DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

Eleanor Abraham, *et al.*, Plaintiffs, v. **St. Croix Renaissance Group, LLLP,** Defendant.	**CIVIL NO. 12-cv-11** ACTION FOR DAMAGES JURY TRIAL DEMANDED

DEFENDANT ST. CROIX RENAISSANCE GROUP L.L.L.P.'S OPPOSITION TO PLAINTIFFS' MOTION TO AMEND THE COMPLAINT

COMES NOW Defendant, St. Croix Renaissance Group, L.L.L.P. ("SCRG") and hereby opposes Plaintiffs' *Motion for Leave to File First Amended Complaint* [D.E. 5] as filed on March 15, 2012. In that motion, Plaintiffs seek leave to amend as to two distinct matters:

1. To fix the many errors in identifying the plaintiffs[1], and

2. "add facts and address other issues raised in Defendant's combined Motion for More Definite Statement and Motion for Severance. . . ." *Id.* at 1.

SCRG respectfully submits that this motion to amend should be denied. Two preliminary comments are in order.

[1] At 1 of Plaintiffs' motion, Plaintiffs first ask for leave:

> (1) to "remove names of Plaintiffs that were inadvertently duplicated, identify the proper Plaintiffs in interest for minors and others lacking the capacity to sue, and add Plaintiffs to the caption that were inadvertently omitted but identified in body of Complaint and vice versa.

First, Plaintiffs have asked that the Court wait to determine this motion until the Plaintiffs' "jurisdictional" motion is filed, which it promised to file by April 5, 2012. *See* Plaintiffs' *Opposition to SCRG's Motion for More Definite Statement and to Sever* [D.E. 6-1] at 4. However, no such motion has been filed, so this motion can be addressed without further delay.[2]

Second, SCRG has filed a reply to Plaintiffs' opposition to SCRG's Rule 12 motion, which seeks a more definite statement of the Plaintiff's claims, simultaneously with this filing. As set forth therein, the proposed amended complaint still fails to meet the requirements of *Twombly* and *Iqbal*, so it is requested that this motion to amend be denied without prejudice so the Plaintiffs can attempt to file a complaint that meets the Twombly/Iqbal standards as requested in SCRG's Rule 12 motion.[3]

With these comments in mind, it is now appropriate to address the Plaintiff's motion to amend their complaint.

I. The Motion to Amend Should be Denied as to ***This Proposed Version*** Due to Futility

While SCRG obviously does not oppose Plaintiff's first request -- to be allowed to correct the caption and averments in the complaint to properly identify all of the plaintiffs -- it does, however, oppose the second part of the motion the filing of the proposed

[2] When the Plaintiffs requested a delay in the submission of this Reply to allow filing of the motion for remand to April 5, 2012, SCRG agreed with this request, submitting a stipulation for the Court's approval. After Plaintiffs had exceeded their stated filing date for the motion to remand, they filed a motion for extension *nunc pro tunc* [D.E. 10], asking for leave to file by April 13, 2012. However, they did not file by that date either, and the motion is now moot as that date has passed as well.

[3] The "Twombly/Iqbal" holdings are two U.S. Supreme Court opinions, *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009).

amended complaint to correct factual inadequacy *in its present form*. The instant motion should be denied until Plaintiffs submit a compliant that meets the "futility" test set forth in the Third Circuit's decision in *Lorenz v. CSX Corp.*, 1 F.3d 1406, 1414 (3d Cir. 1993). There, as here "[m]ost of [the "new" facts] either are repetitions of events already described in the amended complaint, or they have little or no relevance to the [claims]." Moreover, there as here "[m]ost of the [necessary] facts were available to plaintiff. . .before she filed her original complaint. . .and probably all of them were available when she amended her complaint. . . ." *Id.*

By denying the instant motion, the Court can shortcut a time-consuming and unwarranted waste of time. Multiple amendments to get these pleadings 'right' in a process of successive approximations are not necessary. Here, as was the case in *Bennington Foods, L.L.C. v. St. Croix Renaissance Group, LLP*, 2009 WL 982633 (D.V.I. 2009), it is clear that the purported "facts added" are simply an attempt to respond to SCRG's *Motion for More Definite Statement and to Sever.*[4] This is not a problem in and of itself. The problem arises because Plaintiffs seek to amend by injecting more of the same, general, conclusory statements that do nothing to make the complaint adequate. What are needed are the facts that will make this a complaint that satisfies the *Lorenz* futility test by complying with the "Twombly/Iqbal" pleading requirements.

Thus, SCRG asks that the instant motion to amend be seen as nothing more than an *inadequate* adjunct to Plaintiffs' opposition to SCRG's motion for more definite

[4] Plaintiffs filed a simultaneous *Opposition to Defendant's Motion for Severance. . .and for a More Definite Statement.* [D.E. 6-1, March 15, 2012.]

statement. As such is the case, SCRG asks the Court to decide this matter in conjunction with that motion.

Indeed, another federal trial court recently adopted this exact same approach. In *Stearns v. Select Comfort Retail Corp.* 763 F.Supp.2d 1128, 1155 (N.D.Cal. 2010), the court addressed issues identical to those in this case arising out of multiple personal injury claims from the use of the defendant's mattress. The court first noted as follows:

> In support of their individual personal injury claims, Plaintiffs allege that they have suffered various injuries, including but not limited to, lung and pulmonary distress, skin irritation, blemishes, other skin infection treatment, and other lung related treatment. Plaintiffs also plead collectively that they had to pay for "checkups, medication, diagnostic testing, biopsies, medical, surgical, and other related expenses" and that they "will be forced to pay" for these same medical expenses in the future as a result of "negligence of the defendants." These conclusory and generalized allegations do not meet the pleading standard of Fed.R.Civ.P. 8. Plaintiffs' allegations with respect to causation suffer from the same deficiency. (concluding that "as a direct and proximate result of the negligence of the defendants, and each of them, plaintiff suffered grievous personal injuries ...). *Id.* at 1155. (Citations omitted).

However, after finding the claims as pled to be deficient under the Twombly/Iqbal requirements, the court then held as follows:

> However, Plaintiffs' failure to plead their personal injury claims with sufficient specificity may be cured by amendment. *Id.* at 1155.

As discussed in SCRG's Reply to its Rule 12 motion, the proposed amendments now sought by the Plaintiffs are still inadequate -- and thus this amendment should be denied in its present form, without prejudice to the Plaintiff's trying one more time to correct these Rule 8 problems with their pleadings.

II. The Few New "Facts" are Just More Vague Conclusions--Repeating Existing Vague Conclusions

In the motion to amend, the textual description of the "new facts" allegedly being added sound like they will be more detailed and informative. But when actually reading the proposed amended complaint it is clear that just two conclusory points -- repetitions of existing materials -- were added.[5]

The sum total of the "amendments" is one new paragraph and mostly minor changes to 5 others. These additions simply repeat existing statements that the plaintiffs: (1) purportedly lived near the refinery at some time between 2002 and present because they lived *somewhere* on St. Croix, and that (2) there was a continuous release of something from 2002 on. This is *nothing* new or more detailed than was provided in the original. All of the proposed additions are listed below:

1. New paragraph 461 is the ***only paragraph added*** -- it avers:

> 461. At all times relevant to this action, and within the time period of 2002 to the present, all Plaintiffs were residents of or guests staying in close proximity to the Defendant's alumina refinery on the south shore of St. Croix.

2. Paragraph 472 added only the phrases:

> Indeed, all of the Plaintiffs lived or were staying or still live in close proximity to the dangerous dispersion of the red dust particulates. SCRG

and

[5] As a prefatory note, before trying to compare the old and new versions it is useful to understand that the "redline" (Exhibit 5-1) and the "clean version of the redline" (Exhibit 5-2) are numbered differently -- and no changes on paragraph numbers are shown in the redline. In addition, an items such as paragraph 461 in the redline is not within the "Factual Statements" section, but is on the "clean" version.

> This dispersion of toxic materials occurred continuously from the same source, the red mud piles at the alumina refinery[6], and SCRG, owner of the refinery from 2002, did nothing to abate it, and instead, allowed the series of continuous transactions to occur like an ongoing chemical spill. Each Plaintiff's exposure occurred out of the same dispersions of toxic materials including the coal dust, which is buried in the red mud[7], and which was stored outdoors.

3. Paragraph 473 added only the underlined phrase:

> 473. Despite that knowledge SCRG failed to take proper measures to control those emissions ever since it took control of the refinery from 2002 to the present.

4. Paragraph 488 added only the underlined phrase:

> 488. Thousands of residential dwellings are located in close proximity to the refinery and all of the Plaintiffs lived or stayed at or still live in close proximity to the refinery and certainly within range of the dispersion of the toxic materials from the refinery.

5. Paragraph 501 added only the underlined phrase:

> 501. Defendant's actions constitute a private nuisance in violation of 28 V.I.C. § 331 and Virgin Islands common law against each Plaintiff as they all lived within close proximity to the refinery and were subjected to the dangerous ongoing emissions.

6. Paragraph 511 added only the underlined phrase:

> 511. Since at least 2006, Defendant SCRG also knew that dangerous friable asbestos was present at the refinery and could, along with the red mud and related particulates and hazardous substances, be blown by winds into Plaintiffs' neighborhoods, and that it did in fact do so.

7. And Paragraph 512 added only the underlined phrase:

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[6] This averment contradicts other parts of the Complaint which allege that friable asbestos (totally unrelated to the alumina process) was released from the buildings and structures -- not the red mud piles.

[7] This is yet another new allegation totally fabricated to meet Defendant's motions -- also completely incorrect. There is no 'coal dust' mixed in the red mud piles.

> 512. Despite this knowledge, Defendant has knowingly and intentionally failed to take precautions to prevent bauxite, red mud, asbestos and other particulates and hazardous substances from blowing into Plaintiffs' neighborhoods, where it did blow and was dispersed exposing each Plaintiff to the harmful emissions and toxic substances continuously.

After reviewing these proposed changes, it is clear that there are really no new "facts" being alleged – just more conclusory assertions that do not overcome the "futility" requirements of *Lorenz* because these new pleadings still fail to meet the pleading requirements of *Iqbal* and *Twombly*, as discussed in SCRG's Reply to it Rule 12 motion.

III. Conclusion

The proposed amendment is a clear attempt to argue and counter the motion for more definite statement and should be treated as such. However, more vague conclusions and sweeping statements about where "all" of the defendants lived (absent any specificity at all), or that there were "continuous" emissions "blown" from the SCRG are useless. **Plaintiffs should be required to "go back and try it again" and produce a complaint that pleads sufficient facts as required by *Iqbal* and *Twombly*.**

Dated: April 16, 2012

/s/

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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of April, 2012, I filed the foregoing with the Clerk of the Court, and delivered by ECF to the following:

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