FOR OFFICIAL PUBLICATION

SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

FELICIA ARNO, individually and as next of friend to LEONARD RODRIGUEZ and CARLOS ARNO; CONFESOR ARNO; MAGDALENA ARNO; GLADYS ARNO, individually and next of friend to YADIEL A. ARNO and LIZ MARIE M. ARNO; GLERYSBETH ARNO JIMENEZ, individually and next of friend to KELVIN D. CEPEDA and NASHALI E. CEPEDA; HECTOR M. ARROYO; PETRA ARROYO, individually and next of friend of AHRIANNA L. ARROYO and KIANA ARROYO; NOEL U. BERLEY; CASSILLA V. BERLEY; CLAIRE J. COMPTON, BRENDA G. FERDINAND; CRYSTAL JEFFREY; JUANA L. JOHNSON; JANE M. MARSH; JENNIE MCKENZIE; VERNON MCKENZIE; GARY A. MOORE; JEROME MOSES; ANNE MARIE P. MURRAY; JULIAN PETERS; ANITA THOMAS-PETERS, individually and as next of friend of A'JADA D. BURKE; BRUNILDA RAMOS; JOSEFINA I. RAMOS; MARTHA RAPHAEL; THOMAS RAPHAEL; DEREK RAPHAEL; VINCENT SARGEANT; PETRONELLA SARGEANT; ARLENE SWANSTON, individually and as next of friend of ISRAEL DENNIE; COSMOS VICTOR; MARTHA VICTOR; RUBEN VICTOR; SHANEQUA SANTIAGO; BERYL WILLIAMS, individually and as next of friend of LEQUANI L. WILLIAMS and LEONAX L. WILLIAMS; IRA S. WILLIAMS; ANDREA C. WOODRUPP, individually and as next of friend of BRUCE E. P. BIGGS; JOEL A. NIEVES; JOSE A. NIEVES, III; GABRIEL A. DELGADO; JORGE LUIS FONTANEZ CLAUDIO; CLEMENCE BOYCE, SR.; RICHARD COOKE; WILHELMINA COOKE; CARLOS R. FIGUEROA, JR.; TAMICA T. FRASER; ABIGAIL LINARES; EYAJIE MALAYKHAN; NADEAN V. MAYNARD; JULIAN L. MICHEAU; DELROY E. MILLER, SR.; ALDORA FLEMING ROBERTS, individually and as next of friend to VYNISHA CHARLES and DARRIYEN ROBERTS; SANDRA A. NICHOLAS; CHAYANNE SANTIAGO; MAYNALYS SANTIAGO; HELEN SHIRLEY; VENA IRWIN; and GRETTA R. SHALTO, **Plaintiffs,** **v.** **HESS CORPORATION; WYATT, V.I., INC.; TURNER ST. CROIX MAINTENANCE, INC.; and XYZ CORPORATION,** **Defendants.**	**CASE NO. SX-12-CV-314** **COMPLEX LITIGATION DIVISION** *** **Coordinated Under *In Re: Refinery Hydrocarbon Release Litigation*, Master Case No. SX-15-CV-100**

JOSEPH SONNY; THOMAS WILLIAMS, COLETTA MICHAEL; AUGUSTIN ANGOL; ANGELINA M. FELIX; JULIA GABRIEL; JOHN JORDON; VERONICA LLANOS, on her own and on behalf of her children, KEANNA ALPHONSE and KELVIN ALPHONSE, JR.; REGINA CLOVIS; CLESTIN CLOVIS; MARIE VERONICA GONSALVES; MYRNA LOPEZ; RAMONA SANTOS; MAISHALEEN LOPEZ; and MARCO RIJO,	)	**CASE NO. SX-12-CV-328**
	)	**COMPLEX LITIGATION DIVISION**
	)	* * *
Plaintiffs,	)	
v.	)	**Coordinated Under *In Re: Refinery Hydrocarbon Release Litigation*, Master Case No. SX-15-CV-100**
HESS CORPORATION,	)	
Defendant.	)	
SERAFIN RODRIGUEZ, SR.; SERAFIN RODRIGUEZ, JR.; ST. ROSE BARRY; AUGUSTINE CLIFFORD; MICHAEL JNO-FINN; RAMONA GONZALES; ZULEYKA CARLOT; LUIS RIVERA; TERESA RIVERA; QUERMAN PERALTO; ROSANDO AYALA, as Next of Friend to JESUS AYALA; DANIEL CARMONA; ESTHER MARTINEZ; MILCIADE DELACRUZ; BERTA FELIZ; LUIS CARPIO; ROSA DIAL; NELSON MENA; ELADIA MENA; NELSON MENA MALTE, Individually and as Next of Friend to GLORIMAR MENA GARCIA; JOAN MENA MATEO; JUAN HERNANDEZ; LOGAN DUJOLS; ANA ROSARIO; SENCION GUZMAN; DIONIS CUELLO; ANA SANBOY; SIGFREDO MARQUEZ; GUILLERMINA CEPIN, Individually and Next of Friend to DAYONA MARQUEZ, YARALIZ ORTA, and LIGIA FELIZ; JUNIOR MARQUEZ; TEDORA FRIGS PASCUAL; AMERICO ESTEPHAN; BASILIO ROA; EDELMIRA ROA DE ROSA; FREDDY MORLA; ALBERTO MORLA, MARIA RODRIGUEZ, Individually and as Next of Friend to VICTOR OZARIO; FELITO RIJO; LUIS BAEZ; HECTOR MARTINEZ; MIGUEL MARTINEZ; JOANGNA CARMONA; DEMETRIO A. PILLER; ELIZABETH DIAZ, Individually and as Next of Friend to LIZANGEL PILLER, LENADRO PILLER, ANTONIO PILLER and LIZANDRO PILER; DAVID JIMINEZ; KARINA PACHEO; GUILLERMO RIVERA; SANAT PEREZ; LOANMI MENDEZ, Individually and as Next of Friend to ISRAEL RODRIGUEZ; NANCY DE LA CRUZ; ANGELA ROBLES; NATASHA ROBLES, Individually and as Next of Friend to MAICANGEL ROBLES; CONFESOR REYES; JULIAN PETERS;	)	**CASE NO. SX-12-CV-367**
	)	**COMPLEX LITIGATION DIVISION**
	)	* * *
	)	**Coordinated Under *In Re: Refinery Hydrocarbon Release Litigation*, Master Case No. SX-15-CV-100**

ANITA THOMAS-PETERS; A'JADA BURKE; ANDRE FRANCIS; ERIC MASSICOT; EDELMIRO ACOSTA; ARTHUR JOHN-BAPTISTE; ABBEY CLOUDEN; CHASTIDY FARRELLY; MARSHA BASCOMBE, as Next of Friend to CHRISTINE FARRELLY; LAURA RANDOLPH, Individually and as Next of Friend to DANIEL DRIGO; WILMA TUTIEN; ANNE SALDANA, Individually and as Next of Friend to LIZANNI SALDANA, LUIS SALDANA, JR., and JEMEASA GUMBS; JOHANNA ANTOINE; SUSAN GUMBS, Individually and as Next of Friend to JIANNA FRONTAL; ROSANDA AYALA, as Next of Friend to JESUS AYALA; EZEKIEL FARRELL; HECTOR ARROYO; PETRA ARROYO, Individually and as Next of Friend to AHRIANNA ARROYO and KIANNA ARROYO; SANDY THOMAS, GARY JARVIS, as Next of Friend to GARY JARVIS, JR.; HENDERSON EVANS; SHANE NOORHASAN; LUCINDA HASSELL, as Next of Friend to MIRANDA CANNON; ANTHONY WILLIAMS; BASILICA WILLIAMS, GEORGE GLASGOW; HERBERT LEONCE; HYACINTH GONSALVES, MARIE GONSALVES; LENARD AUGUSTE, as Next of Friend to MARIAH AUGUSTE; and ROUMENKA CHAPKANOVA,

Plaintiffs,

v.

HESS CORPORATION; WYATT V.I., INC.; TURNER ST. CROIX MAINTENANCE, INC.; and XYZ CORPORATION,

Defendants.

Cite as: 2019 VI Super 140

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MEMORANDUM OPINION

MOLLOY, *Judge*.

¶1 **BEFORE THE COURT** are motions to dismiss the negligent abatement claims and for a more definite statement filed in *Arno* (SX-12-CV-314), and in *Rodriguez* (SX-12-CV-364) by HOVENSA, LLC ("HOVENSA"). HOVENSA and Hess Corporation ("Hess") in one motion sought similar relief in *Sonny* (SX-12-CV-328) to dismiss the negligence per se and fraud claims and for a more definite statement. Turner St. Croix Maintenance, Inc. ("Turner") and Wyatt V.I., Inc. ("Wyatt") joined the motions in *Arno* and in *Rodriguez*. Hess joined the motions in *Arno* but not in *Rodriguez*. The third motion before the Court—for leave to plead out of time—was filed by Hess once it realized that it failed to answer or respond in *Rodriguez*. Hess seeks leave to plead out of time now by joining the motions in *Rodriguez*.

¶2 HOVENSA was subsequently dismissed by the *Arno*, *Rodriguez*, and *Sonny* Plaintiffs (collectively "Plaintiffs") by way of a claim-resolution process in bankruptcy court. *Cf. In re: HOVENSA L.L.C.*, No. 1:15-bk-10003, 2018 Bankr. 3940, *3-4 (Bankr. D.V.I. Dec. 12, 2018) (explaining options for tort claimants). But HOVENSA's dismissal did not moot the motions in *Arno*, however, because Hess, Turner, and Wyatt had joined. Likewise, because Turner and Wyatt joined the motions in *Rodriguez*, the motions were also not mooted by HOVENSA's dismissal from *Rodriguez*. HOVENSA's dismissal had no impact on the motion in *Sonny*, however, because the District Court of the Virgin Islands ("District Court") denied that motion as moot when before remanding *Arno*, *Rodriguez*, and *Sonny* to the Superior Court. *See generally Rodriguez v. HOVENSA, L.L.C.*, Civ. No. 2012-100, *et seq.*, 2014 U.S. Dist. LEXIS 43967 (D.V.I. Mar. 31, 2014). Thus, five motions are pending:

a motion to dismiss, a motion for a more definite statement in *Arno*; and a motion to dismiss, a motion for a more definite statement, and a motion for leave to plead out of time in *Rodriguez*.

¶3 For reasons explained further below, the Court will, first, grant Hess' motion for leave to plead out of time but only because the *Rodriguez* Plaintiffs failed to respond. Otherwise, Hess' motion would be denied because Hess has not shown good cause or excusable neglect for failing to answer or respond in *Rodriguez* for almost seven years. Next, because the District Court denied Hess and HOVENSA's motion in *Sonny* to dismiss and for a more definite statement as moot, the Court will direct Hess to file an answer even though Hess is technically in default. Additionally, and notwithstanding that the *Arno* and the *Rodriguez* Plaintiffs failed to respond, the Court will grant the motions for a more definite statement in part, but only as to the negligence per se claims. The Defendants are entitled to notice of what statutes they allegedly violated. And the Court will deny the motions to dismiss. The Defendants are correct: "no such cause of action [as negligent abatement] exists under the laws of the Virgin Islands." (Def. HOVENSA's Mot. & Br. to Dismiss Pls.' Negligent Abatement Claim 1, filed Sept. 29, 2012, *Arno, et al. v. HOVENSA, LLC, et al.*, SX-12-CV-314; *accord* Def HOVENSA's Mot. & Br. to Dismiss Pls.' Negligent Abatement Claim 1, filed Oct. 9, 2012 (same); *see also Rodriguez, et al. v. HOVENSA, LLC, et al.*, SX-12-CV-367 (same)). But what the Plaintiffs allege is that the Defendants caused further damage when they attempted to remediate, not abate, the hydrocarbons released from the oil refinery. Although "negligent abatement" may not have been recognized as a tort yet in the Virgin Islands, negligence has been. Moreover, other courts recognize negligent remediation as a cause of action. This Court will as well. Lastly, rather than order the Plaintiffs to file a more definite statement, *cf. Alleyne v. Diageo USVI, Inc.*, 69 V.I. 307, 317, 338 (Super. Ct. 2018) ("*Alleyne II*"), the Court will direct the Plaintiffs to incorporate the additional information the Defendants are entitled to into their complaints because all but the first-named Plaintiff in each case must be dropped and their claims severed to be refiled individually.

I. PROCEDURAL BACKGROUND

¶4 According to the complaints, which are assumed to be true at this juncture, *accord Abraham v. St. Croix Renaissance Group, LLLP*, 70 V.I. 84, 81 (Super. Ct. 2019), the Plaintiffs suffered injuries to their persons and properties after several discharges of hydrocarbons were released from the oil refinery on St. Croix. "[A] large discharge of oil and other chemicals, toxins and particulates" was released from the oil refinery "[o]n or about September 19, 2010." (Amend. Compl. ¶ 49, filed Sept. 5, 2012, *Arno, et al. v. HOVENSA, LLC, et al.*, SX-12-CV-314.[1]) Another discharge occurred "[o]n or about December 9, 2010." (Compl. ¶ 72, filed Sept. 11, 2012, *Rodriguez, et al. v. HOVENSA, LLC, et al.*, SX-12-CV-367.) Further "noxious, foul smelling and toxic emissions" were discharged from "about May 9, 2011 . . . continuously . . . through mid June 2011." (Compl. ¶ 22, filed Aug. 17, 2012, *Sonny, et al. v. HOVENSA, LLC, et al.*, SX-12-CV-328.)

¶5 These discharges were "dispersed in the atmosphere and entered into the homes of the Plaintiffs . . . ." (*Rodriguez* Compl. ¶ 72.) "As a result the Plaintiffs' roofs, walls, insides of their homes, personal property, and vehicles were covered with oil and other matter . . . ." *Id.* ¶ 73; *accord Arno* Amend. Compl. ¶ 50 ("Plaintiffs' roofs, walls, insides of their homes, personal property, vehicles, plants, were covered with oil and other matter and damaged."). Beyond damage to real and personal property, many Plaintiffs were also sickened by the release. (*See Sonny* Compl. ¶ 23 ("The smells made the residents of St. Croix ill and in particular made the Plaintiffs herein physically ill as well as causing psychological injuries."); *Rodriguez* Compl. ¶ 72 ("a large discharge . . . was dispersed . . . and was inhaled by Plaintiffs."); *Arno* Amend. Compl. ¶ 63 ("the Plaintiffs . . . drank or bathed in contaminated water, breathed the contaminants, got the contaminants on their skin."). *But cf. Arno* Amend. Compl. ¶67 ("those Plaintiffs *except* those designated as property damage only suffered physical injuries, medical expenses, are in need of medical monitoring . . . ." (emphasis added).)

¶6 The *Arno* Plaintiffs filed suit first, on August 13, 2012, naming HOVENSA, Hess Corporation ("Hess"), Wyatt V.I., Inc. ("Wyatt") and Turner St. Croix Maintenance, Inc. ("Turner") as defendants. Several days later, the *Sonny* Plaintiffs filed suit, naming only HOVENSA and Hess as defendants. A month later, on September 11, 2012, the *Rodriguez* Plaintiffs filed suit and, like the *Arno* Plaintiffs, named HOVENSA, Hess, Wyatt, and Turner as defendants. The *Arno* and *Rodriguez* Plaintiffs also named XYZ Company, a fictitious corporate defendant who has not yet been identified. As the District Court previously summarized:

> [a]ll of the Complaints share five counts in common: negligence, public and private nuisance, negligent or intentional infliction of emotional distress, and maintenance of an abnormally dangerous condition stemming from particulate matter, toxic emissions and discharges from the HOVENSA oil refinery on St. Croix. Plaintiffs

[1] Following its dismissal, the captions of all three cases were amended to remove HOVENSA, LLC as a party-defendant. To avoid confusion, citations from the record retain the prior caption.

> further allege nuisance *per se* and fraud in *Sonny* . . . and negligence *per se* and negligent abatement in *Rodriguez* . . . and *Arno* . . . .

Rodriguez, 2014 U.S. Dist. LEXIS 43967 at *2.

¶7 HOVENSA appeared in *Arno* and filed two motions on September 28, 2012: to dismiss the negligent abatement claim and for a more definite statement, both of which Turner, Hess and Wyatt joined. On October 9, 2012, HOVENSA filed the same motions—to dismiss the negligent abatement claim and for a more definite statement—in *Rodriguez*, which Turner and Wyatt also later joined. Hess did not join. Turner removed *Rodriguez* to the District Court on October 9th. Hess followed, removing *Arno* on October 10, 2012, and *Sonny* on October 12, 2012. In the District Court, Hess and HOVENSA jointly filed a motion in *Sonny* on October 18, 2012, to dismiss the nuisance *per se* and fraud claims, and for more definite statement concerning the remaining claims.

¶8 The Plaintiffs never responded on the merits to any of the Defendants' pre-answer motions. Instead, the Plaintiffs moved the District Court to stay further proceedings on the motions because they were filing a motion to remand. "It is not appropriate for the Court to rule on any motions or for the Plaintiffs to respond," the Plaintiffs asserted, "until the jurisdictional issue is decided by the Court." (Pls.' Mot. to Stay Proc. in Resp. to Defs.' Mot. for a More Def. Stmt & Mot. to Dismiss Pls.' Negl. Abatement Claim 2, *Arno, et al. v. HOVENSA, LLC, et al.*, Case No. 1:12-cv-00101 ECF. No. 15 (D.V.I. Nov. 2, 2012) (hereinafter "Stay Resp."); *see also* Pls.' Mot. to Stay Proc. in Resp. to Defs.' Mot. for a More Def. Stmt & Mot. to Dismiss Pls.' Negl. Abatement Claim 2, *Sonny, et al. v. HOVENSA, LLC, et al.*, Case No. 1:12-cv-00104 ECF No. 7 (D.V.I. Nov. 2, 2012) (same); Pls.' Mot. to Stay Proc. in Resp. to Defs.' Mot. for a More Def. Stmt & Mot. to Dismiss Pls.' Negl. Abatement Claim 2, *Rodriguez, et al. v. HOVENSA, LLC, et al.*, Case No. 1:12-cv-00100 ECF No.24 (D.V.I. Nov. 5, 2012) (same).) Hess and HOVENSA jointly filed notices in *Sonny* and *Arno*[2] of no objection to staying further proceedings until questions regarding the District Court's jurisdiction were resolved. Turner, and HOVENSA but without Hess, filed identical notices in *Rodriguez*. Wyatt did not respond.

¶9 In a March 31, 2014 Memorandum Opinion, the District Court granted the Plaintiffs' motions to remand to Superior Court. *See generally Rodriguez*, 2014 U.S. Dist. LEXIS 43967. And in the orders

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[2] The notice docketed in *Arno* on PACER retrieves the notice from *Sonny*. The Court assumes for purposes of this Opinion that Hess and HOVENSA did intend to file a notice of no objection in *Arno* and inadvertently filed the *Sonny* notice in the wrong case.

accompanying the opinion, the District Court denied as moot the Plaintiffs' motions to stay further proceedings. *See id.* at *22 ("**ORDERED** that that Plaintiffs' "Motion to Stay Proceedings" (Dkt. No. 24) is **DENIED AS MOOT**."). But the order issued in *Sonny* also denied as moot HOVENSA and Hess' October 18, 2012 motion to dismiss and for a more definite statement. The nearly identical motions filed by HOVENSA in *Arno* and *Rodriguez* were not addressed.

¶10 After remand, the Superior Court identified a total of seven cases, including these three, that all involved claims of "personal injury and property damage allegedly caused by the release of oil, hydrocarbons, and chemicals into the air from the former oil refinery on St. Croix." *In re: Refinery Hydrocarbon Release Litig.*, SX-15-CV-100, 2017 V.I. LEXIS 101, *2 (V.I. Super. Ct. July 10, 2017). The cases were reassigned to the same judge and grouped under a master case, *see id.* at *5-6, but then stayed due to HOVENSA having filed for bankruptcy. Although the automatic stay applied only to HOVENSA, the Court (Brady, J.) extended the stay to all the Defendants for a period of time. *See id.* at *6-7. Approximately eighteen months later, after the Court had not further heard from the parties, the Court issued a memorandum opinion and order to the Plaintiffs to show cause "why the Court should not lift the stay . . . as to *Arno*, *Sonny*, and *Rodriguez* and . . . sever the claims against the solvent co-defendants and . . . dismiss the claims against HOVENSA without prejudice." *Id.* at *18. This Court later summarized the parties' responses:

> The plaintiffs in *Arno*, *Sonny*, and *Rodriguez* responded in favor of proceeding without HOVENSA because HOVENSA's liability, if any, was secondary to the claims of the other defendants. . . . Hess . . . and . . . Turner . . . responded in opposition to proceeding without HOVENSA. Wyatt . . . did not file a response or join in any of the other parties' responses. Hess argued that "the 'identity of interest' that exists between Hess and HOVENSA shows that HOVENSA is an indispensable party to the *Arno*, *Rodriguez*, and *Sonny* cases." "To permit Plaintiffs to sever and proceed with their claims against Hess," Hess argued, "will leave Hess 'subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations,' and lead to potentially conflicting litigation and inconsistent findings of liability and negligence between the Federal District Court and the Superior Court." Turner echoed Hess' concerns, claiming that "HOVENSA's potential liability in these cases is inextricably linked with the potential liability of Turner and Wyatt, both legally and practically. Either of these linkages will affect the bankruptcy estate. Therefore, the bankruptcy court retains jurisdiction over *Arno* and *Rodriguez* cases, and the stay should not be lifted."

(Order 1-2, entered Jan. 16, 2019 (citations and brackets omitted).)

¶11 After the parties had responded, but before the Court could rule on the issues raised in the

July 10, 2017 opinion and order, the Presiding Judge of the Superior Court transferred the cases to the newly created Complex Litigation Division and reassigned them to the undersigned judicial officer. And in the interim, the Plaintiffs filed notices in each of their cases that the automatic stay had been lifted because they had agreed to resolve their claims against HOVENSA through a claim-resolution process. In a January 15, 2019 order to show cause, this Court noted the above background and raised a different question:

> The stay Turner refers to is the stay the Court (Brady, J.) imposed on this case by order dated and entered November 17, 2015, separate and apart from the stay automatically imposed by the bankruptcy code. Technically, that stay remains in effect because the Court has not lifted it. It will be lifted below. The consequence, however, is that the claims of the plaintiffs in *Arno* and *Rodriguez* against Hess, Wyatt and Turner, and the claims of the plaintiffs in *Sonny* against Hess, have also remained stayed while HOVENSA's bankruptcy case proceeded. But HOVENSA and the *Arno* and *Rodriguez* plaintiffs have also decided to "submit their claims to final and binding valuation by former Territorial Court Judge Henry Smock[.] Assuming the *Sonny* plaintiffs were given and will elect the same option, it now means that Wyatt, Turner, and Hess remain parties to *Arno* and *Rodriguez*, and *Hess* a party to *Sonny*, but without HOVENSA, a party they claimed was indispensable and without whom they would face inconsistent or double obligations.
>
> But whether these cases proceed without HOVENSA is not a question for this Court to decide on its own . . . . Assuming, without deciding, that the *Arno*, *Rodriguez*, and *Sonny* plaintiffs can proceed against the remaining defendants now that their claims against HOVENSA have been "outsourced" to binding resolution before a judicial adjunct, plaintiffs must show cause why their claims should not be severed and all but the first-named plaintiff in each case ordered to refile a complaint individually. Here the *Arno* plaintiffs (approximately 70 individuals) and the *Rodriguez* plaintiffs (approximately 100 plaintiffs) have asserted eight counts each, totaling approximately 560 and 800 claims in the aggregate, respectively, but in fact, total[ing] approximately 1,600 claims in *Arno* (eight per plaintiff per each defendant) and 6,400 claims in *Rodriguez* (eight per plaintiff per each defendant). *Sonny* is not as problematic insofar as only 17 plaintiffs joined together to file that case and the only remaining defendant is Hess, again assuming that the *Sonny* plaintiffs are given and chose the same option as the *Arno* and *Rodriguez* plaintiffs by the bankruptcy court. But the *Sonny* plaintiffs each asserted seven counts, totaling 119 counts. Trying 119 counts for 17 people against 1 defendant taxes the outer limits of judicial efficiency. Since these cases have been designated as complex and transferred to the Complex Litigation Division, and since the Court previously opened this master case to manage these cases simultaneously, the *Arno*, *Sonny*, and *Rodriguez* plaintiffs must show cause why their claims should not be severed. The *Arno* plaintiffs, for example, recently filed a motion to amend their amended complaint to correct the omission of some of the

> plaintiffs from the caption-something that highlights the inherent problems in the heretofore unchecked practice of letting [an] unlimited number of plaintiffs join in the same complaint. Each time there is a change to one plaintiff, the complaint would have be changed for all. Furthermore, no plaintiff's claims could be final and appealable until all plaintiffs' claims have been resolved.

Id. at 2-4 (sixth italics added) (brackets and citations omitted).[3]

¶12 The Court then ordered the Plaintiffs to "**JOINTLY SHOW CAUSE** ***in writing*** in the master case why, the Court should not sever the respective claims of all named plaintiffs except for the first-named plaintiff in each case and order them to refile individual cases, assuming the plaintiffs' claims can proceed against the remaining defendants in each respective case without HOVENSA." *Id.* at 4-5. The Plaintiffs had fourteen days to respond and Hess, Turner, and Wyatt had fourteen days to reply. When the Plaintiffs failed to respond, Hess filed a notice on February 14, 2019, stating its intent to reply, notwithstanding that the Plaintiffs had not responded. Hess then filed its reply on February 27, 2019. Turner joined in Hess' reply. Neither the Plaintiffs nor Wyatt responded or replied.

¶13 On February 26, 2019, a day before filing its reply regarding severance, Hess filed a motion in *Rodriguez* for leave to file a responsive pleading out of time. Hess explained that "[f]or reasons that are unclear . . . a responsive pleading was never filed." (Def. Hess Corp.'s Mot. for Leave to File Resp. Pleading out of Time 2, filed Feb. 26, 2019, *Rodriguez*, et al. v. HOVENSA, LLC, et al., SX-12-CV-367 (hereinafter "Time Mot.").) Hess requested leave to plead now by joining, *inter alia*, the motions HOVENSA filed in *Rodriguez* to dismiss and for a more definite statement. The Plaintiffs did not file a response.

¶14 In May 2019, this Court issued an order in *Arno* and in *Rodriguez*. The order in *Arno* amended the caption to remove HOVENSA and to add several individuals who had been "named as party-plaintiffs . . . in the body of the September 5, 2012 amended complaint, but not in the caption." (Order 4, entered May 30, 2019, *Arno, et al. v. HOVENSA, LLC, et al.*, SX-12-CV-314.) The orders also addressed another matter, namely that Wyatt had answered the *Arno* complaint on September 10,

[3] At the time the order issued, the *Sonny* plaintiffs had not yet moved the Court to dismiss their claims against HOVENSA. Eventually they did, but only after being prodded by the Court. The District Court's docket reveals that the *Sonny* plaintiffs mistakenly filed their joint notice of dismissal with prejudice as to HOVENSA in that court on December 21, 2018, notwithstanding that the case had been closed four years earlier.

2012 and the *Rodriguez* complaint on October 9, 2012. However, Wyatt had also

> joined . . . [the] motions . . . for a more definite statement and to dismiss the negligent abatement claim. By answering the amended complaint, Wyatt waived any objection to the sufficiency of the statements alleged therein or the viability of the claims. Thus, joining a pre-answer motion filed by another defendant, after having answered the complaint, is improper.

Id. at 1-2 (citation omitted). The motions in *Arno* and in *Rodriguez* were dismissed as to Wyatt only.

II. DISCUSSION

A. Preliminary Matters

¶15 Before turning to the motions to dismiss and for a more definite statement, the Court must first address several preliminary matters, namely: (1) Hess's motion in *Rodriguez* to plead out of time; (2) the District Court's denial of Hess and HOVENSA's motion in *Sonny*; and (3) the Plaintiffs' failure to respond to the motions to dismiss or for a more definite statement. Each is discussed below.

(1) Hess' Motion in *Rodriguez* to Plead out of Time

¶16 The *Rodriguez* Plaintiffs filed their complaint in the Superior Court on September 11, 2012. At that time, service of process and the time to respond to pleadings were governed by the Rules of the Superior Court. Superior Court Rule 27(b) provided that "summons and process shall be served in the same manner as required to be served by Rule 4 of the Federal Rules of Civil Procedure," and Superior Court Rule 32(a) provided that "[t]he defendant may defend by entering his appearance before the clerk or by filing an answer with the clerk within 20 days after service of the summons and complaint." Rule 4(h)(1)(B) of the Federal Rules of Civil Procedure permits service on corporations "by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or any other agent authorized by appointment . . . ." The *Rodriguez* Plaintiffs filed proof of service on September 20, 2012, showing that Hess Corporation was served on September 19, 2012 via its registered agent, the Corporation Trust Center, in Wilmington, Delaware. Pursuant to Superior Court Rule 9, Hess had to appear on or before Tuesday, October 9, 2012, the same day that HOVENSA filed its motions to dismiss and for a more definite statement and that Turner removed *Rodriguez* to the District Court.[4] As noted, while Turner joined the motions on October 12,

[4] In its motion, Hess contends that it had thirty days to respond or file an answer pursuant to section 112(d) of title 5 of

2012, after the case had been removed to the District Court, followed by Wyatt on October 18, 2012, Hess did not join either motion. In fact, Hess never appeared – not in the Superior Court before removal or in the District Court before remand. In fact, the District Court's docket shows that Hess went unrepresented because no attorney entered an appearance. The first filing in *Rodriguez* by Hess was on February 26, 2019. Thus, Hess' motion for leave to plead out of time by joining HOVENSA's motions comes nearly six and a half years late.

¶17 Virgin Islands Rule of Civil Procedure 6 provides that "[w]hen an act is required or allowed to be done by or within a specified period, the court may upon a showing of good cause or excusable neglect, extend the date for doing that act." V.I. R. Civ. P. 6(b)(1). The Supreme Court of the Virgin Islands has held that "'excusable neglect' and 'good cause' are 'essentially synonyms.'" *Montgomery v. Virgin Grand Villas St. John Owners' Ass'n*, 2019 VI 27, ¶ 14(citation omitted). Further, "[t]he determination" whether excusable neglect or good cause exists is at bottom an equitable one where the court should take into account all relevant circumstances." *Id.* (internal quotation marks and citations omitted). To determine whether good cause or excusable neglect is present, courts

> consider whether the request to extend time is made before or after the required date; the reason for the movant's delay; whether the reason for delay was within the reasonable control of the movant; the danger of prejudice to the parties; the length of the delay; the potential impact of the delay on judicial proceedings; whether the party seeking the extension has acted in good faith, and all other relevant circumstances surrounding the party's failure to meet the originally prescribed deadline.

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the Virgin Islands Code because it was served personally in Delaware. *See* 5 V.I.C. § 112(d) ("In case of personal service out of the Virgin Islands the defendant shall appear and answer within thirty days from date of service."). Whether Hess is correct is unclear. One Superior Court judge concluded that section 112(d) applies when service of process occurs outside the Territory. *See Edwards v. Hess Oil V.I. Corp.*, 69 V.I. 136, 141 (Super. Ct. 2017) ("Since HOVIC was served personally [within the Territory], it had twenty days . . . to answer or otherwise plead, while Hess, served by mail outside the Territory, had thirty days . . . ."). Another Superior Court judge concluded the opposite, however. *See In re Catalyst Third-Party Litig.*, 67 V.I. 16, 21-22 (Super. Ct. 2015) ("Without addressing other subsections of Section 112, HTI singled-out Section 112(d) and argued that it should be applied broadly in every instance, such as here. HTI did not explain why this reading is proper; HTI simply picked a subsection of a statute and applied it out of context. The Court does not find HTI's reading of Section 112(d) proper." (citation omitted)). The Supreme Court of the Virgin Islands has not expressly addressed whether subsection (d) applies outside service by publication, which is what section 112 broadly addresses. *See generally* 5 V.I.C. § 112(a) ("When service of the summons cannot be made as prescribed in Rule 4 . . . and the defendant after due diligence cannot be found within the Virgin Islands . . . the court shall grant an order that the service be made by publication of the summons . . . ."). The Supreme Court has recognized, however, that section 112 should be resorted to last and only on application. *Cf. Estate of Skepple v. Bank of Nova Scotia*, 69 V.I. 700, 738 (2018) ("Implicit in any due diligence analysis under section 112 is that the plaintiff will make a *prima facie* showing that, after reasonable effort, neither personal service nor other methods of substitute service could be achieved wherever the defendant may be."). Regardless of whichever interpretation of section 112(d) is correct, Hess failed to appear on time.

V.I. R. Civ. P. 6(b)(1). But "'the most important . . . factor'" is "'the reason for the delay.'" *Montgomery*, 2019 VI 27 at ¶ 14 (citation omitted). "'[E]ven where there is no prejudice, impact on judicial proceedings, or trace of bad faith, the favorable juxtaposition of these factors does not excuse the delay where the proffered reason is insufficient.'" *Id.* (quoting *In re: Sheedy*, 875 F.3d 740, 744 (1st Cir. 2017)). "'Demonstrating excusable neglect is a demanding standard' and the trial judge has 'wide discretion' in dealing with litigants who make such claims." *In re: Sheedy*, 875 F.3d at 743-44 (citation omitted).

¶18 In its motion, Hess' counsel concedes that "[f]or the duration of this case, up through the HOVENSA bankruptcy stay, undersigned counsel understood that Hess was never served in this matter." (Time Mot. 3; *see also id.* at 4 ("It appears that Hess was served in Delaware on September 19, 2012, but for reasons that are not clear, the suit was never assigned to defense counsel.").) Counsel then "specula[tes] that the matter may have been logged under the lead Plaintiff's first name 'Serafin' and not his last name 'Rodriguez' and, consequently . . . counsel's inquiries into service status in the 'Rodriguez' matter may not have been recognized as relating to the 'Serafin' matter." *Id.* at 4 (citation omitted). Further confusion may have occurred because summons was "directed to 'The Hess Corporation LLC' which is not an entity known to exist and is not Hess Corporation." *Id.* Nonetheless, "Hess does not and cannot dispute that it was served with the Complaint on September 19, 2012, in Delaware." *Id.* But Hess' counsel also "cannot recall Hess not timely responding and defending" after having "represented Hess in many matters over the last 21 years." *Id.* at 5 n.7.

¶19 Notwithstanding that "default is the legal consequence of a party's failure to respond to a complaint that has been properly served," *id.* at 6 (citing V.I. R. Civ. P. 55), Hess finds good cause for excusing the almost seven year delay because

> this is a release case involving the HOVENSA refinery in St. Croix in which Hess was served by the same Plaintiffs' counsel in a two similar release cases, *Sonny* and *Arno*, in which Hess appeared and is actively defending and which are coordinated together with this matter under the master docket styled *In Re: Refinery Hydrocarbon Release Litigation* . . . .

Id. at 5 (footnotes omitted). "Clearly, Hess' failure to appear and respond in only this ***one*** case cannot be said to be because of inexcusable neglect or bad faith," Hess asserts. *Id.* (footnote omitted). Hess further points to the posture of *Rodriguez*, noting that

> this case is still in its infancy, having been stalled during the removal to district court and then the HOVENSA bankruptcy stay. The Court is considering severing the Plaintiffs and requiring a re-filing of individual complaints which will in turn result in a refiling of the Defendants' responsive pleadings. HOVENSA's Rule 12 motions for a more definite statement and to dismiss one count, negligent abatement, are still pending insofar as they were joined by Defendant Turner. Indeed, at least one of the motions – the motion for more definite statement, may well be disposed of by requiring the Plaintiffs to refile with specificity the location and duration of their alleged exposures and the nature of their property damage. This will in turn require the moving Defendants to file Answers. Alternatively, the Court may decide to require the Defendants to refile responsive pleadings with updated briefing given the intervening change in the Virgin Islands Rules of Civil Procedure and, specifically, Rule 8(a)(2). Or, alternatively, the Court may compel certain Plaintiffs to arbitrate their claims.
>
> In short, Hess' responsive pleadings are merely a joinder in the pending Rule 12 motions filed by HOVENSA which were joined by Turner and Wyatt and therefore remain pending notwithstanding HOVENSA's dismissal. Consequently, the case is at the starting blocks and there is no prejudice to Plaintiffs as a consequence of this late joinder in the outstanding and pending responsive pleadings.

Id. at 5-6 (citation omitted). Hess then concludes that "rigid adherence to formalities and technicalities must give way to the policies underlying the . . . [r]ules [of procedure]." *Id.* at 7. Since "Plaintiff[s] will not be prejudiced," and Hess "clearly has a meritorious defense," *id.*, the Court should grant Hess' motion and allow it to join in HOVENSA's motions to dismiss and for a more definite statement.

¶20 The Plaintiffs' failed to respond. And based on this factor only, the Court will grant Hess' motion. *Accord Montgomery*, 2019 VI 27 at ¶ 17 (but for appellee's failure to challenge timeliness appeal would be dismissed as untimely). Simply put, Hess—not Hess' attorney—failed to show good cause or excusable neglect here. "'All too often counsel[] conflate each other with their clients. Cases . . . belong to the parties, not the attorneys.'" *In re: Asbestos, Catalyst, & Silica Toxic Dust Exposure Litig.*, 67 V.I. 544, 557 (Super. Ct. 2017) (citation omitted). Here, Hess admits that it was served and never appeared. Hess surmises that the reason why is because the complaint may have been misfiled by the first name of the plaintiff. But that strains because the number of plaintiffs in *Rodriguez* is over eighty. It is hard to fathom that Hess would not check its databases for each and every named party in a multi-party action to determine what defenses and claims (counter-, cross-, or third-party) that it might have before answering or responding to the complaint, particularly since "Rules 10 and 11 of the Federal Rules of Civil Procedure as to form, signing and verification of pleadings and other papers . . . appl[ied] to the superior court." Super. Ct. R. 29.

¶21 Hess asks the Court to take judicial notice that it routinely "appears and defends matters brought in the Superior Court." (Time Mot. 4-5.) The Court also takes judicial notice that Hess Corporation has regularly appeared through the same attorney who also represents Hess Oil Virgin Islands Corporation ("HOVIC") and HOVENSA and that counsel's "'tactical decisions'" have had consequences in the past. *Cf. Martinez v. Hess Oil V.I. Corp.*, 69 V.I. 519, 548, 550 (Super. Ct. 2018) (finding that HOVIC voluntarily appeared, notwithstanding plaintiffs' failure to serve, because HOVIC jointly filed several motions with Hess). Here too, HOVENSA appeared in *Rodriguez* through the same attorney, Carl A. Beckstedt, III, Esq. ("Attorney Beckstedt"), who appeared on behalf of HOVENSA and Hess in *Arno* and in *Sonny*. The Court acknowledges that an attorney cannot appear or act on behalf of a client if the client has not retained him. But if Hess always appears and defends itself, and historically has been represented by the same attorney, then it strains credulity to think that neither Hess nor Attorney Beckstedt confirmed whether Hess had appeared in *Rodriguez*.

¶22 Attorney Beckstedt affirms that, throughout "the duration of this case, up through the HOVENSA bankruptcy stay . . . [he] understood that Hess *had not been served* in the above captioned matter." (Beckstedt Aff. ¶ 12 (Feb. 25, 2019) (emphasis added), attached as Ex. A to Time Mot.) Even if this is correct, and the Court has no reason to doubt counsel's representation, Hess concedes that the rules of procedure "'reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.'" (Time Mot. at 7 (quoting *Conley v. Gibson*, 355 U.S. 41, 48 (1957)). It stands to reason then—rather than assume it was counsel for the *Rodriguez* Plaintiffs who misstepped by not serving Hess—that Hess could have verified service in *Rodriguez* by reaching out to the Clerk's Office, to its co-Defendants' counsel, or to the *Rodriguez* Plaintiffs' counsel directly.

¶23 It may be that Hess misfiled *Rodriguez* under the wrong name and never retained counsel to appear on its behalf. But even if that were true, Hess neglects to mention that *Rodriguez* was before the District Court on removal for nearly a year and a half. And in papers filed in *Rodriguez* in the District Court, Attorney Beckstedt signed as "Attorney for HOVENSA, LLC *and Hess Corporation*." (Def. HOVENSA, LLC's Notice of Consent to Removal 2, ECF No. 12, *Rodriguez, et al. v. HOVENSA, LLC, et al.*, 1:12-cv-00100 (D.V.I. Oct. 17, 2012) (italics omitted).) He did not withdraw those papers or correct the misrepresentations that he was signing on behalf of Hess. *Accord Martinez*, 69 V.I. at 548. Having the same attorney represent different but related companies in the same cases can have consequences. *See id. Cf. Farmer v. State*, 788 P.2d 43, 49-50 & n.16 (Alaska 1990) (notice of lawsuit may be imputed to new party when represented by same counsel); *Borchers v. Franciscan Tertiary Province of the Sacred Heart, Inc.*, 962 N.E.2d 29, 50 (Ill. Ct. App. 2012) ("Federal appeals courts have held that, where the named defendant and the prospective defendant are closely related and also share the same attorney, that attorney's knowledge of the suit may be imputed to the prospective defendant under certain circumstances."). In this instance, the Court cannot excuse Hess' neglect or find good cause for the delay. However, because the Plaintiffs did not oppose Hess' motion, the Court will grant it and allow Hess to plead out of time by joining the motions to dismiss and for a more definite statement.

(2) The *Sonny* Motion

¶24 In response to the Court's order regarding severance, Hess noted that "in *all three* matters the Defendants have moved to dismiss the negligent abatement claims," but then reasoned that, even if the Plaintiffs' claims were severed, "the Court can still address this legal issue *applicable to all Plaintiffs* in an efficient manner as part of the Master Docket without further delaying the progress of the cases." (Def. Hess Corp.'s Resp. in Supp. of Severance 3, filed Feb. 27, 2019, *In re: Refinery Hydrocarbon Release Litig.*, SX-15-CV-100 (emphasis added) (hereinafter "Hess Reply").[5]) Hess is mistaken on two points.

¶25 First, Hess is correct: a motion to dismiss was filed in all three cases. HOVENSA moved to dismiss in *Arno* on September 28, 2012 and in *Rodriguez* on October 9, 2012. And Hess and HOVENSA moved to dismiss in *Sonny* on October 18, 2012. But the October 18, 2012 motion did not concern negligent abatement because the *Sonny* Plaintiffs did not assert a negligent abatement

[5] The severance order had directed that the Plaintiffs would file a response and Hess, Turner, and Wyatt could file a reply, with the order to show cause being akin to the motion and the Court akin to the movant. For that reason, the Court refers to Hess' response as a reply.

cause of action. Instead, the motion in *Sonny* challenged the viability of the Plaintiffs' nuisance *per se* claims and the sufficiency of their fraud claims. (*See* Defs.' HOVENSA, LLC & Hess Corp.' Mot. to Dismiss Certain Claims as well as for a More Def. Stmt as to Other Claims 7, ECF No. 5, *Sonny, et al. v. HOVENSA, LLC, et al.*, 1:12-cv-00104 (D.V.I. Oct. 18, 2012) ("'Nuisance per se' is not a recognized cause of action in the Virgin Islands and should be dismissed."(bold font omitted)); *id.* at 15 ("The Plaintiffs' fraud allegations are insufficiently pled and must be dismissed." (bold font omitted)).)

¶26 In addition to being mistaken as to the type of claims that were challenged by each motion, Hess is also mistaken in believing that the motion is still pending in *Sonny*. It is not. Before remanding *Sonny* to the Superior Court, the District Court "**DENIED**" the October 18, 2012 motion to dismiss and for a more definite statement "**AS MOOT**." (Order 2, ECF No. 18, *Sonny, et al. v. HOVENSA, LLC, et al.*, 1:12-cv-00104 (D.V.I. Mar. 31, 2014).) The court did not provide further explanation, other than to preface that it had "concluded . . . that it lacks subject matter jurisdiction over the cases, and . . . [had also] granted Plaintiffs' Motion to Remand." *Id.* at 1. Federal district courts often dismiss or deny pending motions as moot immediately before remanding a case to state court. *E.g., NL Indus. v. OneBeacon Am. Ins. Co.*, 435 F. Supp. 2d 558, 566 (N.D. Tex. 2006) (denying as moot); *Eynon v. Kernan*, No. 17-cv-01355-JST (PR), 2017 U.S. Dist. LEXIS 76056, at *4 (N.D. Cal. May 18, 2017) (dismissing as moot); *Jackson v. Wilson*, 4 F. Supp. 2d 671, 673 (E.D. Tex. 1998) (dismissing as moot). Other federal courts strike or terminate the motions before remand. *Cf. Sak v. State Farm Ins. Co.*, No. C13-5480 RJB, 2013 U.S. Dist. LEXIS 114331, at *8 (W.D. Wash. Aug. 13, 2013) (striking pending motions); *As Arete L.L.C. v. Shapiro*, No. 3:17-cv-849-J-32MCR, 2017 U.S. Dist. LEXIS 202126, at *4 (M.D. Fla. Dec. 8, 2017) (terminating motions). Still other courts remand the case with the motions pending, leaving them for the state court to address. *Cf. Hellerstein v. Desert Lifestyles*, No. 2:15-cv-01804-RFB-CWH, 2018 U.S. Dist. LEXIS 55532, at *22 (D. Nev. Mar. 31, 2018) (remanding case and motions to state court); *Greenwald v. Odom*, No. 1:08-CV-2802-ODE, 2009 U.S. Dist. LEXIS 138368, at *13 (N.D. Ga. June 9, 2009) (remanding case and specifying motions remanded); *accord Franco v. Empire Sw. Holdings, Inc.*, No. 07cv0021-B(PCL), 2007 U.S. Dist. LEXIS 17164, at *9 (S.D. Cal. Mar. 12, 2007) ("[T]he entirety of the case including all other pending motions are remanded to state court."); *Poisso v. Formosa Plastics Grp.*, 994 F. Supp. 743, 748 (M.D. La. 1998) ("The Court will defer ruling on all pending motions on the state law claims, whether opposed or not, to the state district judge.").

¶27 Clearly, federal courts are inconsistent in how they approach pending motions immediately before remanding a case to state or territorial court. And herein lies the concern because once a motion is denied or dismissed as moot by a federal district court prior to remand, that decision, technically, precedes the order of remand. *Cf. Powers v. Southland Corp.*, 4 F.3d 223, 230 (3d Cir. 1993). So, the motion is no longer pending once the case returns. But how federal courts approach motions pending in cases about to be remanded does have consequences because a motion denied as moot is still denied. Moot is just the basis for the denial. *Cf. United States v. Boyd*, 398 F. App'x 649, 651 (2d Cir. 2010) ("By denying as moot Boyd's motion to suppress, the District Court did not 'defer' the motion under Federal Rule of Criminal Procedure 12(d) but 'decided' the motion." (brackets omitted)). And since remand orders are generally not appealable, *cf. Kircher v. Putnam Funds Trust*, 547 U.S. 633, 640 (2006), federal appellate courts will, most likely, never have occasion to address the "correct" approach district courts should take. But state and territorial appellate courts can. *Cf. Powers*, 4 F.3d at 235 ("[S]tate appellate courts are not legally bound to follow the federal district court's decision."); *accord Chang v. Buffington*, 256 P.3d 694, 702 (Haw. 2011) ("[S]tate courts have jurisdiction to review pre-remand orders entered by federal courts in cases that are remanded back to a state court."). And under appropriate circumstances, state and territorial trial courts can also revisit orders issued by federal courts prior to remand. As the United States Court of Appeals for the Third Circuit recognized,

> [o]rders entered by the district court prior to a remand order are not nullities. Insofar as they are interlocutory and are included within the action or the part of the action remanded, they would ordinarily remain in effect, following the remand, until the state [or territorial] court took appropriate action to modify or set them aside.

Powers, 4 F.3d at 234-35 (quoting 1A James Wm. Moore *et al.*, *Moore's Federal Practice* P 0.169[2.-2], at 701 (2d ed. 1993), parenthetically); *accord Abednego v. St. Croix Alumina, LLC*, 63 V.I. 153, 177 (Super. Ct. 2016) ("'Interlocutory decisions . . . made by the district court prior to remand remain open to review and revision in state or territorial court; such orders carry no preclusive effect.'" (brackets omitted) (quoting *In re C & M Props, L.L.C.*, 563 F.3d 1156, 1166 (10th Cir. 2009)). The reason why is clear: "trial courts . . . [have] discretion to revise any interlocutory order at any time prior to entry of a final judgment." *Island Tile & Marble, LLC v. Bertrand*, 57 V.I. 596, 609 (2012). And "'[w]hat a state court could do in the first place it may also do on remand.'" *In re: C & M Props., L.L.C.*, 563 F.3d at 1167 (quoting *Kircher*, 547 U.S. at 646).

¶28 Here, however, the October 18, 2012 motion to dismiss and for a more definite statement is not pending. "In general, every motion filed remains pending until 'ruled upon, dismissed, or withdrawn.'" *Der Weer v. Hess Oil V.I. Corp.*, 60 V.I. 91, 98 (Super. Ct. 2014) (quoting 56 Am. Jur. 2d *Motions, Rules, and Orders* § 31 (2010)). The District Court denied the October 18, 2012 motion. Mootness was just the reason why. Strictly-speaking, the motion was not moot because nothing had occurred afterward that had resolved the issues raised in the motion. *Cf. Der Weer*, 60 V.I. at 98-99 ("A motion becomes moot when something occurs after a motion is filed that resolves the issues raised in that motion.").[6] That is, nothing occurred before remand regarding Hess or HOVENSA that mooted the October 18, 2012 motion. In fact, Hess still believes the motion is pending. (*Cf.* Reply 3 ("[I]n *all three matters* the Defendants have moved to dismiss the negligent abatement claims. These motions present a purely legal issue. With matters coordinated, the Court can still address this legal issue applicable to all Plaintiffs in an efficient manner as part of the Master Docket without further delaying the progress of the cases." (emphasis added)).) But Hess is mistaken because an order denying a motion as moot disposes of the motion and renders it not pending. *Accord Valentine v. BAC Home Loans Servicing, L.P.*, 635 F. App'x 753, 756 (11th Cir. 2015) ("True, the earlier denials were 'without prejudice,' but a denial without prejudice is still a denial, and an order denying a motion disposes of the motion (if not always the argument underlying it)."). The March 31, 2014 Order may have been in error because the court did not address the merits of the October 18, 2012 motion. Motions denied by the federal court prior to remand to state or territorial court are not automatically revived on remand. Moreover, Hess never sought relief from the March 31, 2014 order and, even though the Superior Court could vacate the March 31, 2014 order and reinstate the October 18, 2012 motion,[7] this Court will not grant that relief *sua sponte*. It would only delay these

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[6] At least as to Hess, that is. Clearly, the motion would be moot now as to HOVENSA, the Plaintiffs having settled with HOVENSA in bankruptcy court.

[7] In the right circumstance, courts have revived or reinstated motions that were no longer pending. *Cf. Murphy v. Baker*, Civ. No. 17-30021-MGM, 2019 U.S. Dist. LEXIS 55254, at *5 (D. Mass. Mar. 29, 2019) ("As Plaintiff was again *pro se*, the court, *sua sponte*, revived Plaintiff's Motion to Amend."); *Carousel Foods of Am. v. Abrams & Co.*, 423 F. Supp. 2d 119, 124 (S.D.N.Y. 2006) ("This court *sua sponte* revived the sanctions motion . . . previously found to be premature."); *see also Walsh v. Mut. of Omaha Ins. Co.*, No. 4:16 CV 800 RWS, 2016 U.S. Dist. LEXIS 127670, at *8-9 (E.D. Mo. Sep. 20, 2016);

matters further. *Cf. infra*, note 10. As with any other ruling, Hess may raise the issue on appeal.

¶29 The concern now is that Hess, technically, is in default because it failed to file an answer in *Sonny* once the District Court denied the motion to dismiss. Pursuant to Federal Rule of Civil Procedure 12, which applied in the Superior Court in 2014 through Superior Court Rule 7, Hess had fourteen days, or until Monday, April 14, 2014, to file its responsive pleading. *See* Fed. R. Civ. P. 12(a)(2)(A) ("[I]f the court denies the motion or postpones its disposition until trial, the responsive pleading must be served within 14 days after notice of the court's action."). Hess did not file its answer and five years have now passed. However, the *Sonny* Plaintiffs have also failed to alert the Court to the delay, by moving for entry of default or by alerting Hess that its October 18, 2012 motion is not pending and "'the primary responsibility for furthering a case is upon the plaintiff[s] and [their] attorney.'" *Watts v. Two Plus Two, Inc.*, 54 V.I. 286, 292 (2010) (citation omitted). Ordinarily, Hess would have to show excusable neglect for its failure to timely answer. *Cf. Martinez v. Columbian Emeralds, Inc.*, 51 V.I. 174, 191 & n.12 (2009).

¶30 In this instance however, the *Sonny* Plaintiffs have failed to notify the Court that the only remaining defendant in their case is technically in default. Further, since both parties appear to be under the shared misunderstanding that the October 18, 2012 motion is still pending, and since Hess' motion for leave to plead out of time in *Rodriguez* was unopposed, the Court believes that "the equitable decision for all involved is simply to wipe the slate clean." *In re: Red Dust Claims*, 69 V.I. 147, 163 (Super. Ct. 2017). The Court will *sua sponte* grant Hess leave to answer out of time. Courts prefer cases to be resolved on the merits and entering default against a defendant who appeared but failed to file an answer is generally reserved as a sanction for egregious behavior. *Cf. Fingerhut Corp. v. Ackra Direct Mktg. Corp.*, 86 F.3d 852, 856 (8th Cir. 1996) ("Default judgment for failure to defend is appropriate when the party's conduct includes 'willful violations of court rules, contumacious conduct, or intentional delays.'" (citation omitted)); *accord Hoxworth v. Blinder, Robinson & Co.*, 980 F.2d 912, 918 (3d Cir. 1992) ("The failure to plead is no greater an impediment to the orderly progress of a case than is the failure to appear at trial or meet other required time schedules, and we see no reason why the former would be subject to a sanction not equally

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Cent. States v. O'Neill Bros. Transfer & Storage Co., No. 07 C 5220, 2009 U.S. Dist. LEXIS 44190, at *3-4 (N.D. Ill. May 27, 2009).

applicable to the latter."). Such egregious behavior is not present here.

(3) Plaintiffs' Failure to Respond

¶31 The final matter to address is the Plaintiffs' failure to respond to the merits of the Defendants' motions. To be clear, the Plaintiffs did respond – but by filing motions in the District Court to stay further proceedings until remand was resolved. In support, the Plaintiffs cited to *Zambelli Fireworks Manufacturing Company, Inc. v. Wood*, 592 F.3d 412 (3d Cir. 2010), and argued that federal courts must resolve their own jurisdiction first, "'before proceeding to a disposition on the merits.'" (Stay Resp. 2 (quoting *Zambelli Fireworks Mfg. Co.*, 592 F.3d at 418).) And the Plaintiffs were correct that federal courts generally must assure themselves of their own jurisdiction before proceeding with the merits of a case. *Cf. Abednego*, 63 V.I. at 175-76. Similarly, once a motion for remand is filed, federal courts often abstain from considering on dispositive motions. *See, e.g., McCorkindale v. Am. Home Assurance Co./A.I.C.*, 909 F. Supp. 646, 647 (N.D. Iowa 1995) ("Only if remand is not appropriate will the court reach the defendants' motion to hold this action in abeyance."). *But cf. Abednego*, 63 V.I. at 178-79 ("While it is customary for the federal court to resolve doubts about its jurisdiction over the subject matter *first* before proceeding with a case on its merits, there are times when a personal jurisdiction inquiry that is easier to decide can take priority over a subject-matter jurisdiction inquiry." (brackets, quotation marks, and citation omitted).

¶32 But the Plaintiffs' reliance on *Zambelli Fireworks* was misplaced. *Zambelli Fireworks* did not hold that briefing deadlines are held in abeyance just because a motion for remand is filed. In fact, several federal courts have reached the opposite conclusion, that "[a] motion to remand does not moot a pending motion to dismiss. Nor does it serve as an opposition brief." *Nagel v. Aurora Loan Servs., LLC*, No. EDCV 11-00947-JST (DTBx), 2011 U.S. Dist. LEXIS 164376, at *8 n.2 (C.D. Cal. Sep. 22, 2011). Instead, the parties must continue to litigate in federal court even with a motion to remand pending. *Cf. Carriere v. Sears, Roebuck & Co.*, 893 F.2d 98, 102 (5th Cir. 1990) ("[T]he fact that a motion for remand was pending does not excuse failing to pursue discovery diligently."); *Anoruo v. Valley Health Sys., LLC*, No. 2:00318-cv-00105-MMD-NJK, 2018 U.S. Dist. LEXIS 62639, at *7 (D. Nev. Apr. 13, 2018) ("[E]ven if the motion to remand is granted, 'that will not render any discovery conducted moot or otherwise result in a waste of the parties' resources.' 'This action will either continue in federal court or in state court. Unless the case settles, discovery will proceed regardless of the outcome of the District Court's remand decision.'" (brackets and citations omitted)); *Hoffman v. State Farm Fire & Cas. Co.*, No. 15-309-JWD-RLB, 2015 U.S. Dist. LEXIS 102421, at *7 (M.D. La. Aug. 5, 2015) ("The filing of a motion to remand does not automatically stay discovery."); *Grammer v. Colo. Hosp. Ass'n Shared Servs.*, No. 2:14-cv-1701, 2015 U.S. Dist. LEXIS 7303, *4 (D. Nev. Jan. 21, 2015) ("Although the Federal Rules of Civil Procedure do not provide for automatic or blanket stays of discovery when a potentially jurisdictional motion is pending, Rule 26(c)(1) states that "the court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." (brackets and citation omitted)); *Riverside Constr. Co. v. Entergy Miss., Inc.*, No. 5:13cv29-KS-MTP, 2013 U.S. Dist. LEXIS 59313, at *3-4 (S.D. Miss. Apr. 25, 2013) ("A motion to remand does not automatically stay all discovery in a civil action."); *Naiyan v. Sodexo, Inc.*, CV 10-9872, 2011 U.S. Dist. LEXIS 165919, * 3 (C.D. Cal. Aug. 3, 2011) ("Local Rule 23-3 clearly requires that a motion for class certification be filed 'within 90 days after service of a pleading purporting to commence a class action" or the date of removal. L.R. 23-3. There is nothing to suggest that a motion to remand automatically tolls the 90-day period without a court first, in its discretion, issuing an 'order' to that end." (brackets omitted)).

¶33 The Plaintiffs implicitly recognized this, of course, because they asked the District Court for a stay. HOVENSA, Hess, and Turner did not object. But the District Court did not address the Plaintiffs' request until the cases were remanded to Superior Court. The motions to stay were then denied as moot. But approximately a year and a half elapsed between when the Plaintiffs moved to stay further proceedings on the motions to dismiss and for a more definite statement and when the District Court denied the stay motions as moot before granting the motions for remand. In all that time, the Plaintiffs never filed their responses – not even as a precaution since their motions to stay had not been granted. *Cf. McKenzie v. Hess Oil V.I. Corp.*, 70 V.I. 210, 221 (Super. Ct. 2019) ("[F]iling a motion does not entitle the movant to a stay."); *accord Taberer v. Armstrong World Indus., Inc.*, 954 F.2d 888, 909 (3d Cir. 1992) (discussing *Waste Conversion, Inc. v. Rollins Envtl. Servs., Inc.*, 893 F.2d 605, 611 (3d Cir. 1990), which rejected "erroneous" and "mistaken" assumption that filing a motion effected a stay).

¶34 More importantly, however, and notwithstanding whether the Plaintiffs erred in assuming the briefing deadlines were stayed by filing a motion, once their motions to stay were denied, the

Arno and the *Rodriguez* Plaintiffs should have filed their responses to HOVENSA's motions to dismiss and for a more definite statement no later than Tuesday, April 22, 2014. *See* D.V.I. Local R. Civ. P. 12.1(b) ("Any party responding to a motion submitted under this Rule may file a response brief within twenty (20) days of the filing of the motion.").[8] But neither the *Arno* nor the *Rodriguez* Plaintiffs responded.[9] Moreover, as previously discussed, Hess alerted the Court in 2019, in its reply in support of severance, that the motions to dismiss and the motions for a more definite statement were still pending in *Sonny, Arno*, and *Rodriguez*. Although Hess was mistaken as to *Sonny*, the Plaintiffs did not respond to correct Hess' understanding or to seek leave to file their responses out of time. The consequence now is that the motions in *Arno* and *Rodriguez* are unopposed.[10]

B. Motion to Dismiss for Failure to State a Claim

¶35 Having resolved all ancillary matters, the Court turns to the Defendants' motions to dismiss.[11] First, the Court must address the legal standard, however, because at the time when the Defendants filed their motions, the Virgin Islands reviewed the sufficiency of complaints under the heightened "plausibility" standard adopted by the Supreme Court of the United States. *See Joseph v. Bureau of Corr.*, 54 V.I. 644, 649 (2011) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009)), *abrogated by Mills-Williams v. Mapp*, 67 V.I. 574, 585-86 (2017). Consequently, the Plaintiffs were also required to allege sufficient facts in their complaints

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[8] The deadline specified in the Local Rules of Civil Procedure promulgated by the District Court of the Virgin Islands applied in the Superior Court of the Virgin Islands in 2014 through Superior Court Rule 7 because the Superior Court did not have another procedure in place. The Plaintiffs' motions to stay were denied by the District Court on March 31, 2014. Twenty days later would have been Sunday, April 20, 2014. Pursuant to former Superior Court Rule 9, "the period [ran] until the end of the next day which is neither a Saturday, Sunday nor a holiday." Monday, April 21, 2014 was Easter Monday, which is a legal holiday in the Virgin Islands. *See* 1 V.I.C. § 171(a). Thus, the Plaintiffs' responses were due no later than Tuesday, April 21, 2014, which was the next day that was not a Saturday, Sunday, or a holiday.

[9] The *Sonny* Plaintiffs had nothing to respond to since the District Court denied Hess and HOVENSA's motion.

[10] As explained above, *see infra*, section II(A)(2), the motion in *Sonny* was denied as moot and is no longer pending. If the Court were to vacate the order *sua sponte* and reinstate Hess and HOVENSA's motion in *Sonny*, it would further delay the cases. By reinstating the motion as to Hess, the Court might also have to reinstate the *Sonny* Plaintiffs' time to respond in opposition, assuming they were justified in relying on the motion to stay further briefing pending a decision on remand.

[11] Given the issues noted above, concerning Hess' failure to join the motion in *Rodriguez*, the Court will cite to the motion papers in *Arno*, although the motions papers in *Arno* and *Rodriguez* are word-for-word identical. Further, although HOVENSA filed the motion, because it was joined by Hess and Turner, the Court will refer to the Defendants generally as the movant.

to support all elements of a claim and thereby show that the claim was plausible. *Cf. Pollara v. Chateau St. Croix, LLC*, 58 V.I. 455, 471 (2013) ("First, the court must take note of the elements a plaintiff must plead to state a claim . . . . [Then ignore] legal conclusions couched as factual allegations or naked factual assertions . . . . Finally . . . . [i]f there are sufficient remaining facts that the court can draw a reasonable inference that the defendant is liable based on the elements noted in the first step, then the claim is plausible." (quoting *Joseph*, 54 V.I. at 649-50)). Of course, because courts had to "'take note of the elements a plaintiff must plead to state a claim,'" *Joseph*, 54 V.I. at 649 (quoting *Santiago v. Warminster Twp.*, 629 F.3d 121, 130 (3d Cir. 2010)), the plausibility standard presumed that statutory or common law recognized the cause of action.

¶36 But in 2017, the Supreme Court of the Virgin Islands promulgated the Virgin Islands Rule of Civil Procedure and "restore[d] the notice pleading regime that had previously been in effect." *Mills-Williams*, 67 V.I. at 585. Although "[t]he Supreme Court of the Virgin Islands . . . has yet to determine what exactly is required to survive a Rule 12(b)(6) motion to dismiss," *Morton v. Mapp*, ST-16-MC-056, 2018 V.I. LEXIS 148, *3 n.10 (V.I. Super. Ct. Apr. 4, 2018), courts, in the interim, have returned to the dismissal standard that was in effect. *See id.* at *3 n.11 (citing *Conley v. Gibson*, 355 U.S. 41, 47 (1957)).

> Under Virgin Islands Rule 8(a)(2), plaintiffs no longer need to prove plausibility by "setting out in detail the facts upon which they base their claim." Rather, notice pleading simply requires that an initial pleading put the opposing party (or parties) on "fair notice of what the plaintiffs claim is and the grounds upon which it rests." Therefore, instead of dismissing pleadings based on technicalities, Rule 8(a)(2) allows the Court to proceed with the discovery process and address pleadings based on the merits of each asserted claim.

Id. at *3 (footnotes and citations omitted). This Court agrees. By restoring the notice pleading regime that was in effect prior to 2008, when *Robles v. HOVENSA, LLC*, 49 V.I. 491 (2008) (*per curiam*), was decided, the Supreme Court also restored the "no set of facts" regime that previously governed dismissal motions. *Cf. Guildarie v. Williams*, 15 V.I. 240, 242 (Terr. Ct. 1978) ("It is the general rule . . . that a motion to dismiss a complaint for failure to state a claim should be granted only when 'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' That rule . . . is the law in this jurisdiction." (quoting *Conley*, 355 U.S. at 45-46)). One follows from the other. Therefore, although the complaints were filed before the 2017 changes, the motions to dismiss, which remained pending, must be decided under the current rules. *Accord In re: Kelvin Manbodh Asbestos Litig. Series*, 69 V.I. 394, 416 n.12 (Super. Ct. 2018) ("[T]he focus here is not on past action, i.e., whether a motion is properly before the court, which necessarily entails determining whether the rules in effect at the time the motion was filed were complied with. Rather, the focus here is on future action .... In that instance, this Court believes the Virgin Islands rule of procedure should be applied.").

¶37 In ruling on a motion to dismiss for failure to state a claim for relief, courts "assume all reasonable factual allegations in the complaint as true and draw all fair inferences from such allegations." *In re: Kelvin Manbodh Asbestos Litig. Series*, 47 V.I. 375, 380 (Super. Ct. 2006) (citing *Gov't of the V.I. v. Lansdale*, 172 F. Supp. 2d 636, 649 (D.V.I. App. Div. 2001)). But courts cannot infer truth if the allegations "contradict facts ... in the public record or judicially noticed by the [c]ourt." *Id.* Moreover, when "the facts alleged—despite the arguably thorough manner in which they were pleaded—simply do not give rise [to relief]," *Anderson v. Sara Lee Corp.*, 508 F.3d 181, 190 (4th Cir. 2007), then question is not whether "the claims could have survived a Rule 12(b)(6) challenge but for the plaintiff's failure to plead sufficient facts to satisfy the requirements of Rule 8(a)(2) or Rule 9(b)." *Id.* Instead, "[t]he purpose of a motion to dismiss ... is to assess the legal feasibility of the complaint ...." *Kirchoff v. Am. Cas. Co.*, 779 F. Supp. 131, 132 (D.S.D. 1991). "Though a motion to dismiss is often considered a blunt tool, if Plaintiff's complaint fails to articulate a cognizable claim, use of such a tool is entirely proper." *Id.* (brackets and citation omitted). As another court recently observed:

> The basic purpose of a ... motion to dismiss is to test the legal sufficiency of the complaint to state an actionable claim, not to test the truth of the facts alleged in the complaint. This defense is typically used in one of three situations: (1) the allegations in the complaint are so insufficient that the pleader has stated no claim for relief; (2) the pleader has alleged sufficient facts to state a claim for relief but has also alleged facts that disclose a bar to the suit or claim (such as when the complaint establishes a statute-of-limitations defense); and (3) the pleader has made an allegation that is not recognized in the law as a basis for recovery.

Mourning v. Allison Transmission, Inc., 72 N.E.3d 482, 487 (Ind. Ct. App. 2017) (citation omitted). And it is this last basis, that the law does not provide relief, that the Defendants assert here.

¶38 The Defendants move to dismiss the Plaintiffs' negligent abatement claims because "[a] cause of action entitled 'negligent abatement 'does not exist in the Virgin Islands, and allegations for negligent abatement are construed simply as a negligence claim." (Def. HOVENSA, LLC's Mot. & Br. to Dismiss Pls.' Negl. Abatement Claim 2-3, filed Sept. 28, 2012 (citing *Henry v. St. Croix Alumina LLC*, No. 1999-0036, 2009 U.S. Dist. LEXIS 80830, *24 (D.V.1. Oct. 7, 2009)) (hereinafter "Dismiss Mot.").) In support, the Defendants claim that "Plaintiffs' counsel should be well aware that a claim for negligent abatement cannot proceed under Virgin Islands law," *id.* at 3, because Lee J. Rohn, Esq. ("Attorney Rohn"), is Plaintiffs' counsel and also was counsel for the plaintiffs in *Henry*. And Henry is the case in which the District Court concluded that negligence, not negligent abatement, is the claim to assert. *See Henry*, 2009 U.S. Dist. LEXIS 80830 at *24. Defendants point to a second instance where Attorney Rohn, as counsel for the plaintiffs, conceded that negligent abatement is not a viable cause of action. In that case, *Francisca Almestica, et al. v. HOVENSA, LLC*, SX-10-CV-324, Attorney Rohn informed the Superior Court, in response to a motion to dismiss, that

> ha[d] found no other authority from this jurisdiction or the Third Circuit discussing the validity of an independent cause of action for negligent abatement. To that extent, Defendant is correct that it should not be pled as a separate count. Rather than dismiss the claim altogether, however, the Court should follow *Henry*'s lead and treat the negligent abatement count as a claim for simple negligence and allow Plaintiffs to proceed under that theory. Plaintiff seeks to file an amended complaint joining the negligent abatement actions in with the negligence count.

(Pls.' Resp. & Mem. of Law in Opp'n to Def. HOVENSA, LLC's Mot. to Dismiss Pls.' Negl. Abatement Claim 2, *Almestica, et al. v. HOVENSA, LLC*, SX-10-CV-324, filed May 16, 2011, attached as Ex. A to Beckstedt Aff. (Sept. 28, 2012), attached in turn as Ex. A to Dismiss. Mot.) "It is puzzling," the Defendants argue, "that Ms. Rohn continues to sue upon this cause of action, even though she admits the claim does not exist under Virgin Islands law." (Dismiss. Mot. 4.)

¶39 But it is just as puzzling why the Defendants reference *Henry* or *Almestica* at all, since neither the *Rodriguez* complaint nor the *Arno* amended complaint did. And once matters outside the complaint are presented "and not excluded by the court," V.I. R. Civ. P. 12(d), the motion to dismiss "must be treated as one for summary judgment . . . ." *Id. Henry* is a decision of the District Court of the Virgin Islands sitting as a trial court. It is not binding – on any court, *cf. Gasperini v. Ctr. for Humanities*, 518 U.S. 415, 430 n.10 (1996) ("If there is a federal district court standard, it must come from the Court of Appeals, not from the over 40 district court judges in the Southern District of New

York, each of whom sits alone and renders decisions not binding on the others.")—and certainly not on the Superior Court of the Virgin Islands. *See Better Bldg. Maint. of the V.I., Inc. v. Lee*, 60 V.I. 740, 755 (2014) ("[D]ecisions of the District Court sitting in its capacity as a local trial court are not binding on the Superior Court."). What's more, arguments made in motion papers are just that: arguments. *Cf. People v. Rivera*, 68 V.I. 393, 400 (Super. Ct. 2018) ("But at the end of the day, 'argument is argument, whether in the box or at the bar,' and whether at trial, on appeal, or on remand. And arguments of counsel are not evidence." (brackets and citations omitted)). And, since "'[c]ases . . . belong to the parties, not the attorneys,'" *In re: Asbestos, Catalyst, & Silica Toxic Dust Exposure Litig.*, 67 V.I. at 557 (citation omitted), whatever arguments, or concessions, may have been made in *Almestica*, were made by Ms. Almestica and her co-plaintiffs. "Judicial estoppel . . . 'prevents *a party* from contradicting previous declarations made during the same or a later proceeding if the change in position would adversely affect the proceeding or constitute a fraud on the court,'" *Fontaine v. People*, 56 V.I. 571, 583 n.7 (2012) (quoting *Boston v. Gov't of the V.I.*, 46 V.I. 520, 526 (D.V.I. App. Div. 2005) (emphasis added), not an attorney asserting the same claims for relief for different clients. The Defendants' extra-pleading materials are irrelevant and rejected.

¶40 What remains is the heart of the argument: negligent abatement is not recognized as a cause of action in the Virgin Islands. And the Defendants are correct: negligent abatement does not appear in the decisional law of the Virgin Islands. Except for *Henry*, that is. *See Henry*, 2009 U.S. Dist. LEXIS 80830 at *24, and the District Court's reference to the claims asserted in these cases. *See Rodriguez*, 2014 U.S. Dist. LEXIS 43967, at *2. But suits alleging negligent abatement are not unheard of in the law generally. *See, e.g., Steffenhagen v. Sullivan*, 579 F. App'x 32, 34 (2d Cir. 2014) (landlord-tenant action for lead paint) ("Because Steffenhagen did not adduce evidence sufficient to create a question of fact as to the reasonableness of Suhr's remedial actions, her claim for negligent abatement necessarily fails."); *Farm Family Cas. Co. v. Cumberland Ins. Co.*, No. K11C-07-006 JTV, 2013 Del. Super. LEXIS 427, *22 (Del. Super. Ct. Oct. 2, 2013) (negligent abatement of lead paint); *Ortiz v. Lehmann*, 118 A.D.3d 1389, 1389-90 (N.Y. App. Div. 2014) (same); *Dixon v. S. Bos. Corp.*, 69 Va. Cir. 313, 314 (Cir. Ct. 2005) (same); *accord Germantown Cent. Sch. Dist. v. Clark, Clark, Millis & Gilson, AIA*, 791 N.E.2d 398 (N.Y. 2003) (negligent abatement of asbestos). And there have been suits involving negligent abatement and hydrocarbons. *See Cavallo v. Star Enterp.*, 892 F. Supp. 756, 759 n.6 (E.D. Va. 1995) (noting that prior judge had concluded that Count II which sought "'Negligent Petroleum Release and Negligent Abatement and Remediation of the Petroleum Release,'" was "barred by the doctrine of preemption" under an EPA consent order), *rev'd* 100 F.3d 1150, 1156-57, 1159 (4th Cir. 1996) (rejecting preemption for actions prior to issuance of EPA consent order and reversing and remanding dismissal of negligent abatement claim); *cf.* Editors of the William & Mary Environmental Law and Policy Review, *Fourth Circuit Summary*, 21 Wm. & Mary Envtl. L. & Pol'y Rev. 293, 294 (1997) ("[T]he court determined that although the district court was correct that Star Enterprise could not be held liable for remediation activities in conformity with the EPA orders, 'the fact that allegedly tortious conduct occurred within the scope of an EPA order does not necessarily compel preemption of a damages claim based on that conduct.' The court also held that damages claims conflict with EPA orders only if the activities (a) were required, directed, or supervised by EPA, and (b) were performed properly." (citation and ellipsis omitted)).

¶41 The Defendants are correct, however, insofar as abate is not apt here. "Abate' means 'to reduce or lessen in degree or intensity' and 'to decrease in force, intensity, or violence.'" *Trigg v. City of Nome*, 929 P.2d 1273, 1274 (Alaska 1996) (quoting Webster's *Third New Int'l Dictionary* 2 (1966)); *accord 325-343 E. 56th St. Corp. v. Mobil Oil Corp.*, 906 F. Supp. 669, 685 n.24 (D.D.C. 1995) ("To abate means to act in such a way as 'to bring down or demolish, to put an end to, to do away with, to nullify, to make void.'" (quoting *Black's Law Dictionary* 4 (6th ed. 1990)). If the Plaintiffs had alleged that the Defendants were careless in removing, meaning doing away, lead paint or asbestos, then negligent abatement might be proper. But the Plaintiffs allege that the "Defendants sent out contractors who failed to properly clean the discharge and further damaged the Plaintiffs' property." (*Arno* Amend. Compl. ¶ 66; *Rodriguez* Compl. ¶ 87.) And clean-up and remediation efforts, if done negligently, is a claim for relief many courts recognize. *See Nat'l Tel. Coop. Ass'n v. Exxon Corp.*, 38 F. Supp. 2d 1, 3-4 (D.D.C. 1998) ("The Court, however, denies summary judgment with respect to Count I's negligent-remediation claim."); *Marks v. Reston Constr., Inc.*, 67 So. 3d 96, 97 (Ala. Civ. App. 2011) ("The Markses asserted claims of negligent repair; negligent hiring, supervision, and training; negligent remediation . . . ."); *Davis v. Brzostowski*, 20 N.Y.S.3d 814, 816 (App. Div. 2015) ("[T]he court properly denied that part of the motion seeking summary judgment dismissing Shaquita's claim for negligent abatement of the lead paint hazard inasmuch as there are triable issues of fact whether defendants' abatement work was negligently performed, thereby leading to additional injuries . . . ."); *see also Skyline Ridge Developers, LLC v. Cikalo*, Nos. A-5600-15T4, A-3093-16T4, 2019 N.J. Super. Unpub. LEXIS 1100, at *5 (N.J. Super. Ct. App. Div. May 14, 2019) (mold remediation); *Bernard v. City of Cincinnati*, 2019-Ohio-1517, ¶ 34 (Ct. App.) (sewer backup remediation).

¶42 It is true that some courts have dismissed negligent remediation claims as "simply another rendition on negligence." *McGaffin v. Cementos Argos S.A.*, No. 4:16-CV-104, 2017 U.S. Dist. LEXIS 5478, at *22 (S.D. Ga. Jan. 13, 2017). And this is what the Defendants request: dismiss the negligent abatement claims because of the negligence claims. (*See* Dismissal Mot. 4 ("Because, under Virgin Islands law, a claim for negligent abatement does not exist and is construed as a simple negligence claim, the claim should, respectfully, be dismissed. The facts alleged in support of the negligent abatement claim should be construed as part of Plaintiffs' negligence claim (Count I)." (citation omitted)).) The Court does not agree, however, because the torts are not the same. *See Corradetti v. Sanitary Landfill, Inc.*, 912 F. Supp. 2d 156, 164 (D.N.J. 2012) ("Plaintiffs' negligence and negligent site remediation claims are distinct: there is a difference between negligently causing pollution to occur and negligently remediating that pollution."). Admittedly, negligent remediation is a form of negligence. But so are negligent infliction of emotional distress, negligent retention and hiring, negligent supervision, negligent misrepresentation, negligent entrustment, and negligence *per se*, to name a few. Some courts do refer to such claims as negligence. *See, e.g., Abednego*, 63 V.I. at 189 n.6 (noting jurisdictions that do not recognize negligent infliction of emotional distress); *cf. Scott v. Retz*, 916 N.E.2d 252, 257 (Ind. Ct. App. 2009) ("Negligent retention and supervision is a species of negligence . . . ."); *accord Winschel v. Jain*, 925 A.2d 782, 788 (Pa. Super. Ct. 2007) ("Medical malpractice is a species of negligence."). But the law favors clarity and precision, especially in pleadings. *Cf. Mitchell v. Gen. Eng'g Corp.*, 67 V.I. 271, 285 n.7 (Super. Ct. 2017) ("'A shotgun complaint often contains several counts, each one incorporating by reference the allegations of its predecessors . . . . Such pleadings not only harm the litigants who must answer them, but they harm the court by impeding its ability to administer justice.'" (citation and ellipsis omitted)). "The law [also] contemplates but one final judgment in an action." *Davis v. Baum*, 133 P.2d 889, 891 (Okla. 1941).

¶43 In this instance, if the *Arno* and *Rodriguez* Plaintiffs' negligent remediation claims (Count VII) were construed to be a part of their negligence claims (Count I), and if the jury were to find the Defendants not responsible for the release of oil and other hydrocarbons, *cf. Hawkins v. E. B. Germany & Sons*, 425 S.W.2d 23, 25 (Tex. Civ. App. 1968), the Plaintiffs could also find themselves precluded from recovering for damage done to their properties afterward in cleaning up the release. Claimants might not be made whole if negligent remediation claims are subsumed under other negligence claims, particularly "[s]ince it is a basic precept of tort law that there can be only one redress for each wrong . . . ." *Brown v. Jones Store*, 493 S.W.2d 39, 41 n.1 (Mo. Ct. App. 1973). The two are not the same. *Accord Orange Cty. Water Dist. v. Sabic Innovative Plastics US, LLC*, 222 Cal. Rptr. 3d 83, 130 (Ct. App. 2017) (rejecting continuous accrual theory) ("Separate negligent acts could reasonably lead to more or different contamination, contamination with different effects, or contamination requiring different remediation efforts. For example, a defendant's negligent release of hazardous substances could cause some groundwater contamination. A defendant's later negligent remediation effort could cause additional groundwater contamination, in different areas, with different effects. Even though both negligent acts caused groundwater contamination, the contamination is not a single harm.").

¶44 "Legal labels characterizing a claim cannot, standing alone, determine whether it fails . . . ." *Labram v. Havel*, 43 F.3d 918, 920 (4th Cir. 1995). "Even where such a label reflects a flat misapprehension by counsel respecting a claim's legal basis, dismissal on that ground alone is not warranted so long as any needed correction of legal theory will not prejudice the opposing party." *Id.* Here, the Plaintiffs put the defendants on notice that they seek compensation for the damage done to their properties following the release. Although the Defendants are correct, Virgin Islands courts have not yet recognized negligent abatement, the Defendants ignore the substance of the Plaintiffs' allegations, focusing instead on the label. But the core of their claims are negligent remediation. Other jurisdictions have recognized negligent remediation as a cause of action separate and apart from negligence. This Court will as well by declining to grant the Defendants' motion to dismiss.[12] Having undertaken the analysis required in the absence of binding precedent,

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[12] Virgin Islands law already recognizes a duty, concerning the release hazardous substances, to remediate. *See* 12 V.I.C. § 551(r) ("'Remediation' or 'remediate' means all necessary actions to investigate and clean up or respond to any known, suspected, or threatened discharge, including, as necessary, the preliminary assessment, site investigation,

cf. Alleyne v. Diageo USVI, Inc., 63 V.I. 384, 405 n.6 (Super. Ct. 2015) ("*Alleyne I*") ("The Court employs a *Banks* analysis to determine Virgin Islands common law when the Virgin Islands Supreme Court has not spoken." (citing *Banks v. Int'l Rental & Leasing Corp.*, 55 V.I. 967 (2011)), the Court holds that the soundest rule for the Virgin Islands is to recognize a cause of action for negligent remediation. Because the allegations in the complaints gave the Defendants sufficient notice of the nature of their claim, notwithstanding the legal label the Plaintiffs' counsel employed, the Court will deny the motion to dismiss.

C. Motion for a More Definite Statement

¶45 The remaining motion is for a more definite statement concerning the Plaintiffs' "negligence, private nuisance, public nuisance, negligent or intentional infliction of emotional distress, medical monitoring, negligence per se and abnormally dangerous condition claims." (Def. HOVENSA, LLC's Mot. & Br. for a More Def. Stmt. 4, filed Sept. 28, 2012 (hereinafter "Stmt. Mot.").) They contend that they "'cannot reasonable prepare a response,'" *id.* (quoting Fed. R. Civ. P. 12(e)), because "[t]he allegations in the Complaint are pled as if this suit were a class action (which it is not)," rendering the "Plaintiffs' claims . . . vague and ambiguous . . . ." *Id.* at 2.

¶46 Hess, in joinder, makes another point. In their complaints, the *Arno* and *Rodriguez* Plaintiffs allege that "Hess Corporation so controls the decisions of HOVENSA to include what is spent on improvements, safety, investment requirements, upgrades as to be responsible for these decisions." (*Arno* Amend. Compl. ¶ 44; *Rodriguez* Compl. ¶ 67.) Hess argues that "HOVENSA is not a wholly-owned subsidiary of Hess . . . ." (Def. Hess. Corp.'s Mo. & Br. Joining in the Pending Mot. for a More Def. Stmt. by Def. HOEVNSA, LLC 6, filed Oct. 9, 2012.) Yet, "Plaintiffs attempt to plead an 'alter ego' relationship between Hess and HOYENSA, claiming the relationship between the companies is such that Hess should be derivatively liable for Plaintiffs' injuries." *Id.* at 2. This "single-sentence, conclusory allegation . . . cannot possibly satisfy Rule 8," Hess argues, "or permit Hess to prepare a response." *Id.*

¶47 Rule 12(e) of the Virgin Islands Rules of Civil Procedure allows one party to move for a more

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remedial investigation, and remedial action, but does not include the payment of compensation for damage to, or loss of, natural resources."). Virgin Islands statutory law might even imply a right of action for damages, losses, and costs related remediation efforts, *cf.* 12 V.I.C. § 754; *see also id.* § 553(g)(4), though liability might also be limited. *Cf. id.* § 555; *see also id.* § 752.

definite statement of another party's pleading.[13] *See* V.I. R. Civ. P. 12(e) ("A party may move for a more definite statement of a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a response."). "'Courts may also order claimants to flesh out the issues in their pleadings and provide further detail, either *sua sponte* within their inherent authority to move the case forward efficiently and orderly, or by construing a motion to dismiss as a motion for a more definite pleading.'" *Alleyne II*, 69 V.I. at 314 (citation omitted). Generally, "'Rule 12(e) motions are highly disfavored . . . .'" *Id.* at 318 (citation omitted). The reason why is because "notice pleading simply requires that an initial pleading put the opposing party (or parties) on 'fair notice of what the plaintiffs claim is and the grounds upon which it rests.'" *Morton*, 2018 V.I. LEXIS 148, at *3 (citation omitted). "But if the details sought concern potential defenses that could be raised and might be otherwise waived if not timely asserted," *Alleyne II*, 69 V.I. at 318, then a motion for a more definite statement might be appropriate.

¶48 Ordering the Plaintiffs to provide some information is appropriate here. "Even in a notice pleading jurisdiction, a complaint must include a short and plain statement showing that *each plaintiff* is entitled to the relief demanded." *Id.* at 319; *accord Bermudez v. V.I. Tel. Corp.*, 54 V.I. 174, 193-94 (Super. Ct. 2011) ("[P]lead[the] who, what, where, when, and how – sufficient information to put [a d]efendant on notice of the conduct and actions [the p]laintiff complains of."). But the Defendants are not entitled to most of the information they seek because they moved for more definite statements when "'labels and conclusions, and a formulaic recitation of the elements of a cause of action w[ould] not do.'" (Stmt. Mot. 3 (quoting *Twombly*, 550 U,S. at 555).) But even under the now-abrogated heightened pleading standard, the Court questions whether the Defendants would have prevailed.

¶49 For example, regarding all claims, but specifically here for negligence, the Defendants want

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[13] At the time when the Defendants filed their motion, ordering a more definite statement was governed by Superior Court Rule 31, which provided that "[u]pon application by any party on notice, the court may order the filing and serving of a more certain and definite pleading."), *repealed by In re: Amendments to the Rules Gov. the Super. Ct. of the V.I.*, ST-17-MC-019, 2017 V.I. LEXIS 60, *1 (V.I. Super. Ct. Apr. 6, 2017), *approved by* S. Ct. Prom No. 2017-006, 2017 V.I. Supreme LEXIS 23 (V.I. Apr. 7, 2017), *reprinted in* V.I. Ct. Rules Ann. 272 (2013 ed.). Currently, Virgin Islands Rule of Civil Procedure 12(e) governs motions for a more definite statement. Because the legal standards are the same, since Superior Court Rule 31 provided that "Rule 12(e) of the Federal Rules of Civil Procedure shall govern such applications," and "Virgin Islands Rule of Civil Procedure 12 was borrowed from Federal Rule of Civil Procedure 12," *Alleyne II*, 69 V.I. at 318, the Court will apply the Virgin Islands rule here.

to know "the location of each Plaintiff at the time they were allegedly exposed to the Release." (Stmt. Mot. 9 n.6 & 10 n.7.) Yet, the Defendants fail to identify what affirmative defense they might assert if they knew where the Plaintiffs where when the releases occurred. A more definite statement is only appropriate "'[i]f an opposing party cannot prepare an adequate response, because the facts alleged in support of the claim are deficient or too vague . . . .'" *Alleyne II*, 69 V.I. at 314 (citation omitted). The complaints allege that the *Arno* and *Rodriguez* Plaintiffs live on St. Croix and were exposed to hydrocarbons released on September 19, 2010 and December 9, 2010, respectively. The Superior Court has personal jurisdiction because the Plaintiffs commenced these actions and the Defendants were served and appeared. *See* 5 V.I.C. § 115. The Superior Court has subject-matter jurisdiction because the alleged events occurred in the U.S. Virgin Islands. *See* 4 V.I.C. § 76(a). And venue is proper because the causes of action accrued on St. Croix. *See id.* § 78. This Court is at a loss to understand why knowing the precise location of each Plaintiff is necessary and the Defendants' failure to identify any defense they could plead in an answer or pre-answer motion is fatal. Further, this Court holds that a motion for a more definite statement is deficient if it fails to identify what affirmative defense or motion might have been raised. Thus, the Defendants' request is rejected.

¶50 Likewise, the Court rejects the request to have the "Plaintiffs provide . . . the nature and extent of the property damage alleged." (Stmt. Mot. 7.) The Defendants contend that the Plaintiffs should have to

> [a]ssert[] facts that describe (i) the real property that was allegedly damaged by the Release; (ii) a detailed description of the alleged damage to the real property; (iii) the nature of the personal property that was allegedly damaged; (iv) the location of the personal property at the time of the Release; and (v) a detailed description of the alleged damage to the personal property.

Id. at 7 n.5. Again, the Defendants fail to connect the information they seek to any affirmative defense or motion they might raise in response to the negligence claims. They also fail to cite any authority to support requiring a plaintiff to provide such nuance in her complaint, and their own *ipse dixit* does not make it so. The Plaintiffs allege that their "roofs, walls, insides of their homes, personal property, vehicles, plants, were covered with oil and other matter and damaged." (*Arno* Amend. Compl. ¶ 50; *accord Rodriguez* Compl. ¶ 73 ("Plaintiffs' roofs, walls, insides of their homes, personal property, and vehicles were covered with oil and other matter and damaged and was inhaled and consumed by Plaintiff.").) Coupled with their assertion that "HOVENSA, LLC operates an oil refinery in close proximity to the neighborhoods that the Plaintiffs reside in," (*Arno* Amend. Compl. ¶ 50; *cf. Rodriguez* Compl. ¶ 71 ("HOVENSA, LLC and HESS CORPORATION operate an oil refinery in close proximity to the neighborhoods that the Plaintiffs reside in.")), the Plaintiffs gave the Defendants plenty of information to be able to fashion a response.

¶51 Concerning the private nuisance claims,[14] the Defendants contend that they cannot respond because Plaintiffs failed to show in their complaints how the harm, they suffered from the releases, were different than the "'kind that would be suffered by a normal person in the community.'" (Stmt. Mot. 8 (quoting *Bermudez*, 54 V.I. at 193).) But the Plaintiffs did show how their harm was different. They allege that "there was a large discharge of oil and other chemicals, toxins and particulates into the homes of the Plaintiffs." (*Arno* Amend. Compl. ¶ 49; *accord Rodriguez* Compl. ¶ 72.) "As a result the Plaintiffs' roofs, walls, insides of their homes, personal property, vehicles, plants, were covered with oil and other matter and damaged." (*Arno* Amend. Compl. ¶ 50; *accord Rodriguez* Compl. ¶ 73.) The Defendants appear to home in only on the counts, ignoring the all other allegations in the complaint. But pleadings must be read in their entirety whenever they are challenged. *Cf. In re: Cincinnati Gas & Elec. Sec. Litig.*, 594 F. Supp. 233, 238 (S.D. Ohio 1984) ("[R]eading the complaint as a whole, we conclude that plaintiffs have provided Kaiser defendants with adequate notice such that defendants can prepare a responsive pleading."); *Dooley v. Pa. R. Co.*, 64 Pa. D. & C. 110, 118 (C.P. 1948) ("In determining whether or not additional defendant is entitled to a more specific complaint, the complaint must be read as a whole."); *accord Reo v. Midland Credit Mgmt.*, No. 1:18-cv-1544, 2018 U.S. Dist. LEXIS 141753, *3 (N.D. Ohio Aug. 21, 2018) ("The Court is also not persuaded that the answer is vague or defective enough to warrant either striking the answer as a whole or ordering Defendant Midland to file a more definite statement."); *see also Kaster v. Modification Sys., Inc.*, 731 F.2d 1014, 1019 (2d Cir. 1984) ("[C]arefully evaluate the proposed further amended complaint as a whole to determine if it alleges sufficient facts to meet the requirements of Rule 23.1."); *Spear, Leeds & Kellogg v. Pub. Serv. Co.*, 700 F. Supp. 791, 793 (S.D.N.Y. 1988) ("On a Rule 9(b)

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[14] By separate order the Court will order the Plaintiffs to show cause why their public nuisance claims should not be dismissed entirely, or at least as to the request for injunctive relief, in light of HOVENSA's 2012 closure and 2015 bankruptcy and sale of the refinery. *Cf. Atl. Basin Ref., Inc. v. ArcLight Capital Partners, LLC*, Civ. No. 2015-0071, 2018 U.S. Dist. LEXIS 117974, *38 (D.V.I. July 16, 2018) ("Hovensa, the debtor, sold its storage and terminal assets in an open auction. Defendants' affiliate, Limetree . . . ultimately was the successful purchaser of those assets.").

motion to dismiss, 'a complaint must be read as a whole, drawing inferences favorable to the pleader.'" (citation omitted)). The Defendants have enough information to respond to the private nuisance claims.

¶52 Concerning the medical monitoring claims, the Defendants here too, assert they cannot respond. So, the Plaintiffs, in addition to stating where they were at the time of the releases, should also have to state "how each Plaintiffs' alleged exposure to the Release has 'significantly increased' each Plaintiffs risk of contracting a serious latent disease." *Id.* at 18 n.13. The Court rejects this request as well. Assuming the Virgin Islands were to recognize a medical monitoring or fear of future illness cause of action,[15] each Plaintiff has alleged enough "facts to *show* . . . that he or she was significantly exposed to a proven hazardous substance through the negligent actions of the defendant . . . ." (Stmt. Mot. 17 (emphasis added) (citing *Josephat v. St. Croix Alumina, LLC*, Civ. No. 1999-0036, 2000 U.S. Dist. LEXIS 13102, *34 (D.V.I. Aug. 7, 2000)).) Virgin Islands law defines hazardous substances. *See* 12 V.I.C. § 202(l) ("'Hazardous air pollutant' means a pollutant which is listed pursuant to section 112(b) of the Clean Air Act, as amended."). The Defendants can either admit or deny whether, on the dates alleged, "there was a large discharge," (*Arno* Amend. Compl. ¶ 49), and if so, whether what was released were "hazardous substances." *Id.* The Plaintiffs do not have to envision every disease or condition they might acquire from all possible toxins, particulates, and chemicals that could have been released, and enumerate disease or condition in their complaints. All litigants are obligated to certify that their "factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery." V.I. R. Civ. P. 11(b)(3). While the Plaintiffs would have been on firmer footing if they had prefaced several allegations with "upon information and belief," the Defendants, nonetheless, have sufficient information to respond.

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[15] *Compare Josephat v. St. Croix Alumina, LLC*, Civ. No. 1999-0036, 2000 U.S. Dist. LEXIS 13102, *34 (D.V.I. Aug. 7, 2000) (citing *In re: Paoli R.R. yard PCB Litig.*, 916 F.2d 829 (3d Cir. 1999)), *with In re World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 758 F.3d 202, 213 (2d Cir. 2014) ("Medical monitoring is not an independent cause of action under New York law."); *Paz v. Brush Engineered Materials, Inc.*, 949 So. 2d 1, 5 (Miss. 2007) ("Mississippi law does not recognize a claim for medical monitoring based on increased risk of future disease."). *But cf. In re: Paoli R.R. Yard PCB Litig.*, 916 F.2d at 849 ("Neither the Pennsylvania Supreme Court nor the Pennsylvania Superior Court has decided whether a demonstrated need for medical monitoring creates a valid cause of action. Therefore, sitting in diversity, we must predict whether the Pennsylvania Supreme Court would recognize a claim for medical monitoring under the substantive law of Pennsylvania and, if so, what its elements are." (footnote omitted)).

¶53 Concerning the maintenance of an abnormally dangerous condition claim, the Defendants assert that they cannot respond until the Plaintiffs state "how HOVENSA is unable to eliminate the alleged risk by the exercise of reasonable care," "how the operation of the HOVENSA refinery is inappropriate to the place where it is carried on," and "the extent to which the refinery's value to the community is outweighed by its alleged abnormally dangerous attributes." (Stmt. Mot. 20 n.14.). This Court has not found a single opinion addressing a motion for a more definite statement of a claim alleging the maintenance of an abnormally dangerous condition. The only authority the Defendants offered, *see id.* at 19 (citing *Maximin v. Rivera*, 25 V.I. 20, 22-23 (Terr. Ct. 1990)), did not concern the sufficiency of the complaint to give the defendants notice to respond. In fact, the court in *Maximin* concluded that maintenance of an abnormally-dangerous activity was not at issue. *See id.* at 22-23 ("The criteria for an abnormally dangerous activity manifestly do not apply in this circumstance, in which a truck driver supposedly failed to yield the right of way at an intersection." (footnote omitted)). *Maximin* did note several factors courts consider. *See id.* at 22 n.2 (citing *Restatement (Second) of Torts* § 520 (1977)). But, as with any claim for relief, complaints are considered as a whole and legal conclusions and labels ignored.

¶54 Here, all Plaintiffs gave their home addresses, alleged that on a specific date, oil, chemicals, and other particulates were released, and that the discharged materials made their way into their homes. They further asserted that the "Defendants discharge substances at night and burn off residue and other chemicals or substances at night in an attempt to hide their actions," (*Arno* Amend. Compl. ¶ 53; *Rodriguez* Compl. ¶ 76), and "have a history of operating [the] refinery in a negligent manner such that fumes, particulates and other toxins are allowed to escape into the air and affect the neighborhoods of the Plaintiffs . . . ." (*Rodriguez* Compl. ¶ 82; *Arno* Amend. Compl. ¶ 59.) Finally, the Plaintiffs allege that the "Defendants know that they have to use the utmost caution in operating the Refinery because any discharge from the refinery will migrate to those neighborhoods," (*Arno* Amend. Compl. ¶ 51; *Rodriguez* Compl. ¶ 74), and "and understood that there was a high risk that the oil and other chemicals, toxins, and particulates could contaminate nearby neighborhoods and cause their residents severe personal injuries and significant property damages." (*Arno* Amend. Compl. ¶ 88; *Rodriguez* Compl. ¶ 109.) This is enough information for Hess and HOVENSA to admit or deny whether operating the refinery is abnormally dangerous. As for

Turner, however, it is not as clear because the Plaintiffs allege that HOVENSA owns and operates the refinery, and that Hess plays a sizable role behind the scenes. Turner is not alleged to be an owner or operator, only to have "contributed to the negligent discharge." (*Rodriguez* Compl. ¶ 68; *Arno* Amend. Compl. ¶ 45.) Rather than order the Plaintiffs to give a more definite statement as to Turner, the Court will order them to clearly delineate which claims are asserted against each Defendant and provide sufficient information so that each Defendant is able to respond.

¶55 The negligent, or intentional, infliction of emotional distress claims are a closer call because "'the decision to jointly assert the claims of more than 2,000 individual plaintiffs in one lawsuit does not relieve each plaintiff of the obligation to demonstrate a plausible entitlement to relief.'" *Abednego*, 63 V.I. at 190 (citation omitted). On one point the Defendants are correct: "The allegations in the Complaint are pled as if this suit were a class action . . . ." (Stmt. Mot. 2.) These are not class actions. And the Plaintiffs' failure to "individualize" their allegations is bothersome because negligent infliction of emotional distress is not a lesser-included offense of intentional infliction of emotional distress, so to speak. They are different torts.

¶56 Although binding precedent has not yet recognized or identified the elements of the claim,[16] intentional infliction of emotional distress generally requires "conduct that exceeds all possible bounds of decency such that it is regarded as atrocious and utterly intolerable in a civilized society . . . ." *Donastorg v. Daily News Publ'g Co., Inc.*, 63 V.I. 196, 295 (Super. Ct. 2015). "It has not been enough that the defendant has acted with an intent which is tortuous or even criminal . . . or even that his conduct has been characterized by 'malice,' or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort." *Smith v. Elias*, 49 V.I. 65, 75 n.5 (Super. Ct. 2007). Instead, "[t]he defendant must desire to inflict severe emotional distress or know that it is substantially certain to result." *Hartzog v. United Corp.*, No. SX-04-CV-095, 2011 V.I. LEXIS 95, *18 (V.I. Super. Ct. Sep. 7, 2011). Physical injury may or may not be necessary to recover. *Cf. Diaz v. Ramsden*, 67 V.I. 81, 89 (Super. Ct. 2016) ("Plaintiffs must show . . . 'severe emotional distress.'" (citation omitted)). *But cf. Joseph v. Sugar Bay Club & Resort*, No. ST-13-CV-491, 2014 V.I. LEXIS 14, at *9 (Super. Ct. Mar. 17, 2014) ("When there is no physical injury, the conduct is expected to be

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[16] The Court's discussion is intended only to place the Defendants' motions in their proper context and should not be construed as a formal *Banks* analysis nor a recognition that any claims, as-yet unrecognized by binding precedent, are viable or what elements comprise such claims.

sufficiently extreme and outrageous to guarantee that the claim is genuine."), *rev'd on other grounds*, S. Ct. Civ. No. 2014-0018, 2015 V.I. Supreme LEXIS 4 (V.I. Feb. 17, 2015). And one may recover under intentional infliction of emotional distress for extreme and outrageous conduct directed at "a member of such person's immediate family who is present at the time, whether or not such distress results in bodily harm." *Francis v. Brinks P.R., Inc.*, No. 681/1998, 2003 V.I. LEXIS 21, *5 (V.I. Terr. Ct. Feb. 25, 2003) (quoting Restatement (Second) of Torts § 46(2)

¶57 Negligent infliction of emotional distress, by contrast, requires proof of negligence, meaning that a duty of care was breached, in addition to severe emotional distress caused by that breach. *Cf. Diaz*, 67 V.I. at 94 (applying *Donastorg*, 63 V.I. at 314). Intentional or deliberate conduct is not necessarily at issue. *Cf. Bell v. State*, 406 A.2d 909, 915 ("'Intentional' and 'negligent' are mutually exclusive."). Whether the plaintiff must also suffer a physical injury, or be within a zone of danger, to recover is also unclear. *Cf. Diaz*, 67 V.I. at 89 ("This Court also agrees with the growing minority and the Virgin Islands Courts that have abandoned the physical injury and 'zone of danger' requirements."); *accord Donastorg*, 63 V.I. at 312 ("The Court also rejects the requirement that emotional distress must produce physical symptoms before the emotional injury will be considered severe. Although courts in the Virgin Islands have imposed such a requirement in the past, this requirement ignores the facts that individuals respond differently to the same event, and that some mental injuries persist despite an absence of physical symptoms.").

¶58 The concern here is that the Plaintiffs failed to allege any emotional distress, ***directly*** or ***explicitly***, nor do they point to any intentional conduct taken by Hess, HOVENSA, Turner, or Wyatt. Yet, they conclude that "[t]he actions of the Defendants negligently inflicted emotional distress on the Plaintiffs," and "[i]f not negligently then the Defendants' intentionally inflicted emotional distress on the Plaintiffs." (*Arno* Amend. Compl. ¶¶ 81-82; *Rodriguez* Compl. ¶¶ 102-03.) But again, one tort is not the "lesser-included" of the other. Reading each complaint in its entirety, however, does lend further support because the Plaintiffs allege that they "drank or bathed in contaminated water, breathed the contaminants, got the contaminants on their skin." (*Arno* Amend. Comp. ¶ 63; *Rodriguez* Compl. ¶ 84.) They also allege that the "Defendants attempted to cover up their responsibility and for a period of time refused to acknowledge their involvement in the spill or what had been discharged." (*Rodriguez* Compl. ¶ 85; *Arno* Amend. Compl. ¶ 64.) "This made the Plaintiffs even more *anguished* as they did not know what they had been exposed to and could not get a true answer from Defendants." *Id.* (emphasis added). This is enough, though just barely, to put the Defendants on notice of their claims as well as the basis of their claims such that the Defendants could either admit or deny the allegations or file pre-answer motions. To stave off additional unnecessary motions, the Court will, *sua sponte*, direct the Plaintiffs to give additional information, specifically whether the Plaintiffs are asserting negligent infliction of emotional distress or intentional infliction of emotional distress, or both, and against which Defendants. *See Alleyne II*, 69 V.I. at 314.

¶59 Finally, concerning their negligence per se claims, the Defendants are correct: the Plaintiffs must state what statute or statutes the Defendants allegedly violated.

> A plaintiff suing for negligence per se relies on the doctrine that obviates the normal showings of the duty and breach-of-duty elements of an ordinary negligence claim by relying on the defendant's violation of a statute or other legally-binding regulation; that is, the plaintiff must demonstrate that the defendant had a duty to follow the law, failed to follow the law, and that such failure caused damages to the plaintiff as a person within the class intended to be protected by the statute or regulation.

Antilles Sch., Inc. v. Lembach, 64 V.I. 400, 423 (2016) (citing *Alleyne I*, 63 V.I. at 402; *Martinez v. Angel Exploration, LLC*, 798 F.3d 968, 974 (10th Cir. 2015)). "[M]any federal courts have held that a plaintiff fails to satisfy the requirements of notice pleading for a claim of negligence per se when he 'does not identify which statutes the individual defendants allegedly breached.'" *Welch v. Loftus*, 776 F. Supp. 2d 222, 225-26 (S.D. Miss. 2011) (citation and brackets omitted) (collecting cases). This Court agrees: a negligence per se claim must identify which statute, ordinance, regulation, or law was violated.

¶60 Here, the Plaintiffs allege that the Defendants violated

> the statutes of the United States and Virgin Islands laws, including but not limited to the regulations of the Environmental Protection Agency, the Clean Air Act, the Clean Water Act, the Oil Pollution Prevention Act of 1990, CERCLA, 42 U.S.C. Sec. 9601 et seq., RCRA, 42 U.S.C. 6901 et seq., and the Oil Pollution Act of 1990, 33 U.S.C. 2702 et seq. and any and all corresponding, correlating, and/or relating statutes regarding oil pollution in the Virgin Islands . . . .

(*Arno* Amend. Compl. ¶ 91; *Rodriguez* Compl. ¶ 112.) The statutes that were identified are not at issue, except that, technically, each might constitute a claim of negligence per se. Instead, the concern is the "including but not limited to" language as well as the "any and all other statutes" language. The Defendants are correct, "under no circumstances can such a pleading withstand . . . scrutiny." (Stmt. Mot. 21.) Furthermore, "[t]he unspecific and sweeping nature of this 'violation of law' allegation . . . is in clear violation of Plaintiffs' pleading requirement." *Id.* at 21-22. The Plaintiffs also failed to specify who violated which statutes, meaning did all four Defendants (plus the fictitious XYZ Company) allegedly violate the same statutes? Each defendant is entitled to notice of what statute, rule, or regulation he allegedly violated because the same law might also supply a defense. *Cf.* 12 V.I.C. § 719; *accord id.* §§ 555, 556; *see also generally, e.g., id.* §§ 751, *et seq.* Accordingly, the Court will grant the Defendants' motion for a more definite statement. However, as stated, the Court will direct the Plaintiffs to incorporate the additional information into their complaints.

D. SEVERANCE

¶61 Finally, the Court turns to severance. Two examples suffice to show why the claims of approximately 75 *Arno* Plaintiffs, 20 *Sonny* Plaintiffs, and 100 *Rodriguez* Plaintiffs' improperly joined their claims together. Regarding negligent and/or intentional infliction of emotional distress claims, the *Arno* and *Rodriguez* Plaintiffs' state that those "Plaintiffs who are not claiming property damage only suffered physical injuries and extreme emotional distress." (*Rodriguez* Compl. ¶ 104; *Arno* Amend. Compl. ¶ 83.) And in their factual allegations, the *Arno* and the *Rodriguez* Plaintiffs likewise qualify their claims, stating that "those Plaintiffs—except those designated as property damage only—suffered physical injuries, medical expenses, are in need of medical monitoring, lost income and suffered mental anguish, pain and suffering and loss of enjoyment of life that is likely to continue into the foreseeable future." (*Arno* Amend. Comp. ¶ 67; *Rodriguez* Compl. ¶ 88 (em dashes added).)

¶62 But the problem is that every *Arno* Plaintiff and every *Rodriguez* Plaintiff asserted all eight claims against all four Defendants, five with XYZ Company still to be identified. None of the Plaintiffs were "designated as property damage only" in the complaints. By contrast, 13 *Sonny* Plaintiffs plead specific physical injuries. (*See, e.g., Sonny* Compl. ¶ 28 ("Coletta Michael had preexisting respiratory asthma that was exacerbated such that she could not breathe, passed out, had asthma attacks and other physical injuries and had to seek medical attention."); *id.* ¶ 33 ("John Jordan suffered rashes and shortness of breath and other physical injuries and had to seek medical attention.").) But the complaint also alleges that the *Sonny* Plaintiffs "suffered loss of value of their property and other damages." *Id.* ¶ 39. It is unclear if all *Sonny* Plaintiffs assert personal or real property claims (or both), or only those Plaintiffs who did not allege the specific physical injuries they experience.

¶63 Lumping all these individuals together in three separately-filed complaints was improper when such individualistic claims were asserted. If the *Arno*, *Sonny*, and *Rodriguez* Plaintiffs had joined together, collectively or as a class, to allege that the operation of the oil refinery was an abnormally dangerous activity, misjoinder would not be an issue. The same holds for their public nuisance claims. *Cf. Alleyne II*, 69 V.I. at 334-35 (joinder was proper in nuisance and real property devaluation cases cited). But how Ms. Arno, Mr. Rodriguez, and Mr. Sonny were harmed by the Defendants might not be the same for the other co-plaintiffs in each of their cases. Moreover, the evidence necessary to prove Ms. Arno's negligent remediation claim might be quite different than the evidence necessary to prove the other Plaintiffs' claims because the damage alleged done to her property during the cleanup might be more or less extensive. The same holds for the *Rodriguez* Plaintiffs.

¶64 The Court acknowledges that, at the time when these cases were filed, the Superior Court of the Virgin Islands did not have any mechanism or procedure in place for coordinating multiple cases involving the same or similar claims brought by similarly-situated individuals. Attorneys, seeking to protect their clients' rights, joined multiple plaintiffs together in the same case. *Cf. Abraham*, 70 V.I. at 101 (over 500 plaintiffs named in complaint); *Alleyne II*, 69 V.I. at 324 (over 150 plaintiffs named in complaint); *Abednego*, 63 V.I. at 160 (over 2,800 plaintiffs named in complaint); *Alexander v. HOVIC*, Civ. No. 323/1997, *et seq.*, 1998 V.I. LEXIS 36, *2 (V.I. Terr. Ct. Jan. 23, 1998) ("235 plaintiffs filing a total of 13 cases against 30 defendants."). If the cases had been filed individually, the Clerk's Office would have assigned them at random among the judges within the district, which possibly would have resulted in inconsistent rulings and piecemeal resolution if one judge resolved her or his set of cases faster than the others. *Cf. Mitchell v. Gen. Eng'g Corp.*, 67 V.I. 271, 279 (Super. Ctr. 2017) ("By referring to 'this Court's' decisions, Mitchell assumed that his case would be transferred or reassigned to Judge D'Eramo, who would presumably rule the same way here as in *LaBast.* Mitchell may have also believed that Judge Donohue would rule the same way as Judge D'Eramo had. But that is not necessarily correct."). And if the cases were appealed, a decision changing the controlling law would necessarily cause the other judges to revisit their rulings, leading to additional cost and delay. *Cf.* V.I. R. Civ. P. 6-4(b)(1) ("A motion to reconsider must be based on . . . intervening change in controlling law.").

¶65 Since then, the Superior Court, with the approval of the Supreme Court, established a Complex Litigation Division and assigned "one judge . . . exclusively to the Complex Litigation Division . . . to ensure that the cases assigned to the . . . Division receive the continuous and extensive judicial management necessary to their efficient administration . . . ." *In re: Establishment of a Complex Litig. Div.*, No. ST-18-MC-030, 2018 V.I. LEXIS 51, *3 (V.I. Super. Ct. May 11, 2018), *approved in part sub nom. In re: Amends. to the Rules Gov. the Super. Ct. of the V.I.*, Prom. No. 2018-002, 2018 V.I. Supreme LEXIS 7 (V.I. May 22, 2018). The Supreme Court also promulgated rules to govern the assignment of cases into the division and specific procedures for coordinating related cases and authorizing the use of a master. *See generally* V.I. R. Civ. P. 92-96. Nothing like this existed before. *Cf. In re: Alumina Dust Claims*, 67 V.I. 172, 178-82, & 194-96 (Super. Ct. 2017) (describing the confusion from related cases assigned to different judges but being treated as if consolidated by counsel, and confusion caused by using one person's case as a master case). While it may be understandable why, in 2012, the *Arno*, *Sonny*, and *Rodriguez* Plaintiffs joined together to file one action each, the Court cannot let approximately two-hundred individuals remain together in three cases. *See also Alleyne II*, 69 V.I. at 327 (filing fee is also a concern) ("[T]he Legislature vested the Judiciary with the discretion to waive filing fees for persons who cannot afford to pay, it implies that those who can afford to pay should pay.").

¶66 Accordingly, the Court will drop all Plaintiffs except the first-named Plaintiff in each case, sever the claims of the dropped Plaintiffs, and direct the dropped Plaintiffs to refile a new complaint. Leave to replead will be granted. But "[l]eave to replead does not imply leave to supplement or amend . . . ." *Mitchell*, 67 V.I. at 285. Each Plaintiff should plead only the claims that Plaintiff has and specify which Defendant each claim is asserted against. The Plaintiffs must also specify whether they are asserting intentional infliction of emotional distress, negligent infliction of emotional distress, or both, and which statutes or regulations the Defendants allegedly violated. As a master case was already established to coordinate these cases, the Court will direct the Clerk to group the forthcoming cases under this master case. The Defendants will also be directed to file their answers within twenty-one days after the individual complaints have been filed and numbers assigned to the cases. The first-named Plaintiffs will be directed to file amended complaints and Wyatt directed to file amended answers.

III. CONCLUSION

¶67 For the reasons stated above, the Court will grant Hess' motion for leave to file its answer in *Rodriguez* out of time. Further, notwithstanding that the District Court denied Hess and HOVENSA's pre-answer motions as moot when it remanded these cases to the Superior Court, the Court will direct Hess to file its answer in *Sonny* even though it is technically in default. The Court will deny the Defendants' motion to dismiss the negligent abatement claims. Although negligent abatement may not be recognized under Virgin Islands law, the *Arno* and the *Rodriguez* Plaintiffs did not allege negligent abatement. They alleged negligent remediation and this Court holds that recognizing a cause of action for negligent remediation is sound. *Accord* 12 V.I.C. § 712. The Court will also deny the Defendants' motion for a more definite statement as to all but the negligence per se claims. Finally, all but the first-named Plaintiff in each case must be dropped and the dropped Plaintiffs' claims severed, and the Plaintiffs ordered to file an individual complaint.

Date: October 17, 2019

ROBERT A. MOLLOY
Judge of the Superior Court

ATTEST:
ESTRELLA H. GEORGE
Clerk of the Court

By: ______________________
Court Clerk
Dated: 10/17/2019