SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

IN RE: REFINERY HYDROCARBON RELEASE LITIGATION.	))	**MASTER CASE NO. SX-15-CV-100**
This Document Pertains to All Cases Consolidated Under this Master Case	)))	(JURY)

Appearances:

LEE J. ROHN, Esq.
Lee J. Rohn & Associates, LLC
1101 King St.
Christiansted, VI 00820
Attorneys for Plaintiffs[1]

VINCENT A. COLIANNI, Esq.
VINCENT COLIANNI II, Esq.
Colianni & Colianni, LLC
1138 King St.
Christiansted VI 00820
Attorneys for Plaintiffs[2]

CARL A. BECKSTEDT, III, Esq.
Beckstedt & Associates
2162 Church St.
Christiansted, VI 00820
Attorneys for Defendant HOVENSA, LLC and Defendant Hess Corporation

KEVIN J. BRUNO, Esq.
BLANK ROME LLP
405 Lexington Ave.
New York, NY 10174
Attorneys for Defendant HOVENSA, LLC[3]

CHARLES E. LOCKWOOD, Esq.
GEORGE H. LOGAN, Esq.
Nichols, Newman, Logan, Grey & Lockwood, P.C.
1131 King St., Suite 2014
Christiansted, VI 00820
Attorneys for Defendant Turner St. Croix Maintenance, Inc.

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[1] Counsel for plaintiffs in *Almestica, et al. v. HOVENSA, LLC*, case number SX-10-CV-324, *Arno, et al. v. HOVENSA, LLC, et al.*, case number SX-12-CV-314; *Sonny, et al. v. HOVENSA, LLC, et al*, case number SX-12-C-328; and *Rodriguez, et al. v. HOVENSA, LLC, et al.*, case number SX-12-CV-367.

[2] Counsel for plaintiffs in *Cruz, et al. v. HOVENSA, LLC*, case number SX-10-CV-555; *Lucas, et al. v. HOVENSA, LLC*, case number SX-11-CV-342; and *Herman v. HOVENSA, LLC,* case number SX-12-CV-490.

[3] Admitted *pro hac vice* in *Almestica* only

CHARLES E. ENGEMAN, Esq.
Ogletree Deakins Nash Smoak & Stewart
The Tunick Building
1336 Beltjen Rd, Suite 201
St. Thomas, VI 00802
Attorneys for Defendant Wyatt VI, Inc.

BRADY, DOUGLAS A., Judge

MEMORANUM OPINION AND ORDER TO SHOW CAUSE

BEFORE THE COURT is a Notice re: Status and/or Outcome of Bankruptcy filed by HOVENSA, LLC. For the reasons that follow, the Court will order the parties to show cause why the Court should not lift the stay imposed on this case, dismiss the individual cases grouped under this master case against HOVENSA without prejudice, and sever the claims against the other defendants who are not subject to a bankruptcy stay so that this litigation can continue.

Background

Between July 2010 and December 2012, hundreds of individuals sued HOVENSA, LLC in the Superior Court of the Virgin Islands for 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. Two cases were filed in 2010, one case in 2011, and four cases in 2012. Except for the last case filed in 2012, the other cases involve multiple plaintiffs, several with hundreds of plaintiffs, who joined together in the same complaint. *Contra Abednego v. St. Croix Alumina, LLC*, 63 V.I. 153, 192 (V.I. Super. Ct. 2015) ("Nearly twenty years ago, the Territorial Court of the Virgin Islands rejected a similar attempt by 235 plaintiffs who had joined together to file 'a total of 13 cases against 30 defendants,' each of which alleged 'asbestos-related physical injuries' from 'employment at the Hess Oil refinery on St. Croix between the years of 1971 and 1990.'" (quoting *Alexander v. HOVIC*, Civ. No. 323/1997, et seq., 1998 V.I. LEXIS 36, *2 (V.I. Terr. Ct. Jan. 23, 1998)).

The first case, *Francisca Almestica, et al. v. HOVENSA, LLC*, case number SX-10-CV-324, was filed July 13, 2010 and concerns a release that allegedly occurred on October 28, 2008. The second case, *Elvira Cruz, et al. v. HOVENSA, LLC*, case number SX-10-CV-555, was filed December 9, 2010 and concerns a release that allegedly occurred on December 9, 2010.[4] The third case, *Geovanny Lucas, et al. v. HOVENSA, LLC*, case number SX-11-CV-342, was filed July 15, 2011 and concerns releases

[4] *Cruz* was initially captioned *Melinda Ventura, et al. v. HOVENSA, LLC* and commenced as a class action. However, an amended complaint was filed on February 4, 2011 that named over two hundred plaintiffs individually.

that allegedly occurred between May 9 and May 13, 2011. In these three cases, HOVENSA is the only named defendant.

The fourth case, *Felicia Arno, et al. v. HOVENSA, LLC, et al.*, case number SX-12-CV-314, was filed August 13, 2012 and concerns a release that allegedly occurred on September 19, 2010. The fifth case, *Joseph Sonny, et al. v. Hovensa, LLC, et al.*, case number SX-12-CV-328, was filed August 17, 2012 and concerns a continuous release allegedly beginning on May 9, 2011 and continuing through mid-June 2011. The sixth case, *Serafin Rodriguez, Sr., et al. v. HOVENSA, LLC, et al.*, case number SX-12-CV-367, was filed September 11, 2012 and concerns the same December 9, 2010 release alleged by the plaintiffs in *Almestica*. However, unlike the first three cases, the plaintiffs in *Arno*, *Sonny*, and *Rodriguez* sued Hess Corporation in addition to HOVENSA, and the plaintiffs in *Arno* and *Rodriguez* further sued Wyatt, V.I., Inc., Turner St. Croix Maintenance, Inc. as well as an as-yet unknown company named only as XYZ Defendant.[5] HOVENSA and Hess had removed *Arno*, *Sonny*, and *Rodriguez* to the District Court of the Virgin Islands in October 2012 pursuant to section 1441(a) of title 28 of the United States Code, claiming the claims were based in part on violations of the federal law, including the Clean Air Act, the Clean Water Act, and regulations promulgated by the Environmental Protection Agency. However, the District Court remanded all three cases to the Superior Court on March 31, 2014. *See generally Rodriguez v. HOVENSA, LLC*, Civ. No. 2012-100, et seq., 2014 U.S. Dist. LEXIS 43967 (D.V.I. Mar. 31, 2014).

The seventh (and last) case, *Thimothy Herman v. HOVENSA, LLC*, case number SX-12-CV-490, was filed December 12, 2012 and concerned the same December 9, 2010 release at issue in *Almestica* and *Rodriguez*.

Following standard procedure, the Clerk's Office assigned *Almestica* and *Sonny* to Judge Harold W.L. Willocks. *Cruz, Arno*, and *Rodriguez* were assigned to Judge Darryl Dean Donohue, Sr. and later reassigned to Judge Robert A. Molloy following Judge Donohue's retirement. *Lucas* was assigned to Judge Julio A. Brady and later reassigned to the undersigned judge following Judge Brady's retirement. *Herman* was randomly assigned to the undersigned judge once a case was opened. However, in February 2015, the cases—*Almestica*, *Cruz*, *Arno*, *Sonny*, and *Rodriguez*—assigned to the other judges were reassigned to the undersigned judge following a global status conference Judge

[5] Suits may be instituted in the Virgin Islands using a fictitious name for a defendant. *Cf.* Super. Ct. R. 26 ("If the defendant's true name is unknown to the plaintiff, process may issue against the defendant, designating him by a fictitious name and giving an appropriate description of defendant sufficient to identify him. Thereafter, and prior to entry of judgment, on motion and notice to the defendant the proceedings shall be amended to set forth the true name of the defendant."), *repealed by In re: Amendments to the Rules Gov. Super. Ct. of the V.I.*, ST-17-MC-019, 2017 V.I. LEXIS 60, *1 (Super. Ct. Apr. 6, 2017), *approved by* Prom. No. 2017-006, 2017 V.I. Supreme LEXIS 23, *1 (V.I. Apr. 7, 2016); *accord* V.I. R. Civ. P. 8-1 (same).

Willocks held in February 2015 "to begin discussions with counsels, from an administrative perspective only, on how best to move through the court system the complex litigation cases pending in the Superior Court of the Virgin Islands." *Edwards v. Hess Oil V.I. Corp.*, SX-13-CV-382, __ V.I.___, ___ 2017 V.I. LEXIS 95, *4-5 (V.I. Super. Ct. June 29, 2017) (quotation marks and citation omitted). Because all seven cases involved "toxic tort claims arising from, related to, or concerning the former oil refinery or aluminum refinery on St. Croix and . . . multiple parties, whether multiple plaintiffs who filed suit jointly, individual plaintiffs whose cases have been or can be consolidated, or multiple defendants and/or third-party actions," *In re: Alumina Dust Claims*, SX-09-MC-031, 2017 V.I. LEXIS 2, *22 n.9 (V.I. Super. Ct. Jan. 10, 2017) (quotation marks and citation omitted), Judge Willocks, in his capacity as the Administrative Judge of the Superior Court, reassigned the other cases to the undersigned judge (with the undersigned's consent and approval of the Presiding Judge[6]). He also directed the Clerk's Office to open a master case and to consolidate all seven cases under the master case for pre-trial purposes.

Shortly after the master case was opened and the individual cases were grouped together, this Court issued an order, dated August 3, 2015 and entered August 4, 2015, and scheduled a status conference for November 19, 2015. However, on September 15, 2015, HOVENSA filed for bankruptcy. Notice of "the automatic stay of this proceeding as against Defendant HOVENSA pursuant to 11 U.S.C. § 326 *et seq*." was filed in this case shortly thereafter. (Not. of Stay in Bankr. 1, filed Sept. 23, 2015.) In a November 17, 2015 order, the Court continued the November 19, 2015 status conference *sine die* and ordered "this matter . . . **STAYED**, pending the outcome of the Chapter 11 Bankruptcy proceeding known as [*In re: HOVENSA, LLC*,] Bankruptcy Case Number 1:15-bk-10003-MFW in the United States Bankruptcy Court, District of the Virgin Islands." (Order 1, entered Nov. 17, 2015.) The Court also ordered "that the parties . . . immediately notify the Court of the outcome of the . . . bankruptcy proceeding." *Id.*

Approximately a year and half later, when nothing further had occurred, the Court issued an order, dated March 23, 2017, directing HOVENSA to "serve and file a notice regarding the status and/or outcome of the Bankruptcy Case . . . including whether the automatic stay remains in effect." (Order 1, entered Mar. 24, 2017.) HOVENSA filed a notice on May 12, 2017, explaining that "the Bankruptcy is still pending and the automatic stay remains in place." (Not. re Status and/or Outcome

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[6] Following *Vanterpool v. Government of the Virgin Islands*, 63 V.I. 563 (2015), in which the Supreme Court of the Virgin Islands held that "it is the responsibility of the Presiding Judge of the Superior Court to 'assign the cases among all the judges of the court'" and further that the Presiding Judge's "assignment power" may not be "delegate[d] … to a different judge," *id.* at 574, Judge Michael C. Dunston, in his capacity as the Presiding Judge of the Superior Court, issued an order, dated October 7, 2015 and entered October 19, 2015, ratifying and approving the orders the Administrative Judge issued, reassigning the individual cases to the undersigned judge and opening a master case assigned to the undersigned judge.

of Bankr. 1, filed May 12, 2017.) None of the other parties responded and nothing further has been filed in this case or the individual cases to date.

Discussion

Once someone files a petition for bankruptcy, all judicial actions pending against that person or company are stayed automatically pursuant to section 362(a) of title 11 of the United States Code. "The stay is '"automatic" because it is triggered as against all entities upon the filing of a bankruptcy petition, irrespective of whether the parties to the proceedings stayed are aware that a petition has been filed.'" *Cianci v. Chaput*, 64 V.I. 682, 689 (V.I. 2016) (quoting *Maritime Elec. Co. v. United Jersey Bank*, 959 F.2d 1194, 1204 (3d Cir. 1991)). "The automatic stay cannot be waived. Relief from the stay can be granted only by the bankruptcy court having jurisdiction over a debtor's case." *Constitution Bank v. Tubbs*, 68 F.3d 685, 691 (3d Cir. 1995) (citing *Maritime Elec. Co.*, 959 F.2d at 1204). "A party in interest may obtain relief from stay . . . by requesting the relief from the bankruptcy court and, after notice and a hearing, showing cause." *Id.* (citing 11 U.S.C. § 362(d)(1)). Otherwise, "the automatic stay of an action pending against the debtor continues until the bankruptcy case is closed, dismissed, or discharge is granted or denied." *Cianci*, 64 V.I. at 689 (quotation marks and citations omitted)).

But "'Congress, in enacting 11 U.S.C. § 362(a) and its predecessor statute, did not divest state and territorial courts of jurisdiction over proceedings against those who have sought bankruptcy protection in federal court.'" *Id.* at 687-88 (quoting *Brouillard v. DLJ Mortg. Capital, Inc.*, 60 V.I. 763, 765 (V.I. 2014) (*per curiam*)). "Rather, Congress exercised its constitutional authority to enact 'uniform Laws on the subject of Bankruptcies throughout the United States' to suspend such proceedings while a bankruptcy petition remains pending." *Brouillard*, 60 V.I. at 765 (quoting U.S. Const. art. I, § 8, cl. 4) (citing *In re: James*, 940 F.2d 46, 51 (3d Cir. 1991)). Congress also "has not codified a specific procedure for suspending such proceedings." *Id.* at 766 (citation omitted). Instead, state and territorial courts have their own procedures for suspending proceedings against parties subject to a bankruptcy stay. Not unexpectedly, the procedures taken by courts differ around the country. *Compare*, *e.g.*, *id.* ("Although many federal courts of appeal traditionally hold such appeals in abeyance, section 362 does not compel such a procedure. As a result, several courts have developed a practice of dismissing the appeal without prejudice to its re-filing upon either termination of the bankruptcy proceedings or the lifting of the section 362 stay by the bankruptcy court."), *with Chaput v. Scafidi*, SX-10-SM-123, ___ V.I. __, ___ n.12, 2017 V.I. LEXIS 87, *29 n.12 (Super. Ct. App. Div. June 14, 2017) ("*Brouillard* did not decree that dismissal is the soundest approach for all appeals pending in any court in the Virgin Islands where an automatic stay may be in place."). *See also Bradberry v. Carrier Corp.*, 86 So. 3d 973, 984 (Ala. 2011) ("When a bankruptcy petition has been filed, it is common practice for a non-bankruptcy court in which an action is pending against the debtor and others to sever the action as to the debtor and to proceed against the solvent codefendants."). The question raised here is what procedures this Court should adopt for suspending proceedings against HOVENSA, subject to the bankruptcy stay, and whether and in what manner the case should proceed with regard to those other parties who are not subject to the bankruptcy stay. *Cf. Prentice v. Seaborne Aviation, Inc.*, 65 V.I. 96, 113 (V.I. Super. Ct. 2016) ("[T]he Court concludes that the best policy for the Virgin Islands is to permit discretionary dismissal of actions in which all claims have been referred to mandatory, binding arbitration.").

HOVENSA filed for bankruptcy in September 2015. *Almestica*, *Cruz*, *Lucas*, and *Herman* are stayed in their entirety by section 326(a) of title 11 of the United States Code because HOVENSA is the only defendant in each case. "In a bankruptcy proceeding filed pursuant to Title 11 of the United States Code, the federal court has jurisdiction over a civil action if the result could have any effect on the estate being administered. Such proceedings are referred to as 'core' proceedings that are legally distinguishable from non-core proceedings." *Northshore Realty, Inc. v. First Bank*, 62 V.I. 68, 73 (V.I. Super. Ct. Aug. 18, 2014) (citations and footnote omitted). However, while further judicial action *against* HOVENSA cannot occur in any of these cases because of the bankruptcy stay, the bankruptcy stay does not prevent the Superior Court of the Virgin Islands from taking action to manage these cases. "The bankruptcy court does not have the power to preclude another court from dismissing a case on its docket or to affect the handling of a case in a manner *not inconsistent with the purpose of* the automatic stay." *Dennis v. A.H. Robins Co.*, 860 F.2d 871, 872 (8th Cir. 1998) (*per curiam*) (emphasis added).

The question raised in *Almestica*, *Cruz*, *Lucas*, and *Herman* is whether the cases must remain pending, but stayed, on the Court's docket or whether the Court can implement another procedure. Considering that "[t]he need of a court to advance a crowded docket . . . is certainly sufficient to justify the dismissal of a case," *id.* (citing *Moore v. St. Louis Music Supply Co.*, 539 F.2d 1191, 1193 (8th Cir. 1976)), the Superior Court acts entirely consistently with the overall purpose of the bankruptcy stay by dismissing without prejudice any case in which the only defendant in that case is subject to a bankruptcy stay. *Cf. Brouillard*, 60 V.I. at 767 ("[C]ourt may dismiss, rather than stay, proceeding against bankruptcy petitioner, so long as dismissal is without prejudice, since such disposition is 'not inconsistent with the purpose of the automatic stay.'" (quoting *Dennis*, 860 F.2d at 827, and explaining its holding parenthetically)). *see also Martin v. Hearst Corp.*, 3:12-cv-1023, 2013 U.S. Dist. LEXIS 138060, *26 (D. Conn. Aug. 5, 2013) ("[A] court's post-stay entry of an order of dismissal, at least where the stay does not take effect until after briefing on the motion to dismiss is complete, does not constitute a 'commencement or continuation' under § 362(a) as long as the dismissal is consistent with the purposes of the statute." (citations omitted)), *aff'd on other grounds*, 777 F.3d 546 (2d Cir. 2015); *Bezanson v. First Nat'l Bank of Boston*, 1993 Me. Super. LEXIS 447, *4 (Me. Super. Ct. Feb. 23, 1993) ("Dismissal of a creditor's suit during a debtor's bankruptcy is not a continuation of a suit against the debtor, but is rather termination of a suit against the debtor, and therefore does not violate the stay. This result is based on a reading of the stay provision that permits dismissals because they are not actions against the debtor. Other cases have adopted this approach to the automatic stay." (citing *Orion Invests., Inc. v. Dunaway & Assocs., Inc.*, 760 S.W.2d 371, 374 (Tex. Ct. App. 1988); *Int'l Union of Flight Attendants v. Pan Am. World Airways*, 966 F.2d 457, 459 (9th Cir. 1992); *Dennis*, 860 F.2d at 872)); *cf. Picco v. Global Marine Drilling Co.*, 900 F.2d 846, 850 n.6 (5th Cir. 1990) ("Although we express no opinion on the matter, we note that there is ample authority supporting the proposition that an order dismissing a creditor's action against the debtor is completely consistent with provisions of the automatic stay." (citing *Dennis*, 860 F.2d 871)). *But see McGuire v. Champion Fence & Constr., Inc.*, 104 P.3d 327, 330 (Colo. Ct. App. 2004) ("We discern no clear majority rule, and no Colorado appellate opinion directly addresses the issue presented here. We are persuaded by the reasoning in *Ellis*, *supra*. Thus, we conclude, as did the court in *Ellis*, that the operation of the stay does not depend on the outcome of the proceedings and acts that favor the debtor are still void if they violate the automatic stay." (citing *Ellis v. Consol. Diesel Elec. Corp.*, 894 F.2d 371 (10th Cir. 1990)). Because the Court must give the parties an opportunity to be heard before ruling on concerns raised *sua sponte*, *cf. Hughley v. Gov't of the V.I.*, 61 V.I. 323, 334 n.6 (V.I. 2014), the Court will direct counsel for the plaintiffs in *Almestica*, *Cruz*, *Lucas*, and *Herman* to show cause in writing why the Court should not dismiss each case without prejudice subject to its refiling, once the bankruptcy case is closed or dismissed; discharge is granted or denied; or the bankruptcy court terminates the automatic stay or grants relief from it.

The other cases—*Arno*, *Sonny*, and *Rodriguez*—are not as straight-forward because each case involves other defendants. "Federal bankruptcy jurisdiction is defined by 28 U.S.C. § 1334. Section 1334(b) confers upon the district courts 'original and exclusive jurisdiction of all cases under title 11,' and 'original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or *related to* cases under title 11.'" *In re: Combustion Eng'g, Inc.*, 931 F.3d 190, 225 (3d Cir. 2004) (emphasis added) (quoting 28 U.S.C. § 1334(b)). Generally, claims against non-bankrupt co-defendants will not be stayed absent a showing that such claims are "related to" the defendant in bankruptcy and the bankrupt estate. *But cf. A.H. Robins Co. v. Piccinin*, 788 F.2d 994, 999 (4th Cir. 1986) ("[T]here are cases under 362(a)(1) where a bankruptcy court may properly stay the proceedings against non-bankrupt co-defendants but . . . in order for relief for such non-bankrupt defendants to be available under (a)(1), there must be unusual circumstances and certainly something more than the mere fact that one of the parties to the lawsuit has filed a Chapter 11 bankruptcy must be shown in order that proceedings be stayed against non-bankrupt parties." (quotation marks, brackets, and citations omitted)); *Morris v. Rowallan Alaska, Inc.*, 121 P.3d 159, 162 (Alaska 2005) ("Courts have read 362(a)(1) and 362(a)(3) in some instances to establish a stay against non-debtor co-defendants as well."). If claims against non-bankrupt co-defendants are related, they are stayed. If the claims are not related, they proceed. Consequently, in some courts "it is common practice . . . to sever the action as to the debtor and to proceed against the solvent codefendants." *Bradberry*, 86 So. 3d at 984. Again, the reason why is because "the automatic stay is not available to non-bankrupt co-defendants of a debtor even if they are in a similar legal or factual nexus with the debtor." *Maritime Elec. Co.*, 959 F.2d at 1205 (collecting cases). As the United States Court of Appeals for the Tenth Circuit explained over thirty years ago:

> It would make no sense to extend the automatic stay protections to solvent co-defendants. They don't need it, and at the same time it would work a hardship on plaintiffs, by giving an unwarranted immunity from suit to solvent co-defendants. Extending the stay to protect solvent co-defendants would not advance either of the purposes underlying the automatic stay.

Fortier v. Dona Anna Plaza Partners, 747 F.2d 1234, 1331 (10th Cir. 1984). The United States Court of Appeals for the Third Circuit "set forth what has become the seminal test for determining 'related to' jurisdiction . . . in [*In re:*] *Pacor, Inc. v. Higgins*, 743, F.2d 984 (3d Cir. 1984)." *Combustion Eng'g, Inc.*, 931 F.3d at 226 (footnote omitted).

> The usual articulation of the test for determining whether a civil proceeding is related to bankruptcy is whether the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy. Thus, the proceeding need not necessarily be against the debtor or against the debtor's property. An action is related to bankruptcy if the outcome could alter the debtor's rights, liabilities, options, or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankrupt estate. On the other hand, the mere fact that there may be common issues of fact between a civil proceeding and a controversy involving the bankruptcy estate does not bring the matter within the scope of section 1471(b). Judicial economy itself does not justify federal jurisdiction. Jurisdiction over nonbankruptcy controversies with third parties who are otherwise strangers to the civil proceeding and to the parent bankruptcy does not exist.

Pacor, 743 F.3d at 994 (citations, quotation marks, and paragraph break omitted), *overruled on other grounds by Things Remembered, Inc. v. Petrarca*, 516 U.S. 124 (1995).

It is unclear at this juncture whether the stay imposed by the Court's November 17, 2015 order should be lifted. To answer that question, the Court must first consider whether the claims Plaintiffs asserted against Hess, Wyatt, V.I. and Turner St. Croix could be related to HOVENSA's bankruptcy estate. "Related to" jurisdiction is often raised by, though not often found in, multi-party, toxic tort litigation. *Cf. Combustion Eng'g,* 391 F.3d at 227 (citing *In re: Federal-Mogul Global, Inc.*, 300 F.3d 368, 382 (3d Cir. 2002)). For reasons similar to those stated above, the Court will order the parties in *Arno*, *Sonny*, and *Rodriguez* to show cause why the claims against Hess Corporation in *Sonny* and against Hess Corporation, Wyatt, V.I. and Turner St. Croix Maintenance in *Arno* and *Rodriguez* should not be severed and allowed proceed separately against these solvent codefendants.

Accordingly, based on the discussion above, it is hereby

ORDERED that within twenty-eight (28) days from the date of entry of this memorandum opinion and order, Plaintiffs shall SHOW CAUSE in writing in the form of a legal memorandum filed in the master case why: (1) *Almestica*, *Cruz*, *Lucas*, and *Herman* should not be dismissed without prejudice; and (2)(a) why the Court should not lift the stay imposed by the November 17, 2015 Order as to *Arno*, *Sonny*, and *Rodriguez* and (2)(b) sever the claims against the solvent co-defendants and (2)(c) dismiss the claims against HOVENSA without prejudice. It is further

ORDERED that within fourteen (14) days from the date Plaintiffs serve and file the memorandum ordered above, Defendants Hess Corporation, Wyatt, V.I., Inc. and Turner St. Croix Maintenance Corporation may file a response to Plaintiffs' memorandum, jointly if possible, also in the form of a legal memorandum filed in the master case. It is further

ORDERED that Defendant HOVENSA, LLC may (but is not required to) file a response to Plaintiffs within the same timeframe as the other Defendants, provided that filing a response would not violate the automatic stay. It is further

ORDERED that a copy of this Memorandum Opinion and Order shall be served on Lee J. Rohn, Esq., Vincent A. Colianni, Esq., Vincent Colianni II, Esq., Carl A. Beckstedt III, Esq., Kevin J. Bruno, Esq., Charles E. Lockwood, Esq, and Charles E. Engeman, Esq, FORTHWITH.

Dated: July 10, 2017

DOUGLAS A. BRADY
Judge of the Superior Court

ATTEST:
ESTRELLA H. GEORGE
Clerk of the Court
By:
Court Clerk Supervisor 7/10/17