint in the first instance demonstrating that they are entitled to that discovery. Plaintiffs appear to concede as much by arguing that they have met the *Twombly* standard and by citing to *Brothers v. Portage National Bank*, 2007 WL 965835 (W.D. Pa. March 29, 2007), for the proposition that the standard for assessing a motion for class certification is irrelevant where no such motion has yet been filed and that, at the motion to dismiss stage, the plaintiff need only satisfy the requirements of Rule 12(b)(6).

> Having already found that plaintiffs have not pled any facts in the complaint to support a collective action claim, they have not demonstrated that they are entitled to the discovery they seek and those claims are properly dismissed.

Hodczak v. Latrobe Specialty Steel Co., Civ. Action No. 08-649, 2009 WL 911311, at *9 (W.D. Pa. Mar.31, 2009) (footnote omitted). Nor is this a case where there is a specific class definition in the Complaint and, as Plaintiffs put it, that definition may be "refined" in discovery. Pls. Opp'n to Strike at 11. Rather, Plaintiffs' Complaint expressly pleads that the alleged classes are "to be determined." Compl. ¶¶ 58 a-e.

As discussed in Defendants' Motion, and as Plaintiffs agree, a class must be "ascertainable" in order to be viable. *Romberio v. UnumProvident Corp.*, 385 F.App'x. 423, 431 (6th Cir. 2003) (quoting *John v. Nat'l Sec. Fire and Cas. Co.*, 501 F.3d 443, 445 (5th Cir. 2007)) ("The existence of an ascertainable class of persons to be represented by the proposed class representative is an implied prerequisite of Federal Rule of Civil Procedure 23."). Plaintiffs spend most of their Opposition discussing class certification decisions where the proposed class definitions were based on proximity to certain facilities and the court found they were adequate under Rule 23. Pls. Opp'n to Strike at 7-9. These decisions are not on point.

First, none of them addressed the requirements of Rule 8(a)(2), which are at issue in this Motion. Second, in those cases where the court granted certification, there was at least some proposed geographic boundary or attempt to tie the class to a "proximity" to a particular facility.[1] Here, by contrast, the Complaint expressly eschews

[1] For example, Plaintiffs discuss at length *In re Methyl Tertiary Butyl Ether ("MTBE") Products Liab. Litig.*, 241 F.R.D. 185, 194-96 (S.D.N.Y. 2007) ("Koch v. Hicks"). Pls. Opp'n Strike at 8-9. In *MTBE*, however, the court was not addressing Rule 8(a)(2) and, unlike here, the plaintiffs there tied the class to the "vicinity" of a specific gas station. No such vicinity is pled here. Moreover, numerous courts have rejected proposed classes defined by reference to the

any attempt to define the scope of the classes. Even applying Plaintiffs' understanding of the ascertainability requirement—and the outlier cases that they cite—that would not be sufficient. As the Court held in *Brockman v. Barton Brands, Ltd.*, Civ. Action No. 3:06-CV-332-H, 2007 WL 4162920 (W.D. Ky. Nov. 21, 2007), "courts have rejected proposed classes where plaintiffs failed to identify any logical reason . . . for drawing boundaries where they did." *Id.* at *2. Here, Plaintiffs fail to draw any boundaries at all.

II. *Plaintiffs' Proposed Classes Should Be Stricken*

Because Plaintiffs' class allegations fail to comply with Rule 8(a)(2), the class allegations should be stricken and Plaintiffs should be forced to replead their case. At the very least, Plaintiffs should be forced to provide a more definite statement as to the scope of their classes. *Hodges v. Apple Inc.*, Case No. 13-CV-01128-WHO, 2013 WL 4393545, at *8 (N.D. Cal. Aug. 12, 2013) ("[I]f a pleading is deficient, the Court may strike the pleading and require the non-moving party to submit an amended pleading which includes more specific allegations.") (internal citation and quotation marks omitted).

"vicinity" of a facility—particularly where that "vicinity" bore no logical or evidentiary relationship to the harm allegedly caused by activities at the facility. *See Daigle v. Shell Oil Co.*, 133 F.R.D. 600, 602-03 (D. Colo. 1990) ("Although not expressly required by Rule 23, Fed.R.Civ.P., it is obvious that the party seeking certification must establish that an identifiable class exists. . . . Plaintiffs have failed to identify any logical reason relating to the defendants' activities . . . for drawing the boundaries where they did. Therefore, I find and conclude that the plaintiffs have failed to identify a class."); *Brockman v. Barton Brands, Ltd.*, Civ. Action No. 3:06CV-332-H, 2007 WL 4162920 (W.D. Ky. Nov. 21, 2007) ("Though Plaintiffs repeatedly describe the proposed class definition as 'objectively reasonable,' they offer no evidence whatsoever that the airborne contaminants spread in a uniform fashion in all directions from Defendants' facility for a distance of up to two miles, or that the contaminants complained of by proposed class members bear a relationship to Defendant."); *Duffin v. Exelon Corp.*, CIV A 06 C 1382, 2007 WL 845336, at *3 (N.D. Ill. Mar. 19, 2007) ("A well-recognized prerequisite to class certification is that the proposed class must be sufficiently definite and identifiable. Overbroad class descriptions violate the definiteness requirement because they 'include individuals who are without standing to maintain the action on their own behalf.'") (citations omitted).

Contrary to Plaintiffs' argument, there is nothing improper or unusual about a court striking class allegations that are facially deficient, or requiring Plaintiffs to provide more specificity. *See, e.g., U.S. Equal Employment Opportunity Comm'n. v. Pioneer Hotel, Inc.*, No. 2:11-CV-1588-LRH--RJJ, 2012 WL 1601658, at *3 (D. Nev. May 4, 2012) ("The complaint is devoid of any allegations that define or explain the scope of the class, how many class members there are, or who subjected the class members to the alleged discrimination. Therefore, the court shall grant defendants' request for a more definitive statement . . . ."); *Sanders v. Apple Inc.*, 672 F. Supp. 2d 978, 991 (N.D. Cal. 2009) (striking class allegations in the complaint); *Stubbs v. McDonald's Corp.*, 224 F.R.D. 668, 677 (D. Kan. 2004) (same)[2]; *see also* 7A Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, *Federal Practice and Procedure*, § 1760, at 120-21 (2d ed. 1986). In fact, Plaintiffs recognize their need to modify their class definitions by submitting a proposed amended Complaint. Plaintiffs' proposed amendments, however, are not currently before the Court. The question is whether the *current* Complaint has adequate proposed classes. It does not. This Court, therefore, should grant Defendants' Motion, and if Plaintiffs respond by amending their Complaint, Defendants will consider their amendments at that time.

[2] None of these cases, which were relied on in Defendants' Motion, are addressed by Plaintiffs. Defs. Mem. Supp. Mot. Strike at 2, 4.

Dated: October 28, 2013

Chad C. Messier, Esq. (Bar No. 497)
Stefan B. Herpel, Esq. (Bar No. 1019)
Counsel for Defendant,
Cruzan VIRIL, Ltd.
Dudley, Topper and Feuerzeig, LLP
Law House, 1000 Frederiksberg Gade
P.O. Box 756
St. Thomas, USVI 00804-0756
Telephone: (340) 774-4422
E-mail: cmessier@dtflaw.com

Joel H. Holt, Esq. (Bar No. 6)
Law Offices of Joel H. Holt
Counsel for Defendant, Diageo USVI
2132 Company Street
Christiansted, VI 00820
Telephone: (340) 773-8709
Email: holtvi@aol.com

Carl J. Hartmann III, Esq. (Bar No. 48)
Counsel for Defendant, Diageo USVI
5000 Estate Coakley Bay, Unit L-6
Christiansted, VI 00820
Telephone: (340) 719-8941
Email: carl@carlhartmann.com

Dated: October 28, 2013

Chad C. Messier, Esq. (Bar No. 497)
Stefan B. Herpel, Esq. (Bar No. 1019)
Counsel for Defendant,
Cruzan VIRIL, Ltd.
Dudley, Topper and Feuerzeig, LLP
Law House, 1000 Frederiksberg Gade
P.O. Box 756
St. Thomas, USVI 00804-0756
Telephone: (340) 774-4422
E-mail: cmessier@dtflaw.com

Joel H. Holt, Esq. (Bar No. 6)
Law Offices of Joel H. Holt
Counsel for Defendant, Diageo USVI
2132 Company Street
Christiansted, VI 00820
Telephone: (340) 773-8709
Email: holtvi@aol.com

Carl J. Hartmann III, Esq. (Bar No. 48)
Counsel for Defendant, Diageo USVI
5000 Estate Coakley Bay, Unit L-6
Christiansted, VI 00820
Telephone: (340) 719-8941
Email: carl@carlhartmann.com

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:

EMAIL AND HAND DELIVER
VINCENT COLIANNI, II
Colianni & Colianni
1138 King Street
Christiansted, St. Croix
U.S. Virgin Islands 00820
vince@colianni.com,
vinny@colianni.com

EMAIL AND U.S. MAIL
WILLIAM F. McMURRY
McMurry & Associates
1201 Story Avenue, Suite 301
Louisville, Kentucky 40206
bill@courtroomlaw.com

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