

PREFACE

This arbitration arises under and is conducted pursuant to a Professional Services Contract (“Contract”) dated May 7, 2004 for specialized legal representation in environmental matters that were both urgent and complex. By Order of the Bankruptcy Court dated January 20, 2016, and by agreement of the parties, the undersigned was appointed arbitrator. The parties have requested a “reasoned” award, which means some explanation from which the bases for the Award can be gleaned. It is binding upon the parties, the Government of the Virgin Islands (“GVI”) and John K. Dema, P.C. (“the Dema Firm”).

BACKGROUND

Paragraph 23 of the Contract requires submission of any dispute between the parties to binding arbitration including, but “not limited to,” claims of negligence or legal malpractice which the Government may assert against Contractor, as well as any disputes over fees or expenses.

The Contract engaged the Dema Firm to assist the GVI’s Attorney General in litigation that could be brought to obtain all that was recoverable under law for environmental harm on the South Shore of St. Croix arising from the discharge and leeching of contamination into the groundwater, the air, the Kingshill Aquifer, the Alucroix Channel and surrounding coastlines and waters stemming from a closed alumina refinery and from an operating oil refinery. As predicted in the Contract’s preamble, the litigation was complex, novel, prolonged, contentious, demanding and expensive. The Dema Firm represented the GVI in four separate lawsuits. The cases settled before a trial but the settlements were not foregone conclusions. Had it occurred, the trial would have been the longest environmental case in Virgin Islands history. There were 30 expert witnesses, 150 depositions taken across the United States, including the Virgin Islands,

hundreds of trial documents, thousands of discovery documents, and 20 highly skilled lawyers representing 9 parties. District Court Judge Harvey Bartle, III, sitting by designation, offered the parties settlement opportunities while pressing them forward with trial preparation orders and a firm trial date. With the help of two experienced mediators, the parties reached settlements: two consent decrees with cash and non-cash relief components and one with cash only. The two consent decrees enforce extensive, comprehensive and ongoing recovery efforts on the alumina refinery property. The oil refinery settlement involves cash only to GVI, but with the Environment Protection Agency (“EPA”) requiring increased oil recovery from the Kingshill Aquifer and inclusion of important, valuable and enforceable compliance covenants. The cash and non-cash recovery values from the litigation could exceed \$144.16 million. The repair and maintenance obligations of the “cap” placed atop the expansive alumina property and recovery of the groundwater are permanent, enforceable obligations imposed upon the owners of the land, without financial recovery obligations placed upon GVI. All recovery plans must meet approvals of GVI’s environmental agencies, be subjected to public hearing scrutiny and the review of the consent decree monitor, an experienced professional engineering firm, which will monitor that environment for 30 years.

No appropriated funds were used by GVI to pay attorneys’ fees or expenses to obtain this relief which Judge Bartle found to be in the best interests of the people of St. Croix.

For ten years, the Contract parties did not have a dispute about the meaning of terms, fees, or expenses.

By letter dated September 23, 2015, current Attorney General Claude Walker terminated the Dema Firm’s representation under the Contract, substantially after the litigation settlements were finalized, asserting interpretations which were contrary to the ways the Contract had been

administered by prior GVI executive branch officials, including Governors and Attorneys General. Because Attorney General Walker initially took the position that the longstanding Contract was void ab initio, he did not turn to the Contract's binding arbitration provision to resolve any disputes with the Dema Firm related to the Contract. The Dema Firm moved in the bankruptcy court, then overseeing the oil refinery's Chapter 11 petition for a reorganization, to compel arbitration pursuant to Section 23. The bankruptcy court exercised jurisdiction and granted the motion to compel arbitration. GVI then agreed to arbitrate, but reserved any right to bring civil or criminal actions against the Dema Firm's principal, John K. Dema, Esquire.

ARBITRATION CLAIMS

The Dema Firm by its Statement of Claim contested the GVI claim that the Contract was void ab initio and sought declarations that the contingency fee arrangement was lawful and appropriate, that the Dema Firm had earned the claimed fees and incurred under the Contract the expenses submitted to GVI for reimbursement and that since the GVI did not seasonably repudiate the Contract and never repudiated the fruits of the representation, GVI's failure to pay as promised was a breach by principles of contract, promissory estoppel, quantum meruit, unjust enrichment and account stated. The Dema Firm claimed that the Contract required calculation of fees on a contingency basis using both cash and non-cash recoveries. With respect to fees and expenses previously paid by GVI, it sought a declaration that such payments were contractually warranted and that the fees remaining outstanding as of the date of termination were due and owing.

Specifically, the Dema Firm claimed that it is still owed attorney's fees of \$8,968,147.66, (\$21,297,973.94, earned, minus \$12,329,826.28 paid), and that expenses of \$5,545,173.72 in

GVI litigation expenses were reimburseable and properly paid. Alternatively, if the Recapitulations upon which GVI made payments were opened the arbitration, it claimed, entitlement to additional contingency fees of \$1,320,750.00 calculated on the mid-range, as opposed to the low end, of the estimated costs of restoration the alumina site. It also claimed entitlement to a contingency fee of \$1,345,222.15 calculated upon alleged extra monies paid by the oil refinery purchaser into an escrow fund established by the bankruptcy court relating to satisfaction of the first priority lien against refinery property, which was part of the settlement it negotiated. It claimed compensation for litigation services that it performed (defense of counterclaims and third party complaints.) in connection with the litigation which were specifically excluded from Contract coverage, as well as \$280,000.00 for requested non-litigation legal services that enhanced the Virgin Islands' agencies' administrative environmental protection efforts in enforcing laws and regulations as to contamination spills and discharges of oil and oil products by the oil refinery.

Lastly, it sought an award of all costs of arbitration, including the Dema Firm's attorneys' fees and costs, and arbitrator fees and expenses, and such other relief as the arbitrator deemed just and proper.

GVI filed an Answer, Affirmative Defenses and Counterclaim. It sought a declaration that the Contract was void ab initio, contending that it had been procured in violation of Virgin Islands laws, rules and regulations, in that a former employee of the Dema Firm allegedly negotiated the Contract without the involvement of the Department of Property and Procurement ("DPP"). Additionally, the GVI asserted that DPP did not engage in competitive bidding and employed inappropriately a contingency fee arrangement "thereby diverting millions of dollars from the restoration of natural resources to the payment of exorbitant attorneys' fees to the

detriment of the people of the Virgin Islands.” Assuming Contract validity, it asserted that the Dema Firm breached Sections 3, 4, 5, 6 and 9 of the Contract. It also contended that the Dema Firm unjustly and unconscionably enriched itself at the expense of the Government by not depositing GVI settlement funds into interest bearing accounts and not paying GVI accrued interest. GVI claimed the Dema Firm unlawfully inflated its contingency fees by using non-cash elements of recoveries to calculate fees, improperly retained \$4.1M in expenses in excess of a \$1.5 million cap on GVI expenditures, and improperly asserted entitlement to the \$8.9 million held in escrow by the bankruptcy court order.

GVI further claimed that the Dema Firm engaged in bad faith and unfair dealing in that it charged an unreasonable sum for the legal services rendered, taking unfair advantage of a special and trusted relationship that had existed between the parties. GVI asserted that the Dema Firm wrongfully and intentionally converted settlement funds to the detriment of the public and engaged in fraudulent misrepresentation with respect to engaging the Richardson, Patrick Westbrook & Brickman (“RPWB”) law firm as a subcontractor which incurred litigation expenses which were the obligation of the Dema Firm to pay and were improperly submitted to GVI to pay. It claimed the Dema Firm knowingly made false representations to obtain attorneys fees and knowingly induced GVI officials to rely upon false representations. GVI accused the Dema Firm of not submitting decipherable documentation to support its claims to the Virgin Islands’ Inspector General.

GVI demanded an accounting for all expenses, disgorgement of all settlement funds allegedly taken as fees, and as well as to all expenses paid out. Assuming the Contract allowed contingency fees, it contended that only actual costs and not estimated of restoration costs should

have been utilized. GVI also sought an award of attorneys fees and costs in defending the arbitration, together with award of such other relief as the Arbitrator deemed just and proper.

The Dema Firm replied, specifically denying all of the allegations in the GVI counterclaim, including the GVI's adoption of the Inspector General's Report, in whole, or in part, which it argued is factually and legally erroneous in major respects, and does not comply with well-established Quality Standards for Inspection or ("blue book standards"). It contended that such adoption by GVI, along with other GVI conduct, constituted bad faith as a separate basis for award of attorneys fees and costs.

AWARD

The Dema Firm is awarded unpaid Section 3 Contract attorneys' fees in the amount of \$8,967,050.66, and as well as declaration that all attorneys' fees previously paid (\$12,329,826.28) were properly paid by GVI and properly received and retained by the Dema Firm.

Further, the above sum is with any interest accumulated thereon and that amount shall be paid on or after November 15, 2016 to the Dema Firm from the escrowed fund of \$8,968,147.66 in the Wilmington Trust Bank in the State of Delaware upon presentation of this Award to the Bank for payment.

Further, it is declared that GVI litigation expenses previously paid in the amount of \$5,545,173.72 under Section 4 of the Contract were properly paid by GVI and properly received and retained by the Dema Firm and RPWB when paid, less the sum of \$1,097.00 which has been deducted from the above Section 3 attorneys' fee Award.

Provisionally, should GVI unilaterally reject the above Section 3 and/or Section 4 Award by November 14, 2016, then a Section 18 reasonable attorneys' fee Award becomes, and is, \$28,132,717.50 owed less \$12,329,826.28 or paid a \$15,802,891.22 fee balance, plus an appropriate expense Award of \$5,544,076.72. On both sums, interest shall be calculated from the date of this Award in accordance with the post-judgment rate established by Virgin Islands statute.

The GVI counterclaim seeking declaration of the Contract as void ab initio, and the claims for fraudulent misrepresentation, fraud, unconscionability, bad faith and unfair dealing, breach of fiduciary duty, conversion and violations of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") are denied. Its claim for reasonable attorneys' fees and costs is denied against the Dema Firm except as prevailing party to the extra-contractual claims of the Dema Firm and its claim to additional fees calculated on the bankruptcy court escrow fund.

As prevailing party, the Dema Firm is awarded against GVI reasonable attorneys' fees and costs as to its Contract claim and GVI's counterclaim.

Attorney fee and cost awards will be determined and made into an award after a further hearing which will be held on January 19, 2017 in St. Croix, or on such earlier date, in other place and by such alternative means as the parties and arbitrator may agree. As to that proceeding or submission, each party shall bear equally the fees and expenses of the arbitrator.

I. THE SOUTH SHORE CONTAMINATION

A. The Alumina Refinery Property

A useful description of the physical scope of the contamination that confronted GVI as a litigant was set out by District Judge Bartle in his February 13, 2012 opinion approving the first proposed consent decree with three alumina refinery defendants:

“Before the court is the motion of certain settling parties to approve a consent decree in an environmental action.

Plaintiffs, Commissioner of the U.S. Virgin Islands Department of Planning and Natural Resources, Alicia V. Barnes (“the Commissioner”), and the Government of the Virgin Islands (together with the Commissioner, “the Government”), have filed this multi-count environmental lawsuit against entities who at various times owned portions of an industrial area in Kingshill, St. Croix on which both an alumina refinery and an oil refinery have operated. The defendants are Century Aluminum Company (“Century”), (1. Century was named a defendant in this action, but the court granted summary judgment in its favor on November 30, 2011. See Dep’t of Planning & Natural Res. v. Century Aluminum Co., No. 05-62, 2011 U.S. Dist. LEXIS 137431 (D.V.I. Nov. 30, 2011).) Virgin Islands Alumina Corporation (“VIALCO”), St. Croix Alumina, LLC (“SCA”), Lockheed Martin Corporation (“Lockheed”), Alcoa World Alumina, LLC, (“Alcoa”), St. Croix Renaissance Group, LLLP (“SCRG”), HOVENSA, LLC (“HOVENSA”) AND Hess Oil Virgin Islands Corporation (“HOVIC”). (2. The Virgin Islands Port Authority (“VIPA”) and the Virgin Islands Waste Management Authority (“VIWMA”) are third-party defendants sued by defendants Vialco and Lockheed and former defendant Century for contribution under CERCLA and Virgin Islands law.)

In Count VI of its first amended complaint, the Government alleges that the defendants are liable for natural resource damage under the federal Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”), 42 U.S.C. § 9607. There are also five counts under Virgin Islands law: strict liability for an abnormally dangerous activity (Count I); negligence (Count II); negligence per se (Count III); public nuisance (Count IV); and a claim under the Virgin Islands Oil Spill Prevention and Pollution Control Act, 12 V.I.C. § 701, et seq. (Count V).

Three of the defendants, SCA, Alcoa, and SCRG (collectively “the Settling Defendants” and together with the Government, “the Settling Parties”) [sic], have now negotiated a settlement with the Government that would resolve all of the Government’s claims against the Settling Defendants, including the CERCLA claim in Count VI of the first amended complaint.

As required by CERCLA, the Settling Parties have filed a motion for entry of a consent decree approving the terms of their proposed settlement. 42 U.S.C. § 9622(d)(1)(A); see In Re Tutu Water Wells CERCLA Litig., 326 F.3d 201, 206 (3d Cir. 2003). The other defendants to this case, VIALCO, Lockheed, HOVENSA, and HOVIC (collectively the “Non-Settling Defendants”), oppose the terms of the proposed consent decree. (3 VIPA and VIWMA are not parties to the proposed consent decree presently before the court and have not opposed entry of the consent decree.) The court held a public hearing and argument on the pending motion after giving notice to the public and providing for a comment period.

The property at issue in this litigation consists of approximately 1,400 acres on St. Croix’s southern shore and is known as the South Coast Industrial Area. (4. The first amended complaint also refers to the tracts as the “South Central Industrial Area” and the “Southshore Industrial Area.”) It is bounded by the Caribbean Sea on the south, Route 68 on the north, and Route 62 on the east. The Area contains an eastern tract which is occupied by an oil refinery and a western tract on which once operated an alumina refinery. Beneath the South Coast Industrial Area is a large body of fresh water known as the Kingshill Aquifer. The Alucroix Channel extends from the Caribbean Sea into the South Coast Industrial Area.

The now-shuttered alumina refinery on the South Coast Industrial Area was built in 1965 by Harvey Aluminum Virgin Islands, Inc., a wholly-owned subsidiary of Harvey Aluminum Incorporated. In 1972, after Martin Marietta Corporation gained a controlling share in Harvey Alumina Incorporated, Harvey Aluminum Virgin Islands, Inc. was renamed Martin Marietta Aluminum, Inc. (“Martin Marietta”). Martin Marietta processed alumina in the refinery until May 1985. It has since merged into Lockheed.

In May 1989, Vialco purchased the Alumina Refinery from Martin Marietta and processed alumina there until January 1995. In April 1995, Century acquired Vialco, and in July 1995, Vialco sold the alumina refinery property to SCA. SCA, a subsidiary of Alcoa, owned the refinery between July 1995 and 2002 but operated the refinery only between 1998 and 2000. In 2002, SCA sold the

alumina refinery property to SCRG, its current owner. SCRG has never operated the refinery. The court will refer to Lockheed, Vialco, SCA, Alcoa, and SCRG collectively as the "Alumina Defendants."

In this case, the Government contends that the operation of the alumina refinery damaged the natural resources of the Virgin Islands. Specifically, the Government alleges that a high-pH substance known as "red mud," an environmentally deleterious byproduct of alumina refining, has contaminated the environs surrounding the alumina refinery.

The alumina refining process involved the extraction of alumina from bauxite ore using the Bayer process. This ore was mined elsewhere and shipped into St. Croix. The Bayer process at the refinery involved: (1) crushing and grinding bauxite ore; (2) dissolution of alumina hydrates with a caustic soda at high temperatures and pressures; (3) removing impurities via separation and clarification; and (4) calcination and precipitation of alumina. The process yields two primary residual substances, sand and dirt. The dirt is also known as bauxite residue, that is red mud. Each of the defendant alumina refinery operators treated the red mud to reduce its pH and to remove chemical compounds that could be reused in alumina refining. The treated red mud, which is still toxic, was deposited nearby in piles to dry.

Between 1967 and 1972, Martin Marietta disposed of the red mud on a part of the South Coast Industrial Area immediately west of the Alucroix Channel that the parties refer to as "Area B." In 1972, Area B was closed and was not used for red mud disposal by any subsequent Alumina Defendant. Beginning in 1972, Martin Marietta began storing the red mud on a portion of the property known as "Area A," which consists of 62 acres northwest of Area B. The two subsequent refinery operators, Vialco and SCA, deposited all the red mud they created in Area A only. All deposits of red mud ceased in 2000 when SCA ended alumina refining operations at the facility. In early 2002, in connection with its sale of the refinery property to SCRG, SCA re-graded the red mud piles in Area A. ...

In this action, the Government is seeking to recover under CERCLA for the damage done by the red mud to the natural resources of the Virgin Islands. Specifically, the Government alleges that the red mud has caused damage by contaminating the groundwater beneath the refinery and that it then migrates beyond the refinery property. The Government also maintains that a large release of red mud into the Alucroix channel in March 2002 caused

damage to marine life and mangrove trees. See Dep't of Planning & Natural Res. v. Century Aluminum Co., No. 05-62, 2010 U.S. Dis. LEXIS 70848, at *36-*45 (D.V.I. July 30, 2010). ...

While not part of the Government's CERCLA claim, the Government urges the court to consider, in evaluating the proposed consent decree, that winds blow dried red mud into the surrounding residential neighborhoods and cause the red mud to enter cisterns. The Government further contends that rain brings about erosion of the red mud into surface water on the refinery property. ...

In February 2011, while this case, the Cost Recovery Action, the Contract Action, and the Superior Court Actions were all pending, the Government and the Alumina Defendants began negotiating a settlement to resolve all claims among them related to the alumina refinery property. On February 25, 2011 and July 12, 2011, the Government, Lockheed, SCA, Alcoa, SCRG, Vialco, and Century met with a private mediator in an attempt to achieve a settlement of all claims related to the alumina refinery property. On August 24, 2011, these parties met with a mediator appointed by the Court of Appeals for the Third Circuit in connection with the appeal of the Cost Recovery Action. Following the mediation before the Third Circuit mediator a term sheet embodying the outline of a possible settlement was shared among counsel for all of these parties except Century and Vialco, which had already determined not to participate in a settlement. In September 2011, the Settling Parties elected to move forward without Lockheed and finalized terms. HOVIC and HOVENSA, the two entities named as defendants over alleged environmental damage arising from the oil refinery, never participated in the settlement discussions pertaining to the alumina refinery property.

IV.

The Settling Parties have reached an agreement that would resolve all of the claims among them in this case, the Cost Recovery Action, the Superior Court Actions, and the Contract Action. ... These actions would be dismissed as to the Settling Defendants but not as to the Non-Settling Defendants. The settlement also resolves any other past, present, or future claims among the Settling Parties related to response costs, damages, or natural resource damage resulting from the presence of hazardous materials on the site of the former alumina refinery. ...

Further, settlement is reasonable because the CERCLA claims related to the alumina refinery in this case and the Cost Recovery

Action are very limited in scope. In this case, the Government's CERCLA claim against the Alumina Defendants is limited to allegations that erosion from the red mud piles contaminated the groundwater at the alumina refinery and that the release of red mud in March 2002 caused damage to natural resources in the Alucroix Channel. Dep't of Planning & Natural Res. v. Century Aluminum Co., No. 05-62, 2010 U.S. Dist. LEXIS 70848, at *36-*45 (D.V.I. July 30, 2010).

Notwithstanding the narrow compass of the CERCLA claim, the Statement of Work in the proposed consent decree sets the goal of completely preventing further erosion of red mud from Area A. The Statement of Work, outlined above, describes a process for development and executing a remedial response that will contain further damage from Area A to the environment through wind and water erosion or through red mud percolating into the groundwater. Thus, the planned remedial response not only would address the sources of natural resource damage at issue in this case but would go further and ensure that the red mud in Area A is secured and does not further damage the South Coast Industrial Area or the surrounding communities.

B. The Oil Refinery Property

The oil refinery property, tanks and operation facilities are immediately contiguous to the alumina site. In 2004, pre-Contract, at a public hearing, attendees, including a representative of the Department of Procurement and Natural Resources ("DPNR"), learned that the plume of oil upon the Kingshill Aquifer that had been thought to have been situated only under the refinery property had spread to mid-island and the oil layer was 6 to 20 feet deep. Commercial wells that tapped into the aquifer for fresh water supplies were finding oil in their draws. There was public concern and outcry. The Kingshill Aquifer is the principal source of fresh water for the island. Forty to fifty percent of the land mass of the island sits atop it. GVI's administrative environmental actions had proven to be ineffectual. The refinery was said to be obstinate and uncooperative in responding to Department of Property and Natural Resources ("DPNR") environmental citations. St. Croix's DPNR had a legal staff of one attorney and was no match

for the refinery's sophisticated, well-financed team of lawyers in administrative proceedings. St. Croix needed help. Governor Turnbull heard the St. Croix outcry. Thus, the Contract.

II. THE CONTRACT SPEAKS FOR ITSELF

A. Section 15. Entire Agreement

"This Contract constitutes the entire agreement between the parties hereto, and all prior understandings or communications, written or oral, with respect to the retention of Contractor, which are the subject matter of this Contract, are merged herein."

B. The Purpose

"WHEREAS, the Government is in need of the services of a Contractor to assist the Government in litigation by providing it with expert and specialized legal representation in connection with any and all of its claims for penalties and damages recoverable under law for harm to any and all protected interests arising from contamination by third parties of the natural resources near and located in the South Shore Industrial Area, located in South-Central St. Croix, Virgin Islands ('South-Central St. Croix'), which specialized legal representation is more particularly described in Addendum I attached hereto."

C. Contingency Fee As Necessary and Appropriate

"WHEREAS, the Attorney General has undertaken an analysis of the legal, scientific and factual issues involved in successfully recovering penalties and damages resulting from the contamination of South-Central St. Croix and recognizes the considerable risk or uncertainty inherent in this litigation; and

WHEREAS, the Government of the Virgin Islands does not presently have the funding to advance expenses and currently pay the customary charges of the skilled counsel involved; and

WHEREAS, it is acknowledged by the Attorney General that the prosecution of natural resources damage and penalties claims involves many novel and difficult questions of proof and law, all of which further add to the uncertainty of a successful outcome and, therefore, the certainty of compensation under a contingent fee agreement.”

Section 12. Independent Contractor As Aid To Attorney General

1. “Contractor agrees that the ultimate authority resides in the Attorney General and that the Contractor is to aid the Attorney General in the performance of his statutory duties with regard to the conduct of the litigation and the performance of any duties outlined in Paragraph 3 of Addendum I of this Contract.”

2. “Contractor shall advise and counsel Government with respect to settlement and participate in any settlement discussions or negotiations between Government and third parties to recover penalties and damages for the contamination of the natural resources in the South-Central St. Croix region. Contractor shall convey to the Government any and all offers proposed. Contractor shall not enter into any settlement agreement without the expressed written consent of the Governor and the Attorney General of the Virgin Islands. Contractor shall enter into a settlement agreement upon the written direction of the Government.”

3. “Contractor shall represent Government as co-counsel with the Virgin Islands Department of Justice. ...Nothing contained herein shall abrogate the ultimate authority of the Attorney General nor diminish the obligation of Contractor to aid the Attorney General in fulfillment of statutory duties pursuant to 3 V.I.C. § 114.”

Section 18. Independent Contractor (emphasis added)

“At the time of entering into this Agreement, the Government evaluated the Plaintiff’s burden as high in proving liability and entitlement to penalties and damages in this particular

area of litigation which has little precedent upon which to draw; the Government has determined that Contractor will run a substantial risk of expending voluminous hours without guarantee of remuneration and that this risk is magnified by the large quantum of expenses to be advanced by Contractor as well as the knowledge that payment for services rendered and reimbursement for costs expended will be significantly delayed. The Government has selected Contractor due to its evaluation of Contractor's exceptional past performance in successfully prosecuting environmental claims within the Territory of the Virgin Islands."

Sections 3 and 17. Compensation (emphasis added)

Section 3: "Government ... agrees to pay the Contractor a percentage, as set forth in the schedule found in Addendum II, of any recovery or settlement monies (including penalties and damages) received by the Government for damages resulting from the contamination by third parties of the South-Central St. Croix natural resources. Said percentage shall be calculated on the net amount collected, as a result of an award, judgment, settlement or otherwise.

The net amount collected shall be computed by deducting from the gross amount collected ... the expenses and disbursements chargeable to the Government ... Payment shall be made out said recovery or settlement monies at the termination of all involved litigation.

Section 17: "A portion of any gross settlement or judgment recovered through the litigation ... shall be used to compensate Contractor without the need for appropriation of funds by the Legislature of the Virgin Islands. The Government agrees that any gross settlement or judgment recovered is not considered money of the Virgin Islands Treasury subject to appropriation pursuant to Section 3, Clause 18 of the Revised Organic Act of 1954, until after the Government has fulfilled its obligation to Contractor under this Contract pursuant to Paragraphs 3 and 4."

Sections 3 and 17. Timing of Payment of Fees (emphasis added)

“Payment shall be made out of said recovery or settlement monies at the termination of all involved litigation. A portion of any gross settlement or judgment recovered through the litigation ... shall be used to compensate Contractor.”

Sections 3 and 4. Expenses (emphasis added)

“Government authorizes Contractor to incur and agrees to pay reasonable and necessary costs and expenses. ... Contractor shall advance any and all such expenses. In no event will outstanding and unreimbursed reimbursable expenses, of any nature, exceed a total of ONE MILLION FIVE HUNDRED THOUSAND DOLLARS (\$1,500,000.00), exclusive of costs of appeal, if any.”

[I]f there is no recovery or settlement in this matter ... the Government agrees to pay any expenses advanced by Contractor and not previously paid.”

Section 4. Timing of Payment of Expenses (emphasis added)

“Payment of any and all such expenses will be made upon the resolution, either by settlement or final judgment, of all litigation proceedings related to the Government’s claims for penalties and damages recoverable under law ... all shall be deducted from the Government’s portion of any recovery or settlement and returned to Contractor at the time of disbursement of the funds. The Government further authorizes and directs Contractor to pay from the proceeds of the recovery in this case, all expenses and disbursements incurred but not paid.”

“Any expenditure for a specific type of expense in excess of FIVE THOUSAND DOLLARS (\$5,000.00) shall not be incurred without prior written consent of the Government, provided that in the event no written response is received by Contractor from the Government within fourteen (14) days of Contractor making a written request by facsimile transmission or

hand-delivery to the Department of Justice for approval of such costs, the Government shall be deemed to have provided written consent and accepted the obligation therefor.”

Section 3. If No Recovery Compensation

“... Government will not be responsible for the payment of any attorneys’ fees or other fee compensation if there is no recovery or settlement in this matter, except to the extent specified in Paragraph 18. However, at the conclusion of the case, the Government agrees to pay any expenses advanced by Contractor and not previously paid ... even though it may recover nothing, within sixty (60) days of a Stipulated Settlement or Final Judgment terminating the litigation subject to the availability and appropriation of funds. Costs remaining unreimbursed after such period shall bear interest at the legal rate of interest then effective in the Territory.”

Section 6. Professional Standards

“The Contractor agrees to maintain the professional standards applicable to the profession of law ... in the United States Virgin Islands.”

Addendum I. Scope of Representation:

“Such representation shall include, inter alia, the filing of a complaint ... and all other actions necessary or incident to successfully concluding such litigation. Nothing contained herein shall abrogate the ultimate authority of the Attorney General ... in fulfillment of statutory duties pursuant to 3 V.I.C. § 114.”

Section 14. Waivers and Amendments

“No waiver, modification or amendment of any term, condition or provision of this Contract shall be valid or of any force unless made in writing, signed by the parties hereto ...”

Section 9. Right To Subcontract

“The Contractor shall not subcontract or assign any part of this Contract without the prior written consent of the Government. It is understood and agreed that the Contractor, at its expense and risk, may employ other counsel to assist Contractor in this matter. In the event of a termination of this Contract ... the provisions of Paragraph 18 herein as to compensable rates are applicable to the other counsel and legal assistants.”

Section 18. Right to Terminate Contract

“In the event that this Contract is terminated by Government for professional negligence or misconduct. ... the Contractor shall be entitled to reimbursement of its expenses of the litigation then outstanding as verified by appropriate receipts and billing statements and the entitlement to reasonable fees will be subject to the dispute provisions of Paragraph 23.”

Section 2. Term

“This Contract shall commence upon the signature of the Governor and shall terminate upon resolution, either by settlement or final judgment, of all litigation proceedings.”

Section 13. Governing Law

“This Contract shall be governed by the laws of the United States Virgin Islands and jurisdiction shall remain in the United States Virgin Islands.”

Section 23. Binding Arbitration (emphasis added)

“Government and Contractor agree to submit any dispute between us to binding arbitration. Such disputes subject to binding arbitration include, but are not limited to, claims of negligence or legal malpractice which the Government may assert against Contractor, as well as any disputes over fees or expenses. ... This paragraph shall not operate to limit either party’s

right to enforce, to the extent necessary, an arbitration award as a final judgment in a court of law.”

III. THE CONTRACT INTERPRETED

A. The Contract Was Lawful

There was no justification for GVI through the Office of Attorney General (“OAG”) to take the position that the Contract was void ab initio. On its face, the Contract, through its WHEREAS clauses, makes clear that it was made in compliance with law. It was reviewed and approved by the Department of Justice for legal sufficiency by Michael Law. It was executed by Governor Charles W. Turnbull, Attorney General Iver Stridiron, DPP Commissioner, Marc Biggs, and Contractor, John K. Dema, Esquire.

Competitive bidding and negotiation were not necessary because there was only one law firm in the nation as of 2004 that had successfully represented a sovereign in an environment recovery action, and that was the Dema Firm. At arbitration GVI could have offered no proof, and did not attempt to prove, that in 2004 there was another law firm able, willing, and ready to commence the arduous legal representation that lay ahead, risking not only the economic loss of many years of work without pay but the advance of up to \$1,500,000 in expenses, interest free, for which there was no sure recovery from a cash strapped GVI.

On the third day of the arbitration hearing, the GVI withdrew its contention that the Contract was invalid. Advance of the contention and the withdrawal were not explained.

The GVI had known since May 7, 2004, that the Contract was legal and enforceable.

B. The Contract Has An Integration Clause

For its construction or interpretation, Section 15 of the Contract forbids reference to prior understandings or communications, written or oral, with respect to the retention of the Contractor. For example, in interpreting the Contract, it was impermissible for GVI to consider the internal office correspondence between Attorney General Stridiron and Governor Charles A. Turnbull to the effect that the GVI's risk in the contemplated litigation would be no more than \$1.5 million.

C. Other Principles of Contract Law

Different positions on interpretation do not create an ambiguity. The essential question is whether the Contract is unambiguous. A contract is unambiguous if it is reasonably capable of only one construction.

The Contract must be read as a whole, and no provision is to be read in a vacuum.

Contract language must be read using common sense, common word usage and meaning.

A reviewer must avoid interpreting the Contract in a manner that would be absurd, commercially unreasonable, or contrary to the expectations of the parties.

If a contract is unambiguous, its language governs and extrinsic evidence may not be used to interpret the intent of the parties, to vary the terms of the contract, or to create an ambiguity.

Whenever reasonable, the parties' manifestations of intention are interpreted as consistent with each other and with any relevant course of performance, course of dealing, or usage or trade.

Evidence of course of conduct is particularly compelling when it occurs over a substantial time period. The practical interpretation of a contract by the parties to it for any

considerable period of time before it comes to be the subject of controversy is deemed of great, if not controlling, influence. A basic rule of contract construction is that a contract must be interpreted in light of the meaning which the parties have accorded to it as evidence by their conduct in its performance. Any way you slice it, then, the undisputed conduct of the parties controls the terms of the contract between them.

D. The Contract Was Clear and Unambiguous As To Litigation Control and Management Roles of The Attorney General

Contract Section 12, which incorporates paragraph 3 of Addendum I, makes clear that it was the ultimate responsibility of the Attorney General to direct the litigation with the intention of using his best efforts to achieve a “successful conclusion” to the litigation. Part of the Attorney General’s duties is to direct the legal business of the executive department. As former Attorney General Frazer put it, he “relied on the statutory responsibility of the Attorney General to prosecute and win the lawsuit.” The Attorneys General had the power to, and did, direct major aspects of the overall litigation. All settlement offers had to be conveyed to GVI and no settlement could be made without the written consent of the Governor and the Attorney General.

Shortly after the Contract commenced, the Attorney General, and most certainly after consultation with the Governor, determined that the litigation and settlement strategy with respect to the South Shore defendants was to achieve remediation and recovery even if there was no cash payment beyond recovery of its attorneys’ fees and expenses because GVI did not want to assume potential liability under law as a contamination contributor if its recovery contractors were negligent. As to the oil refinery defendants, the objective was only cash. The overall strategy was to keep the litigation moving to a “successful conclusion,” per paragraph 3, Addendum I, of the Contract.

E. "Any Recovery" is Defined the Contract

The phrase "any recovery" used in Section 3, Compensation, is sufficiently defined in the first WHEREAS clause of the Contract. It is any and all claims recoverable under law through litigation for harm to any of the GVI's protected interests arising from contamination by third parties to the natural resources near and located in the South Shore Industrial Area. There is no distinction between cash and non-cash recovery there or in Section 3. It is whatever is recoverable under law. Section 3 states that contingency fee shall be based upon "any recovery" or "settlement monies" received by the Government for damages resulting from contamination by third parties as a result of an award, judgment, settlement or otherwise. The word "or" demonstrates that recovery could be broader and different than settlement monies. The word "otherwise" signifies that no matter the form of relief obtained as part of GVI's "recovery" it would be part of the contingency calculation equation.

All witnesses involved in the formation and administration of the Contract on behalf of the GVI testified under oath that the contingency fee was to be calculated based upon whatever was garnered by way of recovery or settlement monies for the benefit of the GVI.

The course of performance by the prior Attorneys General and Governors with respect to approvals of the consent decrees, settlements and recapitulations shows beyond a doubt the universal understanding of both contracting parties that "recovery" included cash and non-cash recoveries.

The term was well understood within the OAG and other GVI departments and agencies such as DPNR.

Two prior professional services contracts with the Dema Firm for environmental litigation used the term "recovery" and the means of compensation was contingency fee.

The term "recovery" has universal understanding as the inclusive value of all recovery in environmental litigation or agency enforcement and this was so understood by GVI, South Shore defendants and mediators.

In 1996, the Dema Firm represented the GVI on a contingent fee basis with respect to environmental damage to the Estate Tutu Wells aquifer in St. Thomas. The professional services contract was drafted by, and under the direction of, then Attorney General Julio Brady. "Any recovery" was the basis for calculation of fees in that contract. The GVI settled for only cash in that lawsuit. The U.S. Environment Protection Agency ("EPA") had its own lawsuit and retained site remediation and recovery compliance responsibilities.

When settlements were reached with a defendant in that multi-defendant case, the Dema Firm prepared and the OAG approved recapitulations that included expenses incurred, contingent fees earned to date, fees and expenses to be paid from that settlement and the remaining balance, if any, using substantially the same format that the Contract recapitulations at issue in this arbitration. RPWB was known to be a subcontractor in the Tutu Wells litigation that went on for 10 years.

In April 1997, the Dema Firm was asked by GVI to represent its interests on a contingent fee basis with respect to claims against AT&T for major environmental damage to a St. Croix coral reef. The professional services contract was similar to the Tutu Wells agreement, but it included examples of "any recovery" for contingency fee calculation. That contract elaborated "recovery" as follows:

any recovery through administrative and civil proceedings, including by way of example and not limitation, penalties, assessment costs, response costs, mitigation costs, restoration costs, damages, and attorney fees and settlement monies received by the Government as a result of the activities of third

parties associated with the installation of fiber optic underwater communication cables. (Emphasis added)

Again, GVI settled for only cash in settlement of its claim. The National Oceanic and Atmospheric Administration (“NOAA”) assumed oversight compliance responsibilities for site remediation and restoration.

Section 3 directs calculation of the net amount collected, meaning the amount collected minus expenses. The “amount collected” is the “recovery” received for damages resulting from the contamination by third parties. Recovery, therefore, is the fullest value of the litigation resolution package, however configured under law, to compensate, remediate, prevent recurrence, and restore the environment because of contaminating conditions.

GVI now asserts that any contingency fee calculation should be based calculated based only upon cash benefits. This contention ignores the words of the Contract. Further, GVI’s contention would produce an absurd result which no reasonable person could have intended. If GVI were to choose only a non-cash recovery, its attorney, after 10 years of litigation efforts and \$1.5 million in advanced costs, would get no fee, whatsoever. The GVI’s response is that such a circumstance would just be the attorney’s bad luck for not having looked out for his own interests in negotiating the contract. That response overlooks an attorney’s obligation to only enter into agreements with clients that avoid known or foreseeable conflicts of interest. Section 3 of the Contract avoids this very obvious potential conflict of interest between attorney and client such that in the representation there would never be a question of whether the attorney was acting for himself or his client. As intended GVI, the client, could choose a recovery of cash, no cash, or a combination thereof.

The Contract cannot be read to create absurd results.

Considering the Contract language as a whole, the word “recovery” refers to a court judgment or final order, whereas “settlement monies” normally would be a private resolution of a dispute between the parties in a form that is not a court order. However, the word “recovery” is without limitation and could include a private settlement, with or without cash.

Non-cash remedies are routinely monetized when costs of remediation and recovery are borne by defendants, according to the undisputed arbitration evidence. Former Attorneys General Stridiron and Frazer were well aware of this. Each testified that it made no difference to the OAG whether a defendant paid the GVI to effectuate the “recovery” or paid for the clean-up itself. GVI conceded at arbitration that if a court award obligated it to be paid by defendants to perform the recovery work, GVI would have had no problem paying a contingency fee calculated in cash. Cash is cash, either way, just as Stridiron and Frazer stated.

Here, the course of performance in the administration of this contract by the OAG over a 10 year period is entirely consistent with the interpretation of recovery as inclusive of all benefits to GVI, whether all cash or not.

F. Estimated vs. Actual Restoration Costs

GVI, through Attorney General Frazer, chose to calculate contingency fees using the lowest estimated cost of restoration work as determined by GVI experts. The Dema Firm could have reasonably insisted upon calculation on the mid point range of the cost estimates but agreed with the OAG and GVI to use the lowest cost estimate. GVI is now bound by that agreement.

Ironically, the arbitration evidence shows that the actual costs of restoration plus maintenance of the alumina site over 30 years, will be considerably higher than the estimate on which contingency fees in this matter was calculated.

The GVI's contention that the Dema Firm's fees should have been based on eventual actual cost is without case law support and it would be impractical, and unjust. Actual restoration costs will not be determined for at least 30 years. Therefore, it would be unreasonable to keep the Territory's Section 17 Compensation obligations open for 30 years, and the contingency attorney unpaid for that period of time, especially where GVI received, cash more than sufficient to pay attorneys' fees and reimburse its litigation expenses.

G. Payment of Fees Upon "Any Recovery"

Section 3 directed the GVI to pay the Dema Firm's fees pursuant to the schedule found in Schedule II of the Contract upon "any recovery" as a result of an award, judgment, settlement or otherwise. The meaning of the word "any" is plain. "Any" means any and all.

Litigation was authorized by GVI against any and all South Shore polluters with the hope of obtaining full recovery by way of a court award or judgment, through private settlement or otherwise.

Use of words "third parties," in the first WHEREAS clause, without specifying defendants by name, means that there could be any one or more potential defendant responsible under law for the contamination. Payment was authorized to be made out of "said recovery or settlement monies." Again, use of the word "or" demonstrates the parties' intent that payment could be based upon a recovery other than "settlement monies."

Payment was directed to be made at the termination of all "involved litigation." That phrase, used in the same section as "award, judgment, settlement ...," can only reference any litigation that is terminated by "operation of law." By operation of law, litigation could become divided as to one or more defendants. "All involved" is different from "all" and "involved" can only mean what is involved in any particular award, judgment or settlement.

A final judgment is a termination of litigation. The alumina defendant consent decrees recite that they are final judgments. It was thus wholly appropriate for the GVI, through the exercise of the Attorney General's statutory authority, to pay the Dema Firm's fees and expenses whenever there was a final judgment or settlement or resolution otherwise. That had been GVI's course of conduct under the prior environmental agreements, and is the current GVI practice, as evidenced by a GVI contingency fee agreement with the Joel Holt/Cohen Milstein Sellers & Toll law firms. That agreement uses similar language to permit interim payment of fees and expenses before the overall litigation is concluded.

H. Approval of Expenses Over \$5,000

The GVI claims that the Dema firm should not be reimbursed for any of GVI's litigation expenses exceeding \$5,000 for which the Dema Firm did not obtain prior written approvals from the GVI in accordance with Section 4 of the Contract.

GVI's settlement demands and acceptance of the benefits from the consent decrees and oil refinery settlement agreement demonstrate GVI's written consent to and acceptance of its obligation to reimburse the Dema Firm directly, and indirectly, RPWB, for advanced GVI litigation expenses.

Section 4 reads, in part, ... provided that in the event no written response is received by Contractor from the Government within fourteen (14) days of Contractor making a written request by facsimile transmission or hand-delivery to the Department of Justice for approval of such costs, the Government shall be deemed to have provided written consent and accepted the obligation therefor. GVI's argument also lacks merit because the OAG reasonably knew of all expenses as they were incurred since it was involved in prosecution of the litigation as record

counsel. Additionally, OAG ratified the as being validly submitted for payment by approving recapitulation statements, and separately through its litigation conduct.

The vast majority of the expenses incurred in the South Shore litigation involved expert opinion witnesses and technical fact witnesses as necessary for site investigations and testimony in discovery, trial depositions and court hearings. The Attorney General was one of the attorneys of record for GVI on all pleadings, including the first complaint. That status is significant because it attests to knowledge and responsibility for the legal and factual accuracy of court filings and all that went into making the claim or defense under penalty of sanctions.

GVI, through the Attorney General knew of all experts and fact witnesses utilized in the litigation because that work became incorporated into court pleadings, including settlement memoranda filed with the district court in support of the two consent decrees.

In the first, regarding the alumina refinery defendants, in addition to reciting that Attorney General Frazer was physically present at arm's length negotiations and attesting that he had examined and approved the proposed consent decree, the joint memorandum cited and utilized accumulated expert opinions regarding remediation and recovery of Area A, arrived at over 6 years of litigation:

In the present case, the Consent Decree is the result of lengthy negotiations between sophisticated parties conducted at arm's length by experienced counsel who had the benefit of detailed environmental studies of the Site and surrounding areas - - as well as specific historical and recent engineering studies of Area A. ...

The technical solution for the Group A Units will build on a consensus model arrived at through years of negotiation and engineering analyses - - calling on the skills of experienced and highly reputable environmental and engineering experts.
(emphasis added)

In the second, the Lockheed settlement, in addition to Attorney General Frazer being co-counsel, the joint memorandum represented, among other things the following which evidences GVI approval, use and ratification of expert witnesses and related work:

Based on information available to them as well as engineering studies on this issue, Plaintiffs have determined that the activities to which the Settling Parties have agreed, and which are required by the proposed Consent Decree, are appropriate to remediate these areas and assist in the restoration of natural resources by minimizing future releases to such resources. The principal objectives of those activities, which are set forth in detail in the Scope of Work, are to prevent uncontrolled releases of storm water and bauxite residue, protect surface water quality, reduce groundwater impacts, prevent wildlife and people from being exposed to contaminated sediments and water in the Dewatering Pond, and eliminate discharges of groundwater containing site-related contaminants into the western and northern sides of the Alucroix Channel. ...

The technical solution for the Group B Units will build on a consensus model arrived at through years of negotiation and engineering analyses - - calling on the skills of experienced and reputable environmental and engineering experts. The future analyses and planning will be overseen by DPNR and its experienced consulting engineers. The technical process for development and implementation of the solutions has been laid out in great detail in the Scope of Work, and requires Lockheed Martin to monitor and maintain the Group B Units for as long as necessary. (emphasis added)

Post-hearing, GVI has submitted a list of experts and technicians as to whom it submits it cannot find pre-approvals for expenses totaling \$1,715,736.35. Review of that list shows repeated use of most of the same experts, corroborating arbitration testimony that once the specific type of expenditure in excess of \$5,000 was approved, the Contracting parties continued to use the expert as necessary in litigation processes. In any event, the aforementioned memoranda and other court pleadings demonstrate written knowledge and ratification, if not per-approval, of the expenses submitted for reimbursement to the Dema Firm directly, and to RPWB, indirectly.

GVI's adoption of the Inspector General Report unreasonably concluded that the prior GVI administrations were unaware of, or did not participate meaningfully in, management or direction the litigation. That conclusion is wrong. Not only was Former Attorney Frazer consistently adamant to the Inspector General that such a conclusion would be erroneous, but the court affidavits, docket entries and certificates of service all demonstrate that he was intimately involved at every crucial litigation stage during his tenure. The arbitration evidence is abundant that there were regular updates to the Attorneys General and Governors and DPNR Commissioner and that the OAG received volumes of papers from court proceedings such that there should have been found there significant files that had been maintained by Frazer, as he told the Inspector General.

The sheer volume of the legal work that involved expert witnesses, pro and con, dictates the conclusion that there were important and knowledgeable meetings, by telephone or otherwise between OGC and the Dema Firm. There were twenty-five hundred requests for admissions and 30 experts noticed and prepared for hearings to determine if scientifically their opinions were trial admissible. This bespeaks deep involvement of OGC in every aspect of the litigation and further supports the conclusion that all expert witness expenses and related attorney advances were specifically pre-approved or accepted by GVI by the default provisions of Section 4.

The gist of Section 4 is that the GVI does not become obligated for expenses that it would not use but, where it has demonstrated in some meaningful way, even through silence in the face of use for its benefit "acceptance for the obligation therefor" the expense is to be reimbursed. Nothing in Section 4 reads that the Contractor will not be reimbursed where there is ratification of the expense incurred on its behalf and for which it acknowledges use or benefit. GVI's settlement negotiations knowingly and intentionally used the Dema Firm's full estimated

expenses, so that no resort to appropriate funds would have to be made to pay the same, knowing that they would be set forth in Recapitulation.

I. Section 4 Did Not Cap GVI Expense Exposure But Capped Dema Firm's Obligation to Advance GVI Expenses

Section 4 of the Contract states, in part, that “In no event will outstanding and unreimbursed ... expenses ... exceed ONE MILLION FIVE HUNDRED THOUSAND DOLLARS, ...” (emphasis added). Plainly use of “outstanding” and “unreimbursed” signifies that the parties contemplated periodic payments of advanced expenses, whatever the source, e.g., voluntary payments by polluters, or interim settlements. The Dema Firm was obligated to advance expenses up to \$1.5 million. The Attorney General had the power under 3 V.I.C. § 114 to make interim payments of expenses to stay under the cap to keep the litigation going. That is what was done. This language cannot be read as a cap on the amount of expenses the GVI might choose to incur to obtain a successful conclusion of the litigation.

GVI determined for itself at each step of the litigation what level of risk it was willing to take. On the other side, the Dema Firm had to decide, if GVI asked, how much more money, if any, it was willing to advance, especially given there was no guarantee of a recovery. Consequently, the Dema Firm had no incentive to pad expenses. To the contrary, it had every incentive to be as economical as possible, consistent with the substantial representation obligation it had undertaken. This is exemplified by selecting experts more than one thing to advance the litigation.

The South Shore defendants had contended in district court, prior to the settlements, that the expenses the Dema Firm had advanced were not GVI expenses for CERCLA response cost purposes because Section 3 of the Contract, obligated reimbursement of expenses “subject to the

availability and appropriation of funds.” The Third Circuit Court of Appeals determined that the district court had to reexamine its conclusion that expenses Dema advanced were not GVI’s expenses. The GVI, through an affidavit from Attorney General Frazer, assured the district court that the GVI could guarantee payment of any advanced expenses through use of funds from the litigation budget of the Office of Attorney General. In reliance upon that representation, the district court made a ruling that proved to be key to the ultimate resolution of all three pieces of litigation. The first settlement based on CERCLA gave the GVI the financial strength and the litigation confidence to persist through trial, if necessary, as to CERCLA and non-CERCLA causes of action as to the remaining defendants.

Prior to the district court ruling, the Dema Firm, not knowing how the court might construe the Contract as to GVI expense reimbursement obligations, suggested to Attorney General Frazer certain amendments which would have raised its expense cap. However, those proposals were never fully considered by him because the district court made a prompt ruling which the GVI immediately appreciated as litigation leverage to put settlement pressure on the alumina defendants, to wit, GVI could spend such monies as were necessary for response purposes, including attorneys fees and costs, which CERCLA defendants would have to reimburse before a trial on the merits.

At that time, the Dema Firm’s cap had not been exceeded, but it put the Attorney General on notice that the limit was fast approaching and GVI would have to decide how it wished to continue the litigation, if at all. Attorney General Frazer asked the Dema Firm and RPWB to advance GVI litigation expenses beyond \$1.5 million, confident in his litigation authority under 3 V.I.C. § 114 to reimburse those expenses from his office budget and in the ability of the Dema team to move the litigation forward to a successful conclusion through settlement or trial. In

reliance on his declaration of authority, the Dema Firm and RPWB advanced additional GVI litigation expenses as were necessary to continue the litigation as directed by GVI through the OAG. Attorney General Frazer's strategy and case evaluation proved correct and produced the Alcoa consent decree, then the oil refinery settlement, and then the Lockheed consent decree.

The GVI now posits that the Dema Firm must reimburse the GVI for the difference between the \$5.5 million in expenses advanced and, at most, the \$1.5 million cap, which it argues exceeded the Attorney General's litigation authority, absent contract amendment.

This contention fails for eight reasons.

First, GVI has not repudiated the recovery, which was the fruit of the expenditures. This argument amounts to saying that if there had been a prior amendment request by Attorney General Frazer, GVI would have granted it in the amount ultimately spent in order to achieve the settlements that GVI now enjoys and enforces. In effect, GVI seeks to "have its cake and eat it, too." The aphorism is "windfall."

Second, the winning independent litigation strategy decision of Attorney General Frazer was the decision of the GVI for which it deserves much credit and by which it is now bound.

Third, the risk of no recovery and no guarantee of repayment for advanced expenses in excess of \$1.5 million fell upon the Dema Firm, not the GVI.

Fourth, the GVI strategy did not cost the GVI anything in appropriations. But for the risk that the Dema Firm and RPWB took, and the tenacity of Attorney General Frazer and the involved Governors, the South Shore litigation efforts likely would have failed completely and the major source of St. Croix fresh water and the other environments sought to be protected could today be contaminated beyond remediation and recovery.

Fifth, GVI, through Attorney General Frazer, actually obtained the \$5.5 million expended in the settlements from the defendants. Had GVI negotiated based upon expenditures of only \$1.5 million, it would have obtained \$4.1 million less than it did in settlement. The GVI, having received sufficient settlement monies to reimburse counsel for its litigation expenses, is obligated to pay.

Sixth, it would be contrary to the Code of Professional Responsibility for an attorney to pay the litigation expenses of a client.

Seventh, Attorney General Frazer, the GVI's top legal officer, was clear about his authority. He testified that an attorney general, having the responsibility to prosecute a lawsuit, has to do so by the means that are necessary. "And if it means expending funds from his own budget to do so, I believe the law would allow it." The Dema Firm was justified in relying upon this OAG assurance.

Eighth, the covered Contract expenses that were unreimbursed likely never exceeded \$1.5 million. The "large majority" of the expenses were for GVI selected experts to investigate and testify against the defendants' counterclaims and third party claims stemming from GVI's own negligence, the expense for which was not covered by the Contract. GVI had for some time, released sewage onto and into the environments at issue through a long-standing pipe break at a waste treatment facility near the St Croix airport. Counterclaims, cross-claims and third party complaints were not covered under the Contract. Technically, then, counterclaim, and third party defense expenses did not count towards the Dema Firm's cap. GVI requested and required the Dema Firm to represent the Virgin Islands Port Authority ("VIPA"), and, in conjunction with Iver Stridiron, the former Attorney General, the Virgin Islands Waste

Management Authority ("VIWMA"). Defendants' causes of action were spurred by contamination negligence attributed to GVI or GVI related authorities.

J. The Services of RPWB Were Properly Engaged Under the Contract

Section 9 of the Contract provides that "[t]he Contractor shall not Subcontract or assign any part of the services under this Contract without the prior written consent of the Government." By letter dated July 14, 2004, written to Assistant Attorney General Michael Law, the Dema Firm advised GVI that it was engaging RPWB. The record does not show a GVI response by letter, but it is clear that there was official approval. The Office of Attorney General, appeared on all pleadings along with RPWB as co-counsel, including the first complaint, in 2005 through Attorney General Alva A. Swan and Michael Law, Assistant Attorney General. GVI, thereby, evidenced in writing knowledge and approval of RPWB's retention and representation. RPWB was no stranger to GVI as it too represented GVI's interests in the Tutu Wells lawsuit.

Attorney General Frazer and others in his office and in other departments of GVI, such as DPNR, knew that RPWB was assisting the Dema Firm and GVI and advancing expenses. Attorney General Frazer specifically approved the RPWB expenses submitted through the Dema Firm in the Recapitulations and intended that those expenses be paid. It did not matter to the OAG, as he said, whether the Dema Firm or RPWB was advancing expenses just so long as they related to the South Shore litigation.

Section 9 also provides that "[i]t is understood and agreed that Contractor, at its expense and risk, may employ other counsel to assist Contractor in this matter, provided however, that such employment will be via a Subcontract which will incorporate by reference all of the terms of this Agreement except those relating to compensation and expenses." A subcontract would

not have incorporated compensation and expense provisions of the Contract because the GVI was not directly liable to any subcontractor.

The July 14, 2004 letter stated that the Dema Firm was engaging RPWB at the Dema Firm's "own cost." Attorney General Frazer understood that to mean that the Dema Firm and RPWB were sharing the contingency fees, not paying GVI's litigation expenses, and approved the Recapitulations accordingly. Therefore, GVI knew that RPWB was paying GVI's litigation costs on a contingency basis and expecting reimbursement through any recovery, court award, settlement or otherwise.

The GVI now asserts that the expenses incurred by RPWB on behalf of GVI in the South Shore litigation must be paid by the Dema Firm because the Contract states that the Dema Firm could employ co-counsel but it would have to be at the Dema's Firm's "expense and risk." The Contract cannot be read in such an unreasonable manner. GVI and the Dema Firm did not agree to perform an illegal act. An attorney cannot pay his client's litigation expenses.

GVI overlooks the word "its." The phrase "at its expense and risk" has nothing to do with GVI litigation expenses, but rather any business costs between Dema and RPWB for which GVI would not be responsible just as GVI would not be responsible for payment of attorneys' fees to RPWB.

GVI concedes that if the same RPWB expenses were submitted on the Dema Firm's stationery, they would have been reviewed as payable under the Contract.

Attorney General Frazer properly paid the RPWB expenses that were included in the Dema Firm's Recapitulation statements.

K. The Prior Attorneys General Were Empowered By Statute And Contract To Manage The Litigation

The Virgin Islands Attorneys General are specifically authorized to (i) “employ such skilled experts, scientists, technicians, or other specially qualified persons as he deems necessary to aid him in the preparation or trial of actions or proceedings,” (ii) “appear for and represent ... the Government,” (iii) “supervise and direct the legal business of every executive department, board, commission, agency, instrumentality and officer of the said Government,” and (iv) “render opinions on the legal sufficiency of all contracts and other instruments in which the Government of the United States Virgin Islands is interested and the best interests of the people of the Virgin Islands is served.” 3 V.I.C. § 114(a). I conclude that Attorney General Frazer had the statutory authority to request that the Dema Firm and RPWB advance outstanding and unreimbursed expenses in excess of \$1.5 million and to promise to pay such expenses. Such authority is both statutory and inherent in the office of the Attorney General.

GVI had the power to end the Contract at any point, to proceed with other counsel or abandon the litigation, in part or whole. It chose the level of litigation risk necessary to obtain the Contract objectives. The Attorneys General and the Governors involved were kept abreast to litigation on development strategies by the Dema Firm and by the DPNR Commissioner, through in person meetings and by written and telephone communications.

Under the Contract, no settlement could occur without the written consent of the Governor and Attorney General. The Dema Firm could not engage in settlement negotiations without GVI’s written direction.

The Dema Firm had the right to rely upon the actual and apparent authority of the GVI’s top legal officers who determined the limit of her or his statutory powers. By the GVI accepting the Consent Decrees and the oil refinery settlement benefits, it accepted the obligation to

reimburse all the expenses incurred that had been necessary for a “successful conclusion” of the litigation.

IV. THE DEMA FIRM FULFILLED ITS CONTRACT OBLIGATIONS OWED TO GVI

A. Four Civil Actions Filed

The Contract provisions show that the intent of the parties was to include all “third party” polluters in a single lawsuit, if possible, “under law.” That was attempted by the first lawsuit, but, as it turned out, not all relief desired could be obtained under law in one lawsuit. GVI, through Attorneys General, authorized the filing of four separate lawsuits. By operation of law, or for settlement purposes under law, the defendants became divided into three separate final judgment or settlement units.

B. The Recovery Actions

The Dema Firm conducted extensive pre-suit investigation for, filed, and pursued four civil actions on behalf of the GVI to recover damages and other relief relating to environmental damage in and to St. Croix (the “Recovery Actions”):

Commissioner of the Dep’t of Planning and Natural Resources, et al., v. Century Aluminum Co., et al., No. 2005-cv-0062, U.S. District Court of the Virgin Islands, Division of St. Croix (the “First Federal Court Action”);

Commissioner of the Dep’t of Planning and Natural Resources v. St. Croix Alumina, L.L.C., et al., No. 2006-cv-730, Superior Court of the Virgin Islands Division of St. Croix (“First Superior Court Action”);

Commissioner of the Dep’t of Planning and Natural Resource, et al., v. Virgin Islands Alumina Co., et al., No. 2006-cv-772, Superior Court of the Virgin Islands Division of St. Croix (the “Second Superior Court Action”);

United States Virgin Islands Dep’t of Planning and Natural Resources v. St. Croix Renaissance Group, L.L.P., et al., No. 2007-cv-0114, U.S. District Court of the Virgin Islands, Division of St. Croix (the “Second Federal Court Action”).

In addition to the Recovery Actions, the Dema Firm successfully prosecuted an appeal in the Second Federal Court Action (the CERCLA “cost recovery” action), which on remand, resulted in a declaratory judgment in favor of the GVI with respect to its recovery of past and future response costs.

In the First Federal Court Action, commenced in 2005, the Dema Firm asserted environmental claims against entities who at various times owned portions of an industrial area in Kingshill, St. Croix on which both an alumina refinery and an oil refinery have operated. The defendants included Virgin Islands Alumina Corporation (“VIALCO”), St. Croix Alumina, LLC (“SCA”), Lockheed Martin Corporation (“Lockheed”), Alcoa World Alumina, LLC, (“AWA”), St. Croix Renaissance Group, LLP (“SCRG”), HOVENSA, LLC (“HOVENSA”), and Hess Oil Virgin Islands Corporation (“HOVIC”). Lockheed, VIALCO, SCA, AWA, and SCRG are referred to as the “Alumina Defendants.” HOVENSA and HOVIC are referred to as the “Refinery Defendants.”

In the First Federal Court Action, the Dema Firm contended that the Alumina Defendants’ operation of the alumina refinery had contaminated the environs surrounding the alumina refinery by releasing a high-pH substance known as “red mud,” an environmentally deleterious byproduct of alumina refining. For the GVI, the Dema Firm sought to recover under CERCLA, Territorial statutes, and common law for the damage done by the red mud to the natural resources of St. Croix. Specifically, the GVI alleged that the red mud contaminated the groundwater beneath the alumina refinery and that it then migrated beyond the alumina refinery property. The GVI also maintained that a large release of red mud into the Alucroix channel caused damage to marine life and mangrove trees. The GVI also asserted claims against the Refinery Defendants for environmental damage relating to the operation of the oil refinery in the

industrial area on St. Croix. The GVI alleged, inter alia, that petroleum and hazardous substances polluted the soil and waters of St. Croix.

In 2006, the GVI requested that the Dema Firm bring additional environmental claims relating to the alumina refinery. The Dema Firm filed the First Superior Court Action and the Second Superior Court Action (together, the "Superior Court Actions") related to the alumina refinery. In one, the GVI sued SCA under the Virgin Islands Coastal Zone Management Act ("CZM Act") for alleged discharges of red mud. In the other, the GVI asserted claims against SCRG, SCA, and VIALCO under the Virgin Islands Water Pollution Control Act, and the CZM Act.

In 2007, the Dema Firm filed the Second Federal Court Action for GVI. In that action, GVI sought to recover under CERCLA the costs incurred primarily by the Dema Firm and RPWB on behalf of the GVI relating to the investigation of, and a plan to address, the pollution at the alumina refinery. GVI sought to obtain a declaratory judgment against the Alumina Defendants requiring them to reimburse all costs the GVI would incur (through its lawyers or otherwise) to further investigate the alumina refinery in the future. To obtain declaratory relief, it was necessary for the GVI to have incurred costs in the past. In coordination with the Attorney General at the time, the Dema Firm incurred costs by paying the GVI's litigation consultants to conduct certain investigations and feasibility study activities. These incurred costs formed the basis for the declaratory judgment ultimately obtained by the GVI (after the successful appeal), which, in turn, was the impetus for the Lockheed and VIALCO settlements.

The Recovery Actions were vigorously contested and consumed a massive amount of resources, both in terms of human and financial capital, over a decade. Defendants asserted many counterclaims, third-party complaints, and cross-claims.

It was evident to GVI and its attorneys that the defendants were determined to press all litigation with the intent of prevailing against GVI through dispositive motion, elongated trials, appeals or by causing the GVI to surrender because of expenses involved in proving legal fault and entitlement to the relief sought. On November 8, 2006, HOVENSA's counsel advised that, "[i]n light of the underlying facts and the absence of any credible basis for a claim of damage to publicly important natural resources having been caused by the refinery, HOVIC and HOVENSA are not willing to make any cash payment to resolve this matter." That letter exemplified the early litigation stances of the alumina and oil defendants.

The Dema Firma and its co-counsel, RPWB, however, continued to pursue aggressively and diligently the Recovery Actions (and related appeal) over the course of a decade, providing approximately 45,000 hours of legal services. The Recovery Actions involved hundreds of document requests, almost 150 depositions throughout the United States, over 30 experts, numerous Daubert motions, hundreds of docket entries, millions of pages of copied discovery documents and the advance of out-of-pocket expenses as required by the Contract and GVI.

Ultimately, each of the Recovery Actions was settled with the written approval of the Attorneys General and involved Governors for the benefit of GVI. The aggregate value of the settlements in the Recovery Actions had an agreed cash and non-cash value of between \$126.16 million and \$144.16 million, which included \$67.875 million in cash payments.

1. The First Settlement with Alumina Defendants

a. The Alcoa Consent Decree

In 2012, after two mediations, a group of the alumina defendants (excluding Lockheed and VIALCO) were the first to settle with GVI. The settling alumina defendants included SCA, AWA, and SCRG. That settlement, which was embodied in a Consent Decree dated February

12, 2012 (the “Alcoa Consent Decree”) had an estimated minimum value of \$29.5 million, including \$3.0 million in cash and \$26.5 million in environmental restoration work. This amount does not include an additional \$295,000 in oversight costs being paid by SCA. When the oversight costs are included, the lowest estimate of the work was \$26.795 million. The settling Alumina Defendants, however, were required to spend whatever amount was required to restore the “Group A Units” (as defined in the Alcoa Consent Decree). In no event will the GVI have to spend any money to restore the Group A Units.

The open-ended financial commitment to fund the capping, sealing, and stabilizing of “the giant mound of dusty red bauxite aluminum refining tailings,” or “red mud,” was a major victory for the GVI.

b. The 3/9/12 Recapitulation

On March 9, 2012, the GVI and the Dema Firm executed a recapitulation (the “3/9/12 Recapitulation”) detailing the application of the \$3.0 million cash payment being paid pursuant to the Alcoa Consent Decree. As expressly provided in the District Court’s Memorandum Opinion approving the Alcoa Consent Decree, a portion of the \$3.0 million was applied to litigation expenses incurred as of August 19, 2011, in the amount of \$1,075,946. The Dema Firm earned a contingent fee with respect to the settlement contained in the Alcoa Consent Decree (“Alcoa Settlement”) in the amount of \$6,934,810.80 (\$6.25 million, which is 25% of the first \$25 million in value; plus \$684,810.80, which is 20% of the remaining \$3,424,054 in value after subtracting the \$1,075,946 paid in expenses). The sum of \$1,924,054 was paid to the Dema Firm as partial payment of the earned contingent fee, leaving \$5,010,756.80 (\$6,934,810.80 minus \$1,924,054.00) in professional fees owing to the Dema Firm.

Both the Dema firm and the GVI understood that the 3/9/12 Recapitulation was intended to be a final, binding statement of the amounts payable to the Dema Firm (absent fraud or the submission of expenses unrelated to the South Shore litigation).

2. The Settlement with the Refinery Defendants

a. The Settlement Agreement

In 2014, the Refinery Defendants settled for \$43.5 million in cash, which included a \$3.5 million upfront payment and a second payment in the amount of \$40 million that was due no later than December 31, 2014 (the “Second Payment”). There were no pending CERCLA claims against HOVIC and HOVENSA. The non-CERCLA claims, however, represented significant verdict risks and costs of litigation for all parties.

Aware that the Refinery Defendants were financially troubled, Attorney General Frazer and the Dema Firm negotiated a first priority mortgage on the oil refinery and a first priority security interest in the oil refinery’s personal property in order to assure that the GVI could realize the full financial value of the settlement. That action was critical to the GVI’s subsequent realization of the second \$40 million payment after HOVENSA defaulted on its obligation to make the Second Payment by December 31, 2014. When HOVENSA then filed a Chapter 11 bankruptcy petition in the United States Bankruptcy Court for the District of the Virgin Islands, St. Croix Division (the “Bankruptcy Court”), the GVI was the only secured creditor in HOVENSA’s bankruptcy case. As a result, the GVI’s secured claim for the second \$40 million payment was paid in full in HOVENSA’s Chapter 11 bankruptcy case. Unsecured creditors, received only a partial distribution on their claims.

b. The 6/2/14 Recapitulation

On June 2, 2014, the GVI and the Dema Firm executed a second recapitulation (the “6/2/14 Recapitulation”). The GVI approved payment of the Refinery Defendants’ \$3.5 million settlement payment to the Dema Firm. Of that amount, \$2,158,365.32 was applied to outstanding litigation expenses and \$1,341,634.68 was applied toward the \$5,010,756.80 contingency fee balance relating to the Alcoa Settlement, leaving a professional fee balance relating to the Alcoa Settlement of \$3,669,122.12. The Dema Firm earned an additional contingency fee for the \$43.3 million settlement, or \$6,201,245.20, payable from the anticipated Second Payment.

Both the Dema Firm and the GVI understood that the 6/2/14 Recapitulation was intended to be a final, binding statement of the amounts payable to the Dema Firm (absent fraud or the submission of expenses unrelated to the South Shore litigation).

3. The Lockheed Consent Order and VIALCO Settlement

With Attorney General Frazer, the Dema Firm successfully negotiated a resolution of the GVI’s claims against the two remaining Alumina Defendants. The settlement with Lockheed is memorialized in the Consent Decree dated July 7, 2014. Lockheed agreed to pay \$20.75 million in cash and to provide non-cash work having a value of at least \$31.49 million for environmental restoration work relating to the “Group B Units” (as defined in the Lockheed Consent Decree). That value could be \$46.1 million, depending upon the methodology of environmental recovery finally approved by the DPNR and the Consent Decree monitor.

The GVI and Lockheed Martin joint Memorandum to the District Court estimated the cost of the work Lockheed had committed to perform at a present value of \$31.1 million to \$46.1 million. This estimate was based upon the detailed Draft Remedial Investigation Feasibility Studies prepared by the GVI’s own experts, who were experienced professional engineers (John

Gardner, P.E., and Michael Rafferty, P.E.). Experts Gardner and Rafferty testified at arbitration that their estimates were reasonable when made and continue to be so and that the cost estimate for Area B did not include the costs to transport materials to the Virgin Islands, which increases the estimate by a factor of 1.6.

GVI agreed to settle its claims against VIALCO for a cash payment of \$625,000.

a. The 8/22/14 Recapitulation

On August 22, 2014, the GVI and the Dema Firm executed a third and final recapitulation (the "8/22/2014 Recapitulation"). The GVI and the Dema Firm agreed that the \$21.375 million in cash would be disbursed as follows: (a) \$2,310,662.40 to pay outstanding litigation related expenses, (b) \$10 million to the GVI, and (c) \$9,064,137.60 to pay a portion of the professional fees outstanding. The GVI was not entitled to receive the \$10 million at that time, absent the Dema Firm's agreement, under Section 17 of the Contract. Applying Schedule II of the Contract, the Dema Firm earned a contingent fee of \$8,068,167.94 for the Lockheed settlement and \$93,750 for the VIALCO settlement. The Dema Firm was already owed a balance of \$3,669,122.12 in fees from the Alcoa Settlement. Thus, by adding the remaining balance of professional fees due from the Alcoa Settlement (\$3,669,122.12) to the professional fees due from the Lockheed (\$8,068,167.94) and VIALCO (\$93,750) settlements, the aggregate professional fees owed to the Dema Firm due to settlements with the Alumina Defendants at the time of the 8/22/14 Recapitulation totaled \$11,831,040.06. To provide the GVI with the \$10 million it sought at that time, the Dema Firm agreed to accept \$9,064,137.60 in professional fees and defer the balance of \$2,766,902.46.

Both the Dema Firm and the GVI understood that the 8/22/14 Recapitulation was intended to be a final, binding statement of the amounts payable to the Dema Firm (absent fraud or the submission of expenses unrelated to the South Shore litigation).

As of the execution of the last settlement, and as set forth in the Recapitulations, the Dema Firm earned \$21,297,973.94 in attorneys' fees as follows:

SCA/AWA/SCRG Settlement	\$6,934,810.80
Lockheed Settlement	\$8,068,167.94
VIALCO Settlement	\$93,750.00
Oil Refinery Defendants' Settlement	<u>\$6,201,245.20</u>
Total Attorneys' Fees	<u>\$21,297,973.94</u>

The actual costs of restoration work for the Group A Units under the Alcoa Consent Decree will be more than the estimated \$26.5 million upon which the Dema Firm's fees were calculated. According to expert witness John Gardner, the professional engineer designated by the GVI in the Alcoa and Lockheed Consent Decrees to oversee the restoration work, the actual costs for the Group A Units work will likely to be approximately \$28.7 million.

This is a contingency fee of 16.88% based on the low estimated settlement value of \$126.16 million. The arbitration evidence is that the expectable rate of attorney fee compensation for complex sovereign environmental litigation is between 20% and 25%.

The GVI provided no evidence that the Dema Firm's fees are unreasonable for this kind of litigation. The Inspector General's Report, which GVI adopted suggests a "reasonable" fee that is not based upon complex litigation of this type, not based upon actual hours devoted to the litigation, or the hourly rates that would have been applicable in each year since 2004. That

Report postulates, that the GVI could have somehow self-funded the litigation and was prepared to accept the full financial risk of no recovery. Those assumptions are contradicted by the Contract's statements of purpose and justification. They are contrary to the realities of 2004.

As of the execution of the last settlement agreement, adding aggregate litigation expenses in the amount of \$5,545,173.72, the GVI owed the Dema Firm a total of \$26,843,147.66.

The Dema Firm received payments totaling \$17.875 million (\$12,329,826.28 for professional fees and \$5,545,173.72 for partial payment of fees and full reimbursement of expenses) and was owed, as of the date of the arbitration demand, \$8,968,147.66 in professional fees on a contract basis.

The alternate bases claimed by the Dema Firm for fees and expenses, unjust enrichment and promissory estoppel, when applied to the evidence warrant the same result.

V. THE GVI DOES NOT OWE THE DEMA FIRM AN ADDITIONAL \$1,345,222.15 IN CONTINGENCY FEES BASED ON SATISFACTION OF THE FIRST PROPERTY MORTGAGE AND SECURITY LIEN

Section 3 of the Contract requires GVI to pay the Dema Firm a scheduled percentage of "any recovery or settlement monies" received for its benefit pursuant to Settlement Agreement "or otherwise" on the "net amount collected." The security instruments were part of the HOVENSA settlement agreement.

Pursuant to the Bankruptcy Court's Order (A)(I) Approving the Sale of the Debtor's Assets, Free and Clear of All Liens, Claims, Encumbrances, and Interests; and (II) Authorizing the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases; and (B) Granting Related Relief (the "Sale Order"), the sum of \$8,968,147.66 was not deducted from the \$40 million Second Payment from HOVENSA and accepted by GVI.

The Dema Firm claims that under the Contract it is entitled to the payment of a contingency fee on the amount of any attorneys' fees award to the GVI. Specifically, it claims it is owed an additional \$1,345,222.15 in fees, which represents 15% of the additional \$8,968,147.66 placed in escrow.

The Sale Order required the buyer of HOVENSA's assets to "deposit into a segregated account or escrow account in the State of Delaware the sum of \$8,968,147.66 in Sale proceeds (the 'Proceeds') as adequate protection for the charging lien and equitable interest of John K. Dema, P.C. (the 'Dema Firm')." It provided that "[t]he Proceeds will not be subject to garnishment, execution, or other process by any (i) creditor of the Successful Purchaser, (ii) the Debtors, (iii) the Government of the Virgin Islands, or (iv) any other entity as such funds are in *custodial egis* for the benefit of the Dema Firm." (emphasis added). Moreover, the Sale Order provided that, "[t]o the extent the amount of an agreement between the Successful Purchaser and Dema Firm, an arbitration award, or order of this Court are in an amount less than \$8,968,147.66, the balance of funds remaining shall revert to the Successful Purchaser." Thus, the \$8,968,147.66 placed into escrow is not a "recovery" within the meaning of the Contract such that the Dema Firm is entitled to additional contingency fees. The escrowed funds represented a mechanism for payment of the fees the Dema Firm already earned for the benefit of the refinery purchaser to obtain clear title. It is not a specially awarded fund by a court in GVI's favor. Any difference between the escrowed amount and the amount of this Award reverts to the purchaser of bankruptcy assets, not to GVI. GVI cannot assert any interest in that escrow fund.

However, the \$40 million received by GVI is covered under Section 17 of the Contract.

VI. THE DEMA FIRM'S CLAIMS FOR ADDITIONAL SERVICES NOT INCLUDED UNDER THE CONTRACT ARE DENIED

A. Counterclaims, Cross-Claims and Third Party Complaints

Not covered under the Contract was the litigation defense of the GVI against South Shore defendants' counterclaims, cross-claims and third-party complaints. Each of the defendants asserted such claims because of the GVI's own alleged negligence regarding sewage discharges into the environments affected by the contamination sued upon.

Because those services were provided without a separate contract, the claim for additional services is denied. Moreover, the hours devoted to that work have not been satisfactorily separated out from the hours devoted to the four lawsuits constituting the South Shore litigation.

B. Underground Storage Tank Regulations

The Dema Firm also claims fees for non-litigation work performed with respect to the drafting of underground storage tank regulations. It is claimed that DPNR promised to pay \$15,000 for those efforts. That claim is denied because there was no professional services contract covering the work. Although the work performed was of considerable benefit and use to the GVI, there was insufficient information developed through the arbitration hearing to ascertain the essential terms upon which the GVI agreed to pay, assuming there was an agreement to pay.

C. Application for EPA Sole Source Designation

The Dema Firm claims a monetary value for preparing the application for, and obtaining an EPA designation of the Kingshill Aquifer as a sole-source aquifer. No professional services contract was generated for this work and there was no evidence of agreement on the essential term of compensation.

D. RCRA Permits

The Dema Firm claims for time spent in assisting the GVI in reviewing Resource Conservation and Recovery Act ("RCRA") permits and commenting on such permits for DPNR. The Dema Firm estimates that it spent 400 hours for this extra service representation. There was no written professional services contract. Accordingly, that claim is denied.

VII. THERE WAS NO REQUIREMENT TO DEPOSIT SETTLEMENT FUNDS INTO AN INTEREST BEARING TRUST ACCOUNT ON BEHALF OF THE GVI AND GVI IS NOT ENTITLED TO INTEREST

The GVI's claim for interest of \$761,000 is made without justification and is denied. As explained above, the Dema Firm was not improperly paid before the termination of "all involved litigation" and was properly paid amounts for fees and expenses through the Recapitulations.

The GVI's claim for interest also fails because there was no obligation to deposit any funds into an interest bearing account for the benefit of the GVI.

Relying on the Inspector General's Report, but citing to no other evidence or law, the GVI argues that the Dema Firm failed to put settlement funds in an interest bearing account for the Government "as required by the Court."

The Alcoa Consent Decree, specifically provided for the payment of \$3 million into "John K, Dema, P.C., IOLTA Trust Account."

In addition, an attorney is required under Virgin Islands law to place funds in which the client might have an interest in an IOLTA trust account. Any interest earned automatically goes to a foundation that disburses the funds to organizations, such as Legal Services, to assist people in poverty. Usually, little interest is earned in IOLTA accounts because attorneys are able to

resolve fees and expenses with their clients promptly. IOLTA accounts are not investment

accounts as is erroneously asserted by the GVI relying upon the Inspector General's Report.

VIII. DEMA FIRM AND RPWB EXPENSES OF \$5,545,173.72 MINUS \$1,097.00 ARE PROVEN AND ARE REIMBURSABLE UNDER THE CONTRACT, SECTIONS 4 and 18

At the arbitration hearing, Bruce Gordon Dubinsky, a Certified Fraud Examiner and forensics expert who has testified in 49 cases for governmental entities, including for the prosecution in the Madoff criminal trial, testified persuasively that all of the expenses claimed by the Dema Firm and RPWB were reconciled as spent on the South Shore lawsuits, except for \$1,032.00. He used standard auditing principles and methodologies. Consistent with his testimony, I find that the irreconcilable amount is attributed to excusable oversight in light of the frenetic pace of the litigation and innocent human error. A six hundred dollar charge did not have a clear South Shore litigation case designation and one duplicating charge was repeated mechanically. The audit reconciliation accounted for all but 2/100th of a percent of the expenses billed to GVI. The Dema Firm and RPWB routinely maintained and preserved contemporaneously made expense entries.

In arbitration, the GVI had the same documents as Dubinsky used, including the firms' internal ledgers. It presented no evidence from them. It regarded the documentation received as a "document dump." It was not. Dubinsky made an Excel spreadsheet which "everybody ... in the profession uses," digitized the firms' ledgers, created an electronic spreadsheet from which he conducted a forensic investigation in accordance with the standards of the Association of Certified Fraud Examiners. He performed the reconciliation of over 10 years of expense vouchers and receipts designated as South Shore litigation expenses. I find Dubinsky's

examination of documents to be appropriate and satisfactory and conclude, consistent with his opinion, that there was no fraudulently submitted expense documentation and that the recording of expenses not done with any intent to deceive, misrepresent or mislead. In addition to being obligated to explain incurred expenses to GVI, the Dema Firm was obligated to maintain such records for pre-trial and post-trial discovery. A defendant obligated to pay GVI expenses would have had the right to see and evaluate the underlying support for them.

The expenses the Dema Firm and RPWB incurred are awardable as appropriate "expenses of the litigation then outstanding as verified by appropriate receipts and billing statements." The \$5.5 million in incurred expenses by the Dema Firm and RPWB were all GVI litigation expenses except for the \$1,032.

I have added to that amount \$65.00 which was recorded by RPWB in 2003 for two luncheon discussions between the firm's principals on 4/18/03 (\$30.00) and 5/6/03 (\$35.00) regarding "USVI cases." The discussions probably related to their decision making as to whether RPWB would accept a role in possible South Shore litigation. It was then involved in the Tutu Wells case. Before the Dema Firm could have committed to the South Shore litigation, it would have to have had conversations with a law firm like RPWB which was willing and able to advance considerable litigation expenses. Although the \$65.00 amount was not challenged or explained in the arbitration hearing, it does appear to have been mentioned without specificity in the Inspector General's Report as a possible irregularity, I am excluding it since the RPWB engagement in this matter did not begin until 2004.

GVI's arbitration position is that, despite knowing that \$5.5 million was expended by the Dema Firm and RPWB for GVI's benefit and for the results it continues to enjoy, these sums are not payable and must be returned to GVI, except for possibly \$1.5 million, despite approvals for

payment by the OAG on behalf of GVI, and for that \$1.5 million it seeks an accounting. For reasons above explained, that contention is denied. Both sides have asked the arbitrator for such relief as is deemed just and proper. The award of expenses already paid is deemed “just and proper.” The sum of \$1,097.00 is deducted from the \$5.5 million for the reason given.

IX. A FEE AWARD OF \$28,132,717.50 IS REASONABLE AND PROVISIONALLY AWARDED UNDER SECTION 18 OF THE CONTRACT

Based upon the Attorney General Walker’s letter of September 23, 2015, there was an assignment “of cause” for termination of the Contract. Therefore, it triggered the last paragraph of Section 18, which is applicable even if the assignment of cause is subsequently not proven. That provision places award of fees in the hands of the arbitrator to determine, by a standard of reasonableness rather than by the formula contained in Section 18, applicable to termination “without cause.” To ascertain a reasonable attorneys fee, it is appropriate to look to a “lode star”, that is to use current hourly rates multiplied by the number of hours devoted to a matter. To that “lodestar” could be added a multiplier for success or failure in the litigation. Here, the Contractor fulfilled extraordinarily the contract objectives in all four lawsuits for the benefit of GVI the people of the Virgin Islands.

The assignments of error in the September 23 letter are not proven.

The remediation process now enjoyed and the South Coast Industrial Area could not have happened without the GVI’s exhaustive use of the legal talents and resources of the Dema Firm and RPWB.

The Dema Firm has proven to the satisfaction of the arbitrator that John K. Dema’s current hourly rate is \$760. That reflects his national reputation for being the pioneer of successful sovereign resource recovery litigation and is closely comparable to that of

environmental litigators, Allan Kanner, Gordon Rhea and Scott Kauff on the plaintiff side, and probably John Steven Guttman, on the defense side. The evidence is sufficient that the hours (45,000) shown for John K. Dema and others in his firm and RPWB were all properly devoted to the South Shore litigation. Those hours are comparable to one other complex environmental case prosecuted by Allan Kanner on behalf of the State of New Jersey against Exxon (44,000 hrs.).

Environmental litigation is dissimilar from ordinary civil litigation in many ways. It requires investigation, prior to suit, back to the beginning of the pollution at issue. Here, that would have been back to approximately 1962, the era when the alumina refinery and the oil refinery were permitted to commence operations. Attorneys must also investigate what actions potential defendants have been permitted to do by the sovereign. Additionally, the lawyer must analyze all suspected contamination and the concentration levels at and places which they threaten the health of the environment in its many variations. Often, a layperson's concept of what should be contamination is at odds with what the law prescribes. For example, the "red mud" previously discussed is not a CERCLA contaminant and petroleum products are not covered. Sea water added to non-contaminants, though could cause a contamination mixture and leeching into the groundwater. As expert Allan Kanner, Esquire testified, an environmental lawyer must have mastered in depth, all environment laws, rules and regulations, and understand groundwater hydrology, forensic chemistry, history, surveying, and land economics.

I have considered the contentions of GVI that the hours billed are duplicative and unnecessary. Those contentions are without basis. They are advanced without evidence of any specialized knowledge of the complex environmental litigation field, are inconsistent with the recognitions of complex lawsuit difficulties and realities and with no apparent appreciation of

developing environment law from 2004 onward. Also absent from the GVI evaluation of a reasonable fee is what the OGC in the past had described as defendants' "scorched earth" litigation tactics and the involved Governors' decisions to rely on the Dema litigation team to live up to its national reputation of being the best lawyers in the environmental litigation field.

With regard to charges for legal research using aid of LEXIS, notice is taken that it may have been necessary for attorneys to try to predict how the Virgin Islands courts and would apply Restatement of Laws Sections not previously ruled upon. Ascertaining Virgin Islands "common law" may have been arduous at times given the many possible legal traditions imported into land rights expectations from the laws of countries that possessed the Territory before purchase by the United States.

Collaboration and discussion among co-counsel is common and necessary for litigation strategy, trial preparation, and witness preparation settlement as well as for investigative research. And, as was recognized in arbitration testimony, an attorney expecting to be paid on a contingency fee basis has no incentive to pad hours.

I have reviewed generally the records of the legal services provided and find that they are all reasonable for the nature, complexity at length of the litigation, applying arbitration testimony.

A reasonable fee for the Dema Firm is calculated as follows:

John K. Dema - \$760/hr. x 5,315.5 hrs. x 3 (the multiplier in Section 18) equals
\$12,119,340; plus

Associate Attorneys and Other Counsel - \$225/hr. x 26,572.1 x3 (using the Section 18
Schedule of 2004 rates) equals \$17,936,167

equals

\$30,055,507 total fees owed

-12,329,826 less paid

equals

\$17,725,681 additional fees owed by GVI

This amount does not include hours spent by legal assistants, paralegals, or other
timekeepers (13,370.5 hours x \$375) or the current hourly rates of Associate Counsel which
range up to \$800/hr.

This award is reasonable in light of the settlement recoveries to the GVI and the special
attorney skills and efforts needed to obtain cash and non-cash values which could exceed \$144
million when one considers the long-term benefits St. Croix restoration of Areas A and B at the
alumina site to the groundwater, Kingshill Aquifer and the health and safety of residents living in
the vicinity of the refinery property. It is about 20.8% of the value of the GVI recovery and less
than the expectable rate of 25% established by the arbitration evidence.

However, since the Dema Firm's alternative Section 18 claim demand is \$28,132,717.50
under the "no cause" language, I award provisionally that sum minus \$12,329,826.28 paid, for an
additional fee due of \$15,802,891.22.

X. THE GVI ARBITRATION CLAIMS ARE DENIED

The GVI claim for a declaration that the Contract was void ab initio is denied as
withdrawn.

The GVI claim for unconscionability is denied because, as explained above, the Contract is valid and enforceable and because there is nothing unlawful or unconscionable about contingency fee agreements, particularly for states or territories that have environmental harm and inadequate funds to seek and obtain remediation and recovery by judicial determination.

The GVI claim for bad faith and unfair dealings is denied because the Dema Firm and its subcontractor represented GVI at all times with due diligence and vigor and billed for expenses that were directly related and otherwise required by the demands of the Contract. It did not take advantage of any special relationship with GVI or inflate its fee demands or realizations. Negotiations of the Contract were at arm's length and, the proposed contingency fee schedule was reduced by Attorney General Stridiron.

The GVI claim of conversion is denied because the Dema Firm justifiably relied upon the contractual supervisory authority of the OAG and received payment for expenses and fees only upon approval of the Recapitulation statements by the Attorney General. But for the payments of fees and expenses, the litigation efforts would have stalled and been unsuccessful. The payments made were pursuant to, and consistent with, the statutory powers of the Attorney General to manage the litigation effort. No monies were received by the contractor that had not been incurred as an expense for the benefit of GVI's contract interests excepting \$1,097.00 or earned as fees under the terms of the Contract.

The GVI claim for fraudulent misrepresentation is denied because there was no any evidence of fraud. Indeed, at the arbitration hearing, GVI did not attempt to present such evidence.

The GVI claim for an accounting is denied. GVI has had all of the arbitration documents for expenses and hours for the Dema Firm and RPWB work under the Contract. It could have

reviewed the documents produced. GVI did not demonstrate in the arbitration that the audit Recapitulation performed by Dubinsky was inappropriate or unreliable. To the contrary, the GVI's random testing of Dubinsky's audit reconciliations in cross-examination demonstrated the reliability of Dubinsky's work product and opinions.

The GVI claim for breach of contract is denied for reasons above stated. The Dema Firm fulfilled its Contractual obligations of advancing all litigation expenses required. The expenses billed through Recapitulations were incurred as reasonable and necessary litigation expenses, with the exception of \$1,097, which is a sum that I find was misbilled through excusable negligence. Assuming there was failure to request advance approvals of all expenses exceeding \$5,000, I have concluded GVI ratified those expenses through receipt of voluminous litigation pleadings, by having co-counsel responsibilities by settlement negotiation representations to defendants and mediators and by accepting all of the settlement benefits.

GVI obtained fully in settlement all estimated expense and earned counsel fees, subsequently set out in the Recapitulations.

Q. Did the Lockheed settlement decide - - did the Lockheed settlement decide any issues of attorney fees? The Lockheed consent decree?

A. Lockheed made a payment that was to cover all of the claims and relief sought, other than the CERCLA natural resource damages, which were addressed by the work Lockheed Martin's doing. So in the sense it was intended to cover everything, yes. And there was a claim, I believe, there were claims for attorney fees and costs, but it was not broken out. We basically said we'll make this payment to settle everything you're claiming, other than the work. In other words, it was to settle everything. And it was everything sought in the prayers for relief.

GVI obtained the settlements with the intent and promise of paying and it has enjoyed the benefits of the settlements, without resort to appropriated funds.

XI. The Dema Firm Did Cooperate With The Office Of Inspector General Who Did Not Perform An Audit

The Governor asked the Office of Inspector General in January, 2015 to conduct an audit of a \$3 million dollar payment to the Dema Firm made under the Contract probably referring to the first consent decree. The Inspector General chose not to conduct an audit. Instead, he chose to conduct an investigation under “blue book” standards. It is undisputed that “yellow book” audit standards involve higher standards than are applicable than to an “investigation.”

The evidence showed that an “investigation” pursuant to “blue book” standards should not be focused on an individual or individual contracts or be an investigation in aid of criminal prosecution or civil litigation. There are separate and distinct inspector general standards for those types of investigations.

An “investigation” should be a study of many contracts, not one, for the purpose of suggesting to an agency of government how better to implement existing policies and practices or the need for new policies and controls. Although the Inspector General made recommendations to the OAG for future administration of contracts the Report’s focus appears to have been upon a single contract and a single contractor. No consideration was given to prior or ongoing contingency fee contracts, namely the AT&T and Tutu Wells agreements and the Holt/Cohen agreement, in making contract interpretation judgments and no significant review was made of the consent decree terms, conditions, or the covenants.

An inspector general must be careful to maintain independence from other government agencies and avoid or correct any appearance of lack of independence so that public confidence in the independence of the office can be maintained. Here, the Inspector General was directed or chose to report to the Governor and the Attorney General the progress of his investigation, which

course of action may have undercut, in public regard, the desired appearance of independence and objective investigation.

In at least three respects the Inspector General's Report was deficient under "blue book" standards. It was issued without review for legal sufficiency. It was issued before binding arbitration occurred. It did not include an interview of John K. Dema, Esquire, contracting party. The GVI knew that Report was not an audit and that an erroneous Report could be detrimental to the reputations of individuals or firms investigated in the Report.

However it happened, perhaps through newspaper reporting surrounding the Governor's press conference where he directed the Inspector General to conduct an audit relating to the Contract, suspicion developed in the community that the Inspector General was seeking information in furtherance of a criminal investigation. That community included former Attorneys General Stridiron and Frazer.

John K. Dema, Esquire, responded to a letter from the Inspector General seeking all documents related to the South Shore litigation with a counter request for a reasonable time to produce documents covering 10 years of litigation and a request to know under what investigative standard the Inspector General was making the document demand, including whether the demand was on behalf of GVI as the Contract party. Ten years of litigation had produced a warehouse of documents. Without responding to the letter, the Inspector General applied to the Acting Attorney General to support issuance of a subpoena. The Inspector General regarded the Dema letter as an improper questioning of his authority. A subpoena issued. That was reasonably taken by John K. Dema as confirmation of the suspicion that the hat being worn by the Inspector General was for a criminal investigation. Under the arbitration hearing adduced, I find that that was a reasonable suspicion, even if it was not the case, in fact.

I credit the arbitration testimony of former two-term Inspector General of the U.S. General Services Administration, Brian Miller, that the Dema questions asked of the Virgin Islands Inspector General are usual and not extraordinary and should have been answered by an independent inspector general who is, under blue book standards, only interested in gathering all of the pertinent information available from all sources as cooperatively as possible.

Through counsel, Dema did produce 5700 pages of documents, interpreting the subpoena narrowly. The documents produced were responsive to the subpoena.

GVI as contracting party by OAG did not seek contract documentation but the Dema firm provided to the OAG the same 5700 pages.

Dema's counsel offered to meet with the Inspector General and present his client, John K. Dema, and offered the observations of Miller regarding "blue book" standards and the risk of injustices to Dema by inclusion in a final report erroneous factual information and erroneous legal conclusions. Those offers were refused because the Inspector General believed strongly that he knew what Dema was going to say and that the opinion of Miller was not appropriate.

I find from the arbitration evidence that the Inspector General's demand for documents was not adequately communicated to the Dema Firm as a request pursuant to Section 5 of the Contract or "blue book" standards.

Though the OAG had not sought them, it contends that the documents provided pre-arbitration were a "dump" production. I disagree. The documents provided were appropriate and responsive to the Inspector General's subpoena. Litigation expense documents were kept by the Dema Firm and RPWB contemporaneously and according to record keeping systems that were expectable for the years in question and understandable to auditors and from which auditors, could formulate questions, if any, and obtain answers if trying in a good faith effort to

reconcile the expense records. Further, there was no evidence submitted that, pre-arbitration, GVI, as contracting party, found the subpoenaed documents to be confusing, communicated to the Dema Firm any confusion, or requested any clarification or requested an explanation, of them. In arbitration, all documents that GVI deemed necessary were provided through an orderly discovery processes.

XII. THE GVI's RELIANCE ON STATEMENTS GIVEN TO THE INSPECTOR GENERAL BY FORMER ATTORNEYS GENERAL STRIDIRON AND FRAZER WAS UNREASONABLE

The affidavits and arbitration testimonies from former Attorneys General Stridiron and Frazer concerning their management of the litigation and Contract formation are descriptions of what they did, in fact, do. The suggestion by the GVI that these witnesses perjured themselves at the arbitration hearing or that Dema's attorney improperly obtained false affidavits from these former government officials is unfounded. To the extent the GVI relied in this arbitration on statements Stridiron or Frazer gave to the Inspector General that conflict with their subsequent affidavits and arbitration testimony regarding the Contract and its administration, that reliance was unreasonable.

ARBITRATION ATTORNEYS FEES AND COSTS

Both parties seek an award of arbitration attorney fees and costs. Although Section 23 of the Contract does not specify that such claimed expenses are recoverable, since both seek fees and costs through this arbitration, awarding of fees and costs is deemed to be within the scope of the parties' agreement to arbitrate.

Moreover, under Virgin Islands law, in litigation, attorney fees and costs may be awarded to a prevailing party, which is one that achieves at least some of the benefits sought in the litigation. Under this standard, both the Dema Firm and GVI are prevailing parties.

An award of reasonable arbitration attorneys' fees and expenses and costs to GVI is made as to the claims of the Dema Firm for payment of non-contract work.

An award of reasonable arbitration attorneys' fees expenses and costs is made to the Dema Firm as to all of GVI's counterclaims and as to its contract claim and alternate Section 18 claim.

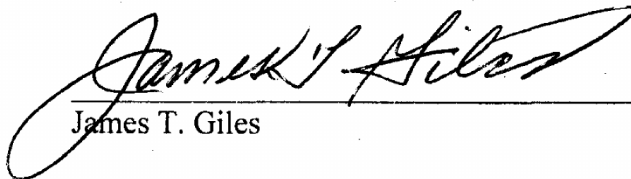
Not awarded is the Dema Firm's claim for attorneys fees and costs based on bad faith as that theory has not been adjudged here since it is a prevailing party.

Also not awarded is the Dema Firm's claim for attorneys fees and costs for proceeding in the bankruptcy court to compel arbitration. That claim was not specifically made in the arbitration Statement of Claim and, therefore, not joined by GVI for dispute resolution. The bankruptcy court is the proper forum to decide entitlement, if any, to an award for a proceedings before it.

The parties' claims for arbitration fees and expenses are not awarded. Such continue to be their shared responsibility.

AFFIRMATION

This above Award is respectfully submitted by the undersigned.


James T. Giles