UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Case No. 12-_____

St. Croix Renaissance Group, LLLP,

Petitioner,

v.

Eleanor Abraham, *et al*.,

Respondents.

From the District Court of the Virgin Islands
(D.C. No. 12-cv-0011)
District Judge: Hon. Harvey J. Bartle III

PETITION
FOR DE NOVO REVIEW OF A CAFA REMAND ORDER
PURSUANT TO 28 U.S.C § 1453(c)(1)

Joel H. Holt, Esq.
Counsel for Petitioner-Defendant SCRG

Law Offices of Joel H. Holt
2132 Company Street, Suite 2
Christiansted, St. Croix
U.S. Virgin Islands 00820

Carl J. Hartmann III, Esq.
Counsel for Petitioner-Defendant SCRG

Carl J. Hartmann III, Attorney-at-Law
5000 Estate Coakley Bay, L-6
Christiansted, St. Croix
U.S. Virgin Islands 00820

December 12, 2012

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ADDENDUM (Exhibits)

Exhibit A - Copy of the Order complained of
Exhibit B - Copy of Memorandum Opinion with regard to the Order
Exhibit C - Docket Below
Exhibit D - Filings Below

D-1	02/02/2012	DE 1	NOTICE OF REMOVAL by Defendant SCRG from Superior Court of the Virgins Islands, case number 11−CV−550. (Filing fee $ 350) (Attachments: # 1 Ex. C, # 2 Ex. B, # 3 Ex. C) (Holt) (Entered: 02/02/2012)
D-2	02/02/2012	DE 2	NOTICE of Appearance by Joel H. Holt on behalf of Defendant SCRG (Holt) (Entered: 02/02/2012)
D-3	02/02/2012	DE 3	ANSWER to Complaint by Defendant SCRG (Holt) (Entered: 02/02/2012)
D-4	02/10/2012	DE 4	NOTICE TO THE COURT by Eleanor Abraham, et al., (Attachments: # 1 Ex. 1) (Rohn) (Entered: 02/14/2012) Filing fee: $ 350.00, receipt number 100002085 on 2/10/2012 (MB). (Entered: 02/10/2012)
D-5	03/15/2012	DE 5	MOTION to Amend/Correct and leave to file First Amended Complaint by Plaintiff Eleanor Abraham, et al. Motions referred to Magistrate Judge George W Cannon. (Attachments: # 1 Ex., # 2 Ex., # 3 Ex.) (Rohn) (Entered: 03/15/2012)
D-6	03/15/2012	DE 6	NOTICE of filing response to Def [doc 1, exh C] by Eleanor Abraham, et al.. re Notice of Removal (Attachments: # 1 Supplement Response to Def's [1, exh 3]) (Rohn) (Entered: 03/15/2012)
D-7	03/15/2012	DE 7	NOTICE of Appearance by Carl J Hartmann, III on behalf of Defendant SCRG (Hartmann, Carl) (Entered: 03/15/2012)
D-8	03/19/2012	DE 8	STIPULATION [FOR EXTENSION OF TIME] by SCRG (Attachments: # 1 Text of Proposed Order) (Holt) (Entered: 03/19/2012)
D-9	03/26/2012	DE 9	ORDER granting Stipulation 8. Defendant shall have until April 16, 2012 to file its responses to 5 and [6−1]. (GWC) dated 3/26/2012 (CB) (Entered: 03/26/2012)

D-10	04/12/2012	DE 10	MOTION for Extension of Time to File Plaintiffs' Third Motion to Remand for lack of Federal Subject Matter Jurisdiction by Plaintiff Eleanor Abraham, et al. Motions referred to Magistrate Judge George W Cannon. (Attachments: # 1 Supplement, # 2 Ex., # 3 Text of Prop. Order) (Rohn) (Entered: 04/12/2012)
D-11	04/16/2012	DE 11	Opposition to Motion re 5 MOTION to Amend/Correct and leave to file First Amended Complaint filed by Defendant SCRG (Holt) (Entered: 04/16/2012)
D-12	04/16/2012	DE 12	REPLY to Opposition to Motion re 6 Notice (Other) [Motion for More Definite Statement and for Severance] filed by Defendant SCRG (Attachments: # 1 Ex. C, # 2 Ex. B, # 3 Ex. B−1, # 4 Ex. B−2, # 5 Ex. B−3) (Holt) (Entered: 04/16/2012)
D-13	05/01/2012	DE 13	NOTICE of Response to Plaintiffs' 10 Motion for Extension of Time to File. (WAL) dated 5/1/2012. (GS) (Entered: 05/01/2012)
D-14	8/1/2012	DE 14	ORDER (GWC) dated 8/1/2012 granting 5 Motion for Leave to File First Amended Complaint (KMD) (Entered: 08/01/2012)
D-15	8/2/2012	DE 15	AMENDED COMPLAINT against SCRG filed by Eleanor Abraham, et al. (Rohn) (Entered: 08/02/2012) ORDER (GWC) dated 8/1/2012 granting 5 Motion for Leave to File First Amended Complaint (KMD) (Entered: 08/01/2012)
D-16	8/6/2012	DE 16	MOTION to Sever by Defendant SCRG (Holt) (Entered: 08/06/2012)
D-17	8/6/2012	DE 17	MEMORANDUM in Support re 16 MOTION to Sever filed by Defendant SCRG (Attachments: # 1 Ex. C, # 2 Ex. B, # 3) (Holt) (Entered: 08/06/2012)
D-18	8/6/2012	DE 18	MOTION for More Definite Statement by Defendant SCRG Motions referred to Magistrate Judge George W Cannon. (Holt) (Entered: 08/06/2012)

D-19	8/6/2012	DE 19	MEMORANDUM in Support re 18 MOTION for More Definite Statement filed by Defendant SCRG (Attachments: # 1 Ex. C, # 2 Ex. B, # 3 Ex. C) (Holt) (Entered: 08/06/2012)
D-20	8/6/2012	DE 20	NOTICE OF CORRECTED DOCKET ENTRY Re: 20 Reply to. Pleading docketed in wrong case. Should have been docketed in Civil No. 2011/0088. To be corrected by attorney's office. (NH) (Entered: 08/06/2012) -- *REPLY to [REPLY MEMORANDUM IN SUPPORT OF AMENDED MOTION FOR SUMMARY JUDGMENT] filed by Defendant SCRG Responses due by 8/20/2012 (Attachments: # 1 Ex. C) (Holt) (Entered: 08/06/2012)*
D-21	8/7/2012	DE 21	NOTICE of Withdrawal of Plaintiffs' First Amended Complaint, Doc No 15 by Eleanor Abraham, et al.. re 15 Amended Complaint (Rohn) (Entered: 08/07/2012)
D-22	8/7/2012	DE 22	AMENDED COMPLAINT Plaintiffs' First Amended against All Plaintiffs filed by Eleanor Abraham, et al. (Rohn) (Entered: 08/07/2012)
D-23	8/21/2012	DE 23	MOTION for Extension of Time to File Response/Reply as to 18 MOTION for More Definite Statement by Plaintiff Eleanor Abraham, et al. Motions referred to Magistrate Judge George W Cannon. (Attachments: # 1 Text of Proposed Order) (Rohn) (Entered: 08/21/2012)
D-24	8/21/2012	DE 24	MOTION for Extension of Time to File Response/Reply as to 16 MOTION to Sever by Plaintiff Eleanor Abraham, et al. Motions referred to Magistrate Judge George W Cannon. (Attachments: # 1 Text of Proposed Order) (Rohn) (Entered: 08/21/2012)

D-25	9/12/2012	DE 25	MOTION and Memorandum to Deem Conceded Defendant's Motions to Sever and for a More Definite Statement re 18 MOTION for More Definite Statement, 16 MOTION to Sever by Defendant SCRG Motions referred to Magistrate Judge George W Cannon. (Attachments: # 1 Text of Proposed Order) (Hartmann, Carl) (Entered: 09/12/2012)
D-26	9/12/2012	DE 26	MOTION for Extension of Time to File Response/Reply as to 17 Memo in Support to Motion, 18 MOTION for More Definite Statement, 16 MOTION to Sever, 19 Memo in Support Motions referred to Magistrate Judge George W Cannon. (Attachments: # 1 Text of Proposed Order) (Rohn)
D-27	9/13/2012	DE 27	Opposition to Motion re 26 MOTION for Extension of Time to File Response/Reply as to 17 Memorandum in Support to Motion, 18 MOTION for More Definite Statement , 16 MOTION to Sever , 19 Memorandum in Support to Motion filed by Defendant SCRG (Hartmann, Carl) (Entered: 09/13/2012)
D-28	9/19/2012	DE 28	Opposition to Motion re 16 MOTION to Sever filed by Plaintiff Eleanor Abraham, et al. (Attachments: # 1 Ex.) (Rohn) (Entered: 09/19/2012)
D-29	9/19/2012	DE 29	Opposition to Motion re 18 MOTION for More Definite Statement filed by Plaintiff Eleanor Abraham, et al. (Attachments: # 1 Ex., # 2 Ex.) (Rohn) (Entered: 09/19/2012)
D-30	9/25/2012	DE 30	REPLY to Opposition to Motion re 29 Opposition to Motion [FOR A MORE DEFINITE STATEMENT] filed by Defendant SCRG (Holt) (Entered: 09/25/2012)
D-31	9/25/2012	DE 31	REPLY to Opposition to Motion re 28 Opposition to Motion [TO SEVER] filed by Defendant SCRG (Holt) (Entered: 09/25/2012)
D-32	10/12/2012	DE 32	ORDER REASSIGNING CASE (CVG) this case is reassigned to Judge Harvey Bartle, III, for all further proceedings. Judge Wilma A. Lewis is no longer assigned to this case. (This is a text entry only. There is no PDF document associated with this entry.) (DHK) (Entered: 10/12/2012)

D-33	10/23/2012	DE 33	MOTION to Continue /Emergency Motion to Continue the October 23, 2012 Telephone Conference to 4:30 p.m. by Plaintiff Eleanor Abraham, et al. Attachments: # 1 Proposed Order) (Rohn) (Entered: 10/23/2012)
D-34	10/24/2012	DE 34	ORDER that Plaintiffs shall file and serve their motion to remand by 10/30/2012; Defendant shall file an opposition by 11/5/2012; Plaintiff shall file any reply by 11/15/2012. (HB) dated 10/24/2012 (CB) (Entered: 10/24/2012)
D-35	10/24/2012	DE 35	Minute Order. Proceedings held in chambers before US District Judge Harvey Bartle, III: Telephone Conference held on 0/23/2012. (CB)
D-36	10/24/2012	DE 36	MOTION to Remand */Motion to Remand for Lack of Federal Subject Matter Jurisdiction* by Plaintiff Eleanor Abraham, et al. Attachments: # (1) Ex. Ex. 1, # (2) Text of Proposed Order Proposed Order) (Rohn)
D-37	10/29/2012	DE 37	Opposition to Motion re [36] MOTION to Remand */Motion to Remand for Lack of Federal Subject Matter Jurisdiction* filed by Defendant SCRG (Attachments: # (1) Ex., # (2) Ex.) (Holt)
D-38	11/16/2012	DE 38	REPLY to Opposition to Motion re [37] Opposition to Motion filed by Plaintiff Eleanor Abraham, et al. (Attachments: # (1) Ex., # (2) Ex., # (3) Ex.) (Rohn)
D-39	11/16/2012	DE 39	MOTION for Extension of Time to File Response/Reply as to 37 Opposition to Motion, 38 Reply to Opposition to Motion Nunc Pro Tunc by Plaintiff Eleanor Abraham, et al. (Attachments: # 1 Ex., # 2 Text of Proposed Order) (Rohn) (Entered: 11/16/2012)
D-40	11/16/2012	DE 40	REPLY to Motion for Extension of Time Nunc Pro Tunc filed by Defendant SCRG Responses due by 11/29/2012 (Holt) (Entered: 11/16/2012)

TABLE OF AUTHORITIES

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STATEMENT OF JURISDICTION

Jurisdiction exists as to Plaintiffs' amended complaint (Ex. D-22) pursuant to 28 U.S.C. § 1332(d) and as to this petition pursuant to 28 U.S.C. § 1453(c). The CAFA remand order (Ex. A) issued December 10, 2012; thus the Petition is timely.

STATEMENT OF THE STANDARD OF REVIEW

The Court reviews issues of subject matter jurisdiction and statutory interpretation *de novo. Kaufman v. Allstate New Jersey Ins. Co.*, 561 F.3d 144, 151 (3d Cir. 2009) . Thus, pursuant to 28 U.S.C § 1453(c)(1) an order remanding a CAFA case is reviewed *de novo*. *Admiral Ins. Co. v. Abshire*, 574 F.3d 267, 272 (5th Cir. 2009) *cert. denied* 130 S. Ct. 756. Ordinarily the court reviews a remand order for abuse of discretion, but that is a product of 28 U.S.C. § 1447(d)'s bar to review of most non-discretionary remand orders. *See Certain Underwriters at Lloyd's, London v. Warrantech Corp.*, 461 F.3d 568, 572 (5th Cir. 2006).

STATEMENT OF FACTS NECESSARY TO UNDERSTAND THE QUESTIONS PRESENTED

The site. In 1965, Harvey Alumina constructed a refinery for the removal of alumina from bauxite ore. The alumina refinery ("Site") was situated within what is known as St. Croix's South Coast Industrial Area ("SCIA"). *Comm'r of the Dep't of Planning & Natural Res. v. Century Aluminum Co.*, 2012 WL 446086 at *2 (D.V.I. Feb. 13, 2012) ("*Century*"). The SCIA contains an eastern tract with an oil refinery and a western tract close to the airport with the 1512.182 acre Site. *Id*.

From 1965 to 2000, the alumina refinery used a method referred to as the "Bayer Process" to extract alumina by applying a caustic chemical (sodium hydroxide). The primary waste was a red, dirt-like substance ("red mud") with an approximate 10.5 pH. (Until 1972, a higher pH form was stored below ground.) From 1972 to 2000, the lower pH material [not classified as hazardous] was stacked in a series of 150 foot high piles in a 62 acre area -- Bauxite Residue Disposal Area A ("BRDA-A") pursuant to a local VI regulatory permit. *Id., at* *2.

After 1972, the Site was operated by Lockheed Martin (1972-1984), the V.I. Alumina Corp. (1984-1995) and Alcoa World Alumina's ("Alcoa") subsidiary St. Croix Alumina ("SCA") (1995-2002). In 2000, SCA ceased refining. *Id*. In 2002, SCRG purchased the Site as a brownfields renewal project. It never operated the refinery -- and from 2006 through 2009, removed the alumina operating facilities.

In 2011, a federal jury awarded SCRG funds to remediate BRDA-A, finding that Alcoa hid and misrepresented pre-sale releases of red mud. Because of "hidden misrepresentations and the involvement of top officials at [Alcoa]. . .the fraud was 'outrageous'." *St. Croix Renaissance Group v. Alcoa World Alumina and SCA*, 2011 WL 2160910 at *11 (D.V.I. May 31, 2011) ("*SCRG v. Alcoa"*).

In 2012, SCRG's contribution of that jury award to a settlement led to the entry of a *consent decree* with the USVI Dept. of Planning and Natural Resources ("DPNR") and Alcoa in a series of associated environmental cases. *Century,* 2012 WL 446086 at *13. That highly-detailed decree requires Alcoa to fully remediate

BRDA-A and surrounding areas with all waste material being covered -- under DPNR supervision and a specially empowered mediator. *Id*. (*Decree*, DE 1076.)

This litigation. In November 2011, 459 plaintiffs filed this action in the Superior Court of the Virgin Islands against SCRG. They claimed personal injury and property damages. Memorandum (Ex. B) at 1. The amended complaint (Ex. D-22) alleges injuries from three different types of wrongs by SCRG:

1. Failure, during the period of SCRG's non-operational ownership (2002-present) to prevent erosion and blowing of waste materials left by prior owners.
2. Failure, after 2006, to remediate newly discovered structural (non-process, non-waste) asbestos Alcoa certified it removed in 2002 from plant structures[1]:

> 475. SCRG discovered that **ALCOA had not abated** the asbestos in the property on or about 2006 when it was informed by DPNR.

That 2006 'discovery' referenced in the complaint was discussed in a reported decision. *Bennington Foods, L.L.C. v. St. Croix Renaissance Group, L.L.L.P.*, 2010 WL 1608483 (D.V.I. April 20, 2010). (That discovery, not of record here, related to structural asbestos in the facilities -- not industrial waste products; although the complaint is correct that post-sale abatement of that asbestos was the contractual obligation of Alcoa under its 2002 sales contract with SCRG.)

> Alcoa, the previous owner, had told SCRG when SCRG purchased the plant that all asbestos had been removed from the relevant portions of the property, later assessments in. . .2006. . .confirmed that, in fact, some asbestos remained.

Id., *at* 2. (That is the same sales contract where the jury found that Alcoa hid environmental violations from SCRG, discussed above.) What is important here, however, is that the amended complaint avers that plaintiffs' claim is that *four years after the 2002 purchase and remediation by Alcoa, in 2006, an inspection subsequently "discovered" additional asbestos in those facilities. Id*. The negligence is the alleged failure to respond quickly enough to that inspection **after 2006**. (It *has* been removed.) Moreover, in *Abednego*, 1:10-

[1] The map attached at page 30 of Exhibit D-7 plots the locations of the alleged exposure to asbestos -- covering more than 50 square miles over half the island.

cv-00009 at D.E. 126, Doc. Nos. 12-3, at 2924-2926; 111-2, at 2083-87, 2091-94) 60% of plaintiffs and their counsel admitted:

> When they sold the site to SCRG, Alcoa and SCA left . . .asbestos. . .and concealed from SGRG and Plaintiffs the true nature of the toxic materials.

3. And finally, SCRG allegedly failed to warn neighbors of the above conditions.

The complaint does not aver there was **a** chemical spill or any other discrete event. It does not even aver that there *was* a continuous event. Rather, it avers many events characterized only as being "from the same location."

There is neither an allegation nor any evidence regarding a *continuous event* in what plaintiffs have filed. In its notice of removal (Ex. D-1) SCRG noted the complaint alleges a variety of discrete events and, more specifically, that it describes at least two completely different types of wrongs: one relates to known, long-term natural erosion and blowing (no spills) of permitted industrial waste, and the other to a totally distinct post-2006 failure to remediate newly discovered structural asbestos in plant facilities. (Ex. D-1, fn. 3 at 5).

However, in their motion to remand (Ex. D-36) plaintiffs did not attempt to either argue or submit evidence that their claims were based on a continuous spill-like event -- or how post-2006 asbestos-related negligence was part of such a continuous *process waste* event. Instead they argued that SCRG had the burden of proof with regard to CAFA[2] exceptions and failed to prove any such exception.

[2] The *Class Action Fairness Act of 2005*, 28 U.S.C. §§ 1332(d), 1453, and 1711–1715 ("CAFA")

See Ex. D-36 at 2-7. In short, plaintiffs *chose* not to submit affidavits, put *any* facts in the record to demonstrate that these instances were part of a continuous event or show how the post-2006 negligence relates to the waste items. *Id., at* 8-9.

In its Opposition (Ex. D-37 at 7) SCRG again raised these same points:

> [A]llegations in the Amended Complaint cover, at a minimum, a varied series of events ranging over more than a decade....damages from different types of events: from...waste going to the ground and then being transported *to a completely different, non-process substance (structural asbestos) that was allegedly released...years after the industrial processes ceased* -- a totally separate source and incident (undertaken at a different time by different parties...by different subcontractors.) (Emphasis added.)

Plaintiff's reply (Ex. D-38 at 1-3) reiterated the argument that the burden with regard to CAFA exceptions lay with defendant. Once again, they chose not to submit affidavits or put facts before the Court that would demonstrate to a preponderance of the evidence that the different types of wrongs were part of a continuous event, or how they were even related.

THE QUESTIONS PRESENTED

1. As a matter of first impression in this Circuit, was the District Court's statutory analysis of the phrase "an event" in CAFA "mass action" section 28 U.S.C. § 1332(d)(11)(B)(ii)(I) contrary to law where the court found it includes "a continuing tort which results in a regular or continuous" activity?

2. Did the District Court err: (1) as a matter of law in proceeding to find jurisdictional facts on remand where plaintiffs have the burden of proof yet failed to submit any facts in the record to support the court's finding; and, alternatively (2) was such finding clearly erroneous?

THE RELIEF SOUGHT

A determination is sought either that: (1) a CAFA exception exists as there is more than one "event" at issue here, or alternatively, (2) there is an insufficient record to determine the number of events and a further record must be made.

ARGUMENT

The trial court found the prerequisites here for classification as a mass action: there are more than 100 plaintiffs, as a Massachusetts citizen SCRG meets the minimum diversity requirement and plaintiffs conceded the jurisdictional amounts. Memorandum (Ex. B) at 2-3. Judge Bartle then noted that CAFA section 28 U.S.C. §1332(d)(11)(B)(i) excepts certain actions from being mass actions, and that plaintiffs allege an exception under 1332(d)(11)(B)(ii)(I) because:

> **(I)** all of the claims in the action arise from **an event or occurrence** in the State in which the action was filed. . . . (Emphasis added.)

Id., at 3. Finally, he held that plaintiffs, as the parties seeking remand, have the burden of establishing this exception by a preponderance of the evidence. *Id.*, at 3 (*citing Kaufman v. Allstate*, 561 F.3d 144, 153 (3d Cir. 2009)).[3]

1. As a matter of first impression in this Circuit, the District Court's statutory analysis of the phrase "an event" in CAFA "mass action" section 28 U.S.C. § 1332(d)(11)(B)(ii)(I) was contrary to law where the court found it includes "a continuing tort which results in a regular or continuous" activity

Plain language. At 8 of the Memorandum (Ex. B) the court defined "an event" from the language of the exception ("all of the claims in the action arise from **an event or occurrence** in the State in which the action was filed") to mean

> **a continuing tort** which results in a regular or continuous [activity] . . .where there is no superseding occurrence or significant interruption that breaks the chain of causation, [and thus there is]
>
> no reason to distinguish between a discrete happening[4]. . .and one of a continuing nature" [such as is described in Restatement (Second) of Torts § 161 cmt. b (1965).]

[3] For reasons that will become apparent below, it is important to note that this Court and others have stated that it is not just the history of this law, but rather longstanding §1441(a) doctrine which places the burden on plaintiffs to show exceptions under CAFA. See generally *Frazier v. Pioneer Americas LLC*, 455 F.3d 542, 546 (5th Cir. 2006) (citing *Breuer v. Jim's Concrete of Brevard, Inc.*, 538 U.S. 691, 697-98 (2003) for the proposition that "placing burden on plaintiff to prove express exceptions to § 1441(a) removal jurisdiction." See also *Wiggins v. Daymar Colleges Group, LLC*, 2012 WL 884907 (W.D. Ky. 2012).

> Given the Supreme Court's guidance in *Breuer* that a plaintiff bears the burden of identifying an express exception to removal under 28 U.S.C. §1441, this Court is not prepared to recognize the rebuttable presumption advocated by the Plaintiffs. Doing so would grant a plaintiff the ability to remand a case **without carrying the whole burden of proving that a jurisdictional exception applies.** This would be contrary to *Breuer* and those circuit courts holding that plaintiffs bear the burden of proof in order to remand under CAFA's jurisdictional exceptions. (Emphasis added.)

"As in all statutory construction cases, [a Court] begin[s] with the language of the statute." *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 450 (2002) "If Congress has conveyed its intent through the use of unambiguous statutory language, [a court goes] no further than the text of the statute to discern its meaning." *In re Calabrese*, 689 F.3d 312, 314-315 (3d Cir. 2012). The language here is pretty clear. The article "an" is, by definition, a "singular article." It means "one." (The Oxford English Dictionary provides that 'an' and 'a' are modern forms of the Old English 'an,' which in Anglian dialects *was* the number 'one.') Thus,

> the Court need not rest its opinion on the decisions of other district courts. The plain language of the statute, which obviously controls, says "an event or occurrence" not "events or occurrences." The use of the singular in the statutory language is important and sufficient.

Dunn v. Endoscopy Ctr. of S. Nev., 2011 WL 5509004 at *2 (D. Nev. Nov. 7, 2011). However, the Court was apparently led astray by what it (reasonably) believed to be legislative history reflecting the intent to exclude cases "involving environmental torts such as a chemical spill" from CAFA jurisdiction. To respond to this perceived intent, the Court semantically reached (with some determination)

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[4] The very phrasing distinguished by Judge Bartle, "discrete happening" has been used in *defining* the word 'event' as singular. "[T]he plain meaning of "event" is a discrete happening that occurs at a specific point in time. (E.g., Random House Webster's College Dict. (1992) p. 463 [event: "something that occurs in a certain place during a particular interval of time"].) Thus, for example, while an explosion or series of related explosions is an "event" or "series of events," 30 years of manufacturing activities cannot properly be so characterized." *London Market Insurers v. Sup. Ct. (Truck Ins. Exchange)*, 146 Cal.App.4th 648, 661 (2007).

to remand a 10-year sequence of various, differing events, at least in part, because they were "environmental," and similar to a legislatively referenced "spill."

Even given that desire to "reach" to satisfy that legislative intent, however, while it might not strain the phrase "an event" to include "a chemical spill" of red mud from BRDA-A that started on a Monday and continued to a Thursday -- some strain begins to exist if that "spill" continues without any interruption for six months. One might even argue the point if, during 12 months, what had been a spill became a continuous release which stopped only intermittently. But here it was not even a spill,[5] but rather various, differing natural dispersions of different types alleged to have occurred over ten years. As even the complaint makes clear (and if any factual record actually existed, it would show) the allegations are of a number of different mechanisms, by different paths and from different causes -- all involving different materials -- and happening gradually during a 10-year period. At some point, even ignoring consideration of the separate, post-2006 structural asbestos-related negligence, the Court overrode the statute's phrasing as to "an event," substituting "arguably related natural occurrences at one location."

Beyond that, even if one concedes that the effects of multiple types of industrial waste over ten years *was* continuous; how does this in any way relate to non-waste asbestos that was built into the facilities, was abated in 2002 and which

[5] How can a "continuing" ten year release be a spill? The word spill itself means something unusual that occurs at a point in time, not a sustained release.

even plaintiffs aver was only "discovered" (their own language, in the complaint) in those plant facilities in 2006? That negligence is explicitly described as occurring *in or after 2006* and isn't related to the other "continuous event" at all.

Finally, in any case, how exactly can this Court parse the facts of record ***de novo*** to decide the relationship between the post-2006 structural asbestos-related negligence and the waste issues when there is absolutely no averment or record?

The Court mistakenly adopted legislative history disfavored by this Court. Next, assuming, *arguendo*, Congress did *not* really intend "an event" to mean ***an*** event, and the phrase *is* ambiguous, how should the phrase be evaluated?

"In the absence of any plain meaning of the statutory language, [a court looks] to the legislative history of the statute to determine whether Congress provided any guidance concerning its intent." *World Fuel Corp. v. Geithner*, 568 F.3d 1345, 1349 (11th Cir. 2009) (quoting *United States v. Fields*, 500 F.3d 1327, 1330 (11th Cir. 2007)). However, any history so adopted must be "reliable." *Knepper v Rite Aid Corp.*, 675 F.3d 249, 259 (3d Cir. 2012).

> "[T]he authoritative statement is the statutory text, not the legislative history.... Extrinsic materials have a role in statutory interpretation only to the extent they shed a **reliable** light on the enacting Legislature's understanding of **otherwise ambiguous terms**." *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568, 125 S. Ct. 2611, 162 L.Ed.2d 502 (2005); *see also Fogleman v. Mercy Hosp., Inc.*, 283 F.3d 561, 569 (3d Cir. 2002). . . .

Here the trial court cited what it (and other courts making a similar, incorrect distinction) *believed* was reliable legislative history of CAFA. Judge Bartle did so

for the proposition that Congress voted on this bill after being advised (in the report) that the Committee did not intend continuing environmental tort-like events or "a chemical spills" to be considered "an event" and should be excluded from federal jurisdiction. Based on this intent, he stated, as the lynchpin of his decision:

> The Senate Judiciary Committee Report on CAFA contained the following relevant analysis:
>
> > The purpose of this exception [for "an event or occurrence"] was to allow cases involving environmental torts such as a chemical spill to remain in state court if both the event and the injuries were truly local, even though there are some out-of-state defendants. By contrast, this exception would not apply to a product liability or insurance case. The sale of a product to different people does not qualify as an event.
>
> S. Rep. 109-14, at 47 (2005).

Memorandum (Ex. B) at 7. But this issue was not briefed or argued to the Trial Court, and such a report is only reliable as to 'intent' because it is written by a bill's submitting committee with regard to its deliberations -- issued (*and therefore placed before the larger political body)* ***prior*** *to the main body's vote*. It reflects views *considered by the voting body at the time of the vote*. 'After-the-fact' statements are not really even committee reports *on a bill* and are of no real value. 2A Norman J. Singer & J.D. Shambie Singer, *Sutherland Statutes and Statutory Construction* § 48:20 (7th ed. 2007) and *Weinberger v. Rossi,* 456 U.S. 25, 35 (1982). That is unusually true here. It is now well understood (and repeatedly judicially recognized) that this Committee Report (109-14) is not *truly* legislative

history at all, but rather was *written well after the vote* in an intentional (some say, cynical) effort by partisan senators to "shape" judicial actions out Congress' sight.

> [E]ven if the Committee Report excerpt were relevant, it was issued ten days **after** CAFA was enacted, and by a small subset of the voting body of the Senate. Such after-the-fact bolstering or "shaping" is a technique of statutory construction this court rejects. This court shares the Ninth Circuit's recognition that this belated Committee Report has limited persuasive value.

Lowery v. Honeywell Int'l, Inc., 460 F. Supp. 2d 1288, 1294 (N.D. Ala. 2006).[6] When this identical history was previously before this Court, it declined to follow the report "issued ten days after CAFA was signed by the President." And in a decision under circumstances very close to what is occurring here, held:

> [R]eliance on CAFA's legislative history is misplaced, for at least two reasons. First, **the actual text of CAFA makes no reference to this . . .legislative history**. . . .The text of CAFA does not explicitly address [the alleged interpretation.] Writing for a unanimous panel, Judge Easterbrook went so far as to state that "none [of the statute's language] is even arguably relevant" to [the alleged interpretation]. *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446, 448 (7th

[6] The history of CAFA (and its mass action provisions in particular) show that the statutory language should be dealt with on its face as there was no real consensus beyond what is in the statute. "[N]egotiations surrounding enactment of this bill tell a typical story of legislative battle among interest groups, Congress, and the President." *Barnhart*, 534 U.S. at 461. The often confusing provisions of CAFA "**reflect a compromise amidst highly interested parties attempting to pull the provisions in different directions**." *Id.* (emphasis added). See also *Coll. of Dental Surgeons of Puerto Rico v. Triple S Mgmt., Inc.*, 2011 WL 414991 at *4 (D.P.R. Feb. 8, 2011) ("This committee report, however, is of questionable value in determining legislative intent. It was published...over a week after CAFA was voted on by the Senate and House, and on the same day it was signed into law....Consequently, the 2d Circuit has noted that this report's "probative value for divining legislative intent is minimal.") (citation omitted).

> Cir.2005).* * * [similarly] the Findings and Purposes say nothing about this. . . .

Morgan v. Gay, 471 F.3d 469, 472-73 (3d Cir. 2006). Indeed, the U.S. Supreme Court warned of this exact problem just prior to *Lowery* and *Morgan* -- in *Exxon Mobil Corp. v. Allapattah Serv. Inc.*, 545 U.S. 546, 568-69 (2005)

> As we have repeatedly held, the authoritative statement is the statutory text, not the legislative history or any other extrinsic material. Extrinsic materials have a role in statutory interpretation only to the extent they shed a reliable light on the enacting Legislature's understanding of otherwise ambiguous terms. Not all extrinsic materials are reliable sources of insight into legislative understandings, however, and legislative history in particular is vulnerable to two serious criticisms. First, legislative history is itself often murky, ambiguous, and contradictory. Judicial investigation of legislative history has a tendency to become, to borrow Judge Leventhal's memorable phrase, an exercise in "'looking over a crowd and picking out your friends.'" See Wald, Some Observations on the Use of Legislative History in the 1981 Supreme Court Term, 68 Iowa L.Rev. 195, 214 (1983). Second, judicial reliance on legislative materials like committee reports, which are not themselves subject to the requirements of Article I, may give unrepresentative committee members—or, **worse yet, unelected staffers and lobbyists—both the power and the incentive to attempt strategic manipulations of legislative history to secure results they were unable to achieve through the statutory text.** (Emphasis added.)

To cut off an entire class and a type of cases from CAFA protection based *solely* on a manipulated 'non-history' is wrong. The facial language says *nothing* of this, nor does any valid legislative history. Moreover, all of the decisions which find Congressional intent to exclude "cases involving environmental torts such as a chemical spill" can all be traced back to this sham.

In fact, the contrary intent is probably true -- for if anything can be gleaned from the admittedly contentious and unhelpful "real" legislative history of CAFA *mass actions*, it would be the exact opposite. In the (heated) discussion that occurred when the bill was being debated on the floor, Senator Lott explicitly distinguished between mass actions and *exactly* the type of continuous tort described by Judge Bartle. Lott defended the *mass action* provision by arguing:

> The mass action section was specifically included to prevent plaintiffs' lawyers from making this end run. . . .Under the mass action provision, defendants will be able to remove these mass actions to Federal court **under the same circumstances in which they will be able to remove class actions**. However, a Federal court would only exercise jurisdiction over those claims meeting the $75,000 minimum threshold. To be clear, in order for a Federal court to take jurisdiction over a mass action, under this bill there must be more than 100 plaintiffs, minimal diversity must exist, and the total amount in controversy must exceed $5 million. In other words, the same safeguards that apply to removal of class actions would apply to mass actions. Mass actions cannot be removed to Federal court if they fall into one of four categories: One, **if all the claims arise out of *an event or occurrence* that happened in the State where the action was filed and that resulted in injuries only in that State or contiguous States. . . .Some of my colleagues will oppose *this* mass actions provision and will want to gut it *by making an effort to confuse mass actions with mass torts*. I realize we are kind of getting into a legalese discussion, but words make a difference when you are considering a bill such as this. I am very concerned that the real motive is to render this provision meaningless. . . .Mass torts and mass actions are not the same**. The phrase ''mass torts'' refers to a situation in which many persons are injured by the same underlying cause, such as a single explosion, a series of events, or exposure to a particular product. In contrast, the phrase ''mass action'' refers to a specific type of lawsuit in which a large number of plaintiffs seek to have all their claims adjudicated in one combined trial. Mass actions are basically disguised class actions.

151 Cong. Rec. S1082 (daily ed. Feb. 8, 2005) (emphasis added). This is *exactly* what the Senator railed against -- a thinly disguised class action, one which CAFA was designed to address but is being circumvented by classification as a mass tort.

Thus, there was *no* pre-vote stated intent to 'exclude' these types of cases from the CAFA exclusion -- nothing discussing exclusion of environmental issues such as spills. The only stated intent was to make exactly this sort of mass actions removable (except for the facial distinctions in the text) "under the same circumstances in which they will be able to remove class actions."

Even if accepted, the unreliable report does not support the trial court. Petitioner would prefer to stick with language of the statute. But if pressed to cherry-pick language, SCRG would far rather note that "Congress" repeatedly stated that it intended the *exceptions* to CAFA to be *narrowly construed*, and CAFA to be broadly construed "with all doubts resolved 'in favor of exercising jurisdiction over the case'." *Evans v. Walter Indus., Inc.*, 449 F.3d 1159, 1163 (11th Cir. 2006) (emphasis added) (quoting S.Rep. 109-14, at 42 (2005)). That would seem more applicable here -- as even the "bad" report indeed discusses ONLY the exclusion of "**a** spill" but says nothing about ten years of different events. To stretch "**a spill**" into such sequence seems strained as well.

> CAFA's language favors federal jurisdiction over class actions and CAFA's legislative history suggests that Congress intended the local controversy exception to be a narrow one, with all doubts resolved "in favor of exercising jurisdiction over the case." S.Rep. No. 109-14 at

> 42, U.S.Code Cong. & Admin. News 3, 40. The Senate Report on CAFA further states that the local controversy exception:
>
> > is a **narrow exception** that was carefully drafted to ensure that it does not become a jurisdictional loophole. . . .

Evans, 449 F.3d at 1163. The Court (based on S. Rep. 109-14) noted:

> The language and structure of CAFA itself indicates that Congress contemplated **broad federal court jurisdiction**. . . . (*id*., at 1164.)

The two decisions relied on by the trial court are also inapposite. The Court below relied solely on a semantic discussion of what the word "event" means in a rather problematic "plain" usage[7], aided only be two inapposite decisions, its own decision in *Abednego*[8] and *Allen v. Monsanto Co.*, 2010 WL 8752873 (N.D. Fla. Feb. 1, 2010). However, in *Abednego*, Judge Bartle found the opposite; that a single event <u>*had*</u> occurred -- a hurricane resulted in the injuries. He obviously felt then that a "single event" finding was necessary. To the extent *Abednego* says anything regarding multiple events, which it doesn't, it is dicta.

To rely on *Allen* creates a whole series of problems. To accept the reasoning of *Allen*, this Court will have to find that § 1332(d)(11)(B)(ii)(I) is not an "exception" to the "mass action" definition of 28 U.S.C §1332(d)(11)(B)(i), but rather something different, something called "**a provision that outlines what is simply not a mass action**" and **thus the burden is on defendant**. For that was

[7] Under the theory that the Civil War is an event, so were the Holy Roman Empire, the 20th Century and everything happening during the "Age of Man." All cases after the Cretaceous age would have to be excepted from being a continuous tort.

[8] *Abednego v. Alcoa et al*., 2011 WL 941569 (D.V.I. Mar. 17, 2011).

the holding in *Allen* -- <u>*not*</u> that the multiple events over many years constituted a single event. The court actually determined defendants didn't sustain **what was their burden to show that this was not the case**.

Allen actually accepts the general view of *Evans* that CAFA exceptions are subject to very narrow interpretation, but reaches its holding not on law related to multiple events -- but rather based on the view that rather than being such an exception (as has been found by this Court and was found by Judge Bartle) "[s]ection 1332(d)(11)(B)(ii) defines what a mass action is not. *Id.*, at *3

> Because it is not an exclusionary provision, it is not subject to the *Evans* holding, and **therefore the burden of proof remains with Defendants** and the presumption favoring remand is still observed.

(Emphasis added). Thus, the *Allen* court went against all other decisions on this point -- deciding the matter on the basis of where the burden of proof rested -- the opposite burden from what Judge Bartle decided here. The *Allen* court, at 9, states that in the absence of evidence, *because of the burden,* defendants had to lose.

> Defendants contend that, because the complaint spans a number of years, it is precluded from being classified as an "event or occurrence." What **Defendants fail to disprove**, however, is that through the passage of time the release of PCB's is in essence a continuous event. ***Though they hardly do so, Defendants could perhaps discuss*** **various aspects of the pollution problem that might have occurred – such as whether an individual company or person failed to notice or attend to a particular situation, failed to deal with new information or some discovery about the leakage, or did not implement a method for dealing with the problem** – and use these to argue that the complaint is comprised of more than one event or occurrence. (Emphasis added.)

As was true in *Allen*, in the instant case there is simply no proof whatsoever as to whether this is a single or multiple events.

2. The District Court erred: (1) as a matter of law in proceeding to find jurisdictional facts on remand where plaintiffs have the burden of proof yet failed to submit any facts in the record to support the court's finding; and, alternatively (2) was such finding clearly erroneous.

The Trial Court noted that plaintiffs have the burden to prove the exception to a preponderance -- for example, "that it is more likely than not"[9] that the post-2006 failure to remediate newly discovered asbestos was "factually" part of a "continuous" event with releases of red mud from a permitted containment area. But what does this really mean? An "exception to CAFA jurisdiction may be likened to 'a defense' to jurisdiction. The. . .party urging this defense, must meet its burden to ***show*** this defense is adequate and appropriate under the circumstances." *Mississippi ex rel. Hood v. Entergy Mississippi, Inc.*, 2012 WL 3704935 at *14 (S.D. Miss. Aug. 25, 2012). The Court should not have proceeded to determining the "continuing" nature of the releases absent facts (or even averments.) If it did proceed, it should have assigned the burden to plaintiffs. Finally, if this is what it believed it was doing -- it erred as to the critical facts.

There is absolutely nothing of record to support the two critical factual "findings" by the court, upon which its decision rests. Apparently relying on averments in the complaint as "proof to a preponderance" the Court found:

[9] *Wiggins v. Daymar Colleges Group, LLC*, 2012 WL 884907 (W.D. Ky. 2012).

> The asbestos is said to have been present in the buildings left by the predecessor owners, and **SCRG has done nothing to contain this toxic material since it became the owner of the property in 2002**

and:

> [a]ccording to the amended complaint, bauxite residue **and friable asbestos have been blowing "continuously" for many years** from SCRG's property on St. Croix onto neighboring land.

Memorandum (Ex. B) at 4 (emphasis added). Neither finding is even remotely true, and more to the point, neither was proved to a preponderance.

The "findings" are also factually clearly erroneous on the face of the pleadings and record. As to the first "finding," that "asbestos is said to have been present in the buildings left by the predecessor owners, and SCRG has done nothing to contain this toxic material since it became the owner of the property in 2002" -- *this is utterly wrong*. As stated in the complaint (and mentioned in *Bennington*) Alcoa undertook contractual post-sale responsibility and remediation. Even the plaintiffs aver that Alcoa was remediating the asbestos. Alcoa's failure wasn't discovered until 2006. Moreover, the asbestos has been removed, which a record would show.

As to the second "finding" that the *continuous* nature of the alleged ***post-2002 failure*** by SCRG to stop post-2006 asbestos release of newly discovered materials was part and parcel of a continuous post-2002 release of industrial wastes -- even plaintiffs (correctly) averred this structural asbestos was not discovered until 2006. See *Bennington* and the Amended Complaint, ¶475.

Under the Court's logic, if an SCRG truck removing drums of an old, buried chemical powder discovered on the property in 2011, rolls over and spills on the ground tomorrow, that would be part of the same continuous "event" because it was there before SCRG bought the property and could be carried offsite by the wind. Like the hypothetical powder, the asbestos had nothing to do with the waste materials in origin, SCRG's knowledge, its response or in any other way. As set forth in the *Notice of Removal* (Ex. 1, fn. 3 at 5) the asbestos-related negligence is unrelated to the process materials in plaintiffs' other claims.

CONCLUSION

There was no factual record to support the Trial Court's two findings that led to the remand order, resulting in clear error, requiring reversal and remand with instructions regarding (1) how to determine if there was 'an event,' (2) the correct burden of proof and (3) whether that burden has been met.

ORAL ARGUMENT IS REQUESTED

Respectfully submitted,

Joel H. Holt, Esq.
Counsel for Petitioner-Defendant SCRG
Law Offices of Joel H. Holt
2132 Company Street, Suite 2
Christiansted, St. Croix VI 00820

Carl J. Hartmann III, Esq.
Counsel for Petitioner-Defendant SCRG
Carl J. Hartmann III, Attorney-at-Law
5000 Estate Coakley Bay, L-6
Christiansted, St. Croix, VI 00820

CERTIFICATE OF BAR MEMBERSHIP

I, Joel H. Holt, Esquire, hereby certify that I have been admitted before the bar of the United States Court of Appeals for the Third Circuit and that I am a member of good standing of the Court.

Joel H. Holt

Joel H. Holt, Esquire

CERTIFICATE OF BAR MEMBERSHIP

I, Carl J. Hartmann III, Esquire, hereby certify that I have been admitted before the bar of the United States Court of Appeals for the Third Circuit and that I am a member of good standing of the Court.

Carl J. Hartmann III, Esquire

CERTIFICATE OF COMPLIANCE

I, Carl J. Hartmann, Esquire, hereby certify that:

1. This Brief complies with type and volume limitation of Fed.R.App.P. 32(a)(7)(B), because:

This Brief is 20 pages exclusive of prefatory materials, signatures and following materials as per Fed.R.App.P. 32(a)(7)(B)(III).

2. This Brief complies with the typeface requirements of Fed.R.App.P. 32(a)(5) and the type style requirements of Fed.R.App.P. 32 (a)(6) because: This Petition has been prepared in a proportionately spaced typeface using MS Word, and the font size is "14 point Times New Roman."

3. Pursuant to L.A.R. 32.0:

(a) All documents are bound at the left margin.

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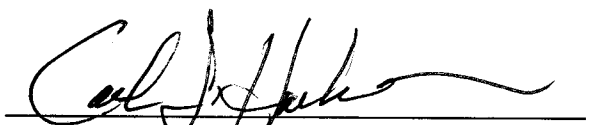
4. The Petition is being filed in paper form, in triplicate, and thus there is no electronic copy of this brief requiring virus scanning.



Carl J. Hartmann III, Esquire
Attorney for Petitioner

CERTIFICATE OF SERVICE

A true and accurate copy of this Petition and the accompanying Addendum of Exhibits was sent by Federal Express overnight courier to:

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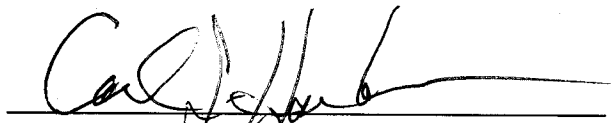
601 Market Street
Philadelphia, PA 19106
Telephone: (215) 597-2995

and hand delivered to Plaintiffs' counsel on the 12th of December, 2012, at the address below:

Lee J. Rohn, Esquire
Counsel for the Respondents-Plaintiffs

LEE J. ROHN AND ASSOCIATES, LLC
1101 King Street
Christiansted, St. Croix. U.S. Virgin Islands 00820
Telephone: (340) 778-8855
Fax: (340) 773-2954



Carl J. Hartmann III, Esq.