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March 20, 2013 ECF and Mail

Marcia M. Waldron, Clerk of the Court
United States Court of Appeals for the Third Circuit
601 Market Street, 21400 United States Courthouse
Philadelphia, PA 19106

Oral Argument Scheduled for April 16, 2013

Re: *Eleanor Abraham, et al. v. St. Croix Renaissance Group,* No. 13-1725
Letter Brief of the Appellant St. Croix Renaissance Group, L.L.L.P.

Dear Ms. Waldron:

Defendant-Appellant St. Croix Renaissance Group ("SCRG") files this letter brief in lieu of standard briefing as per the Court's Order of March 14, 2013.

INTRODUCTION

In 1965, Harvey Alumina constructed a refinery in St. Croix's South Coast Industrial Area for the extraction of alumina from bauxite ore (the "Site"). *Comm'r of the Dep't of Planning & Natural Res. v. Century Aluminum Co.*, Civil Action No. 05–62, 2012 WL 446086, at *2 (D.V.I. Feb. 13, 2012) ("*Century*"). The 1400 acre Site is bordered by an oil refinery, a four-lane highway, the island's landfill, an airport road and the Sea. After 1972, it was operated by Lockheed, then VIALCO and, finally, Alcoa World Alumina and its subsidiary SCA ("Alcoa"). Alcoa owned it from 1995 to 2002, when all operations ceased. In 2002, SCRG purchased the Site from Alcoa as a brownfields renewal project. SCRG never operated the refinery [demolishing and removing the process structures after 2006.] *Id.*

The process waste was a red, dirt-like substance ("red mud"). Until 1972, a high pH form of this red mud was buried below ground in the lined, completely covered "Area B," which is not involved in this action. From 1972 to 2000, a reduced pH form of red mud [at pH 10.5, *not* classified as hazardous] was stacked in [120' high] piles in the 62 acre Bauxite Residue Disposal Area A ("Area A"). *Id.*

In 2011, a federal jury awarded SCRG funds to fully remediate Area A and the surrounding areas, finding that Alcoa hid and misrepresented contamination. *Century*, 2012 WL 446086, at *4 (citing *St. Croix Renaissance Grp. v. Alcoa World Alumina and SCA*, Civ. No. 04–67, 2011 WL 2160910, at *2-4 (D.V.I. May 31, 2011) (*"SCRG v. Alcoa"*). Because of "hidden misrepresentations and the involvement of top officials" at Alcoa, the court found the fraud was "'outrageous." *SCRG v. Alcoa*, 2011 WL 2160910, at *11. In 2012, SCRG's contribution of the award led to a CERCLA consent decree with the government and Alcoa, *Century*, 2012 WL 446086, at *12-13, under which Alcoa is remediating and covering Area A and its surrounds. *Id*. at *5-7 (*see also* Decree, Feb. 16, 2012, ECF No. 1076).

In November 2011, just prior to the February 2012 approval of that detailed, highly supervised consent decree, these 459 plaintiffs filed the instant action in V.I. Superior Court. They claimed damages from red mud and associated dust (mixed with constituent process chemicals and coal dust) from Area A and its surrounds, as well as structural asbestos from refinery buildings. (Ex. C, JA1 p. 10.)

The amended complaint (Ex. D, JA2 pp. 21-59) alleges injuries from three different types of wrongs by SCRG:

1. Failure, during SCRG's non-operational ownership (2002-present) to prevent intermittent intrusions of red mud mixed with process chemicals and coal dust (left by prior owners) which *plaintiffs allege* have occurred as a result of a number of different causes and at different times *over 30+ years*; [1]
2. Failure, after 2006, to abate newly discovered non-process, non-waste structural asbestos; and
3. Failure to warn plaintiffs of the above conditions.

STATEMENT OF THE CASE

The District Court held that SCRG proved all necessary criteria for finding a CAFA[2] 'mass action' pursuant to 28 U.S.C. § 1332(d)(11)(B)(i):[3] (a) there are more than 100 plaintiffs whose cases involve common questions of law or fact to be tried jointly, (b) as a Massachusetts citizen SCRG meets the minimum diversity requirement and (c) plaintiffs conceded the jurisdictional amounts. (Ex. C, JA1 pp. 11-12.) Judge Bartle also noted that notwithstanding these findings, plaintiffs

[1] At ¶¶ 461-472 and 477, the complaint avers that SCRG's failure to "take proper measures" has resulted in just the most recent of a long series of such intermittent intrusions of these materials *plaintiffs aver have been continuing "[f]rom the beginning of the alumina refinery's operations."* (Ex. D, JA2 pp. 48-52.)

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

[3] (11)(B)(i) states "[a]s used in subparagraph (A), the term 'mass action' means any civil action (except a civil action within the scope of § 1711 (2)) in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact, except that jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under subsection (a)."

asserted that the CAFA *mass action* provisions did not apply here due to the exclusionary language of section 1332(d)(11)(B)(ii)(I):

> **(ii)** . . ."mass action" *shall not include* any civil action in which—
> **(I)** all of the claims in the action arise from *an event or occurrence* in the State in which the action was filed. . . .

Id. at 12 (emphasis added). Next, the Court defined the central issue:

> Plaintiffs maintain that all the claims arise from "an event or occurrence" in the Virgin Islands and that all injuries resulted there. SCRG counters. . .there was more than one event or occurrence and that such events or occurrences took place over a number of years.
>
> * * * *
>
> The question presented is whether the allegations as pleaded concerning the continual release of red mud, red dust, and coal dust as well as the friable asbestos over a period of years fit within the meaning of "an event or occurrence" as set forth in §1332(d)(11)(B)(ii)(I).

Id. at 13. Relying on legislative intent gleaned from S. Rep. 109-14 (2005), the District Court then defined the phrase "an event" *very* broadly. (It also made two factual findings which are addressed separately, in Issue II below.)

The first distinction drawn by the Court in attempting to discern Congress' intent was that this case "involves an environmental tort," and therefore should be examined in a different light than one presenting "non-environmental occurrences."

> [L]ike Abednego and Allen, [this case] *involves an environmental tort.* It contrasts with Gastaldi and Aburto which alleged a series of separate and independent *non-environmental occurrences.* . . .

Id. at 16 (emphasis added). Second, but in that same vein, the District Court seemed to suggest that even if this action presents what might otherwise be *narrowly* interpreted as 'multiple events,' perhaps the definition of the phrase "an

event" in the context of mass actions is broadened at times. The gist seems to be to determine if a "localized" environmental tort is averred and, if so, expand "event."

> A very narrow interpretation of the word event as advocated by SCRG would undermine the intent of Congress to allow the state or territorial courts to adjudicate claims involving truly localized environmental torts with localized injuries. We see no reason to distinguish between a discrete happening, such as a chemical spill causing immediate environmental damage, and one of a continuing nature. . .[as] here.

Id. at 17. It then said the "Senate Judiciary Committee Report on CAFA contain[s] the following relevant analysis." (Ex. C, JA1 p. 16) (citing S. Rep. 109-14 (2005)).

> 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.

(Emphasis added.) Based on this, the Court defined "an event" to include non-discrete happenings or an aggregation of minimally-related environmental torts at a facility[4] akin to the *Restatement (2d) of Torts* § 161 concept of a "continuing tort."

> *The word event in our view is not always confined to a discrete happening that occurs over a short time span such as a fire, explosion, hurricane, or chemical spill.* For example, one can speak of the Civil War as a defining event in American history, even though it took place over a four-year period and involved many battles. We think that *an event, as used in CAFA, encompasses a continuing tort which results in a regular or continuous release of toxic or hazardous chemicals, as allegedly is occurring here, and where there is no superseding occurrence or significant interruption that breaks the chain of causation.*

Id. at 16-17 (emphasis added) (footnote omitted).

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[4] This 'special' type of event can apparently involve any number of transports of materials, which while discrete and different, are 'regular'—even over decades.

ISSUES

I. As a matter of first impression in this Circuit, was the District Court's statutory analysis of the phrase "an event" in CAFA's *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?

II. Did the Court err: (a) in finding two facts relied on as to jurisdiction where there was no support of record for those findings; or, alternatively (b) were such findings clearly erroneous based on plaintiffs' own facts?

JURISDICTION

The District Court issued a CAFA remand order on December 10, 2012. (Ex. B, JA1 p. 8.) Pursuant to a 28 U.S.C. § 1453(c) petition by Appellant, on March 14, 2013, this Court granted leave to appeal that Order on an expedited basis. (Ex. A, JA1 pp. 3-4.) Subject matter jurisdiction exists as to the amended complaint (Ex. D, JA2 pp. 21-59) pursuant to 28 U.S.C. §1332(d). Appellate jurisdiction is provided by 28 U.S.C. § 1453(c) and 28 U.S.C. § 1332(d)(11)(A).

STANDARD OF REVIEW

With regard to the definition of the phrase "an event" in a CAFA mass action, the Court reviews issues of 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), a CAFA remand order based on such an interpretation is reviewed *de novo*. *Admiral Ins. Co. v. Abshire*, 574 F.3d 267, 272 (5th Cir. 2009) *cert. denied*, 130 S. Ct. 756. As to the facts discussed in Issue II, such arguments are reviewed under the 'clearly erroneous standard.' *In re Diet Drugs (Phen/Fen) Prod. Liab. Litig.*, 297 F. App'x 181, 183, 2008 WL 4711055 (3d Cir. 2008).

FACTS

The first type of injury described in the complaint arises from purported dispersions of various materials: bauxite residue (red mud) mixed with coal dust, spent process chemicals and sand. This allegedly occurred on an intermittent basis over the 30+ years since outdoor storage started at Area A in 1972. (Ex. D, ¶¶461-472, JA2 pp. 48-51.) Thus, plaintiffs aver that during those 30+ years, events such as hurricanes, major rain storms, bulldozers working the Area A hills (prior to SCRG's ownership) and the like, resulted in these materials reaching their properties by various mechanisms. SCRG is sued for its share of that—the post-purchase portion of those 30+ years—after June 14, 2002. *Id*. (Just the hurricanes and storms are at issue here, as there is no description of any post-purchase activity by SCRG: no deposition in, or any alteration of the storage area. The claim is negligent failure to contain. Nor does the complaint assert *a* particular spill or any other discrete event. It does not even aver this was one *continuous* event.)

The second, unrelated type of injury set forth in the complaint involves structural asbestos, described as follows (Ex. D, JA2 p. 52) (emphasis added):

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

The description of the asbestos and its 2006 discovery by DPNR and SCRG comes from facts discussed in a reported decision, *Bennington Foods, L.L.C. v. St. Croix Renaissance Group*, Civ. No. 06-154, 2010 WL 1608483 (D.V.I. April 20, 2010) (the 2006 DPNR discovery described asbestos used in the construction of the plant

facilities themselves which Alcoa failed to fully abate post-sale—not industrial waste products). That court noted, at *2:

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

What is important here, however, is that the complaint avers at ¶475 that four years after SCRG purchased the property, it was negligent in failing to act following the discovery of Alcoa's failure.[5]

In its notice of removal, SCRG argued that the complaint does not allege or provide facts as to any single or even truly continuous event. (Ex. H, fn. 3, 5 JA2 p. 140.) With regard to SCRG, plaintiffs describe a number of discrete, *natural* mechanisms and different types of occurrences—particularly with regard to residue and asbestos. However, in their motion to remand (Ex. E, JA2 pp. 61-87), plaintiffs did not attempt to show that their claims were based on a continuous spill-like event—or how the post-2006 asbestos-related negligence was linked to the different, alleged *process waste* 'event.' *Id*. at 62-69. In its opposition (Ex. F, JA2 p. 95), SCRG raised this issue once more. But in their reply (Ex. G, JA2 pp. 117-134), plaintiffs again chose not to submit affidavits or put any facts forward.

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[5] That 'discovery' and a potential exposure are all that is averred. No actual diagnosed cases of asbestosis or any other actual effects or conditions (or any medical treatments) are alleged. The multiplicity of events and sheer scope of the hypothetical dispersion of asbestos over 50 square miles can be seen from the map of the locations where plaintiffs lived—submitted below as Exhibit A to Def.'s Reply to Pls.' Opp'n to SCRG's Mot. for More Definite Statement and for Severance, Apr. 16, 2012, ECF No. 12. (Here, Ex. I, JA2 p. 147.)

ARGUMENT

I. As a matter of first impression in this Circuit, the District Court's statutory analysis of the phrase "an event" in CAFA's *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.

In the District Court's memorandum (Ex. C, JA1 p. 17) (emphasis added) (footnote omitted) "an event" in § 1332(d)(11)(B)(ii)(I)[6] is defined as:

> *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*[7]. . .and one of a continuing nature" [such as is described in Restatement (Second) of Torts § 161 cmt. b (1965).]

The plain language of the statute contradicts the District Court's interpretation. The U.S. Supreme Court has observed that "[a]s 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). In a decision last year, this

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[6] That section, 28 U.S.C. § 1332(d)(11)(B)(ii)(I) (emphasis added), provides:

> **(ii)** As used in subparagraph (A), the term "mass action" shall not include any civil action in which--
>
> > **(I)** all of the claims in the action arise from **an event** or occurrence in the State in which the action was filed. . . .

[7] The very phrase distinguished by the Court, "discrete happening," has been used in *defining* the word 'event' as being singular. *London Mkt. Insurers v. Sup. Ct. (Truck Ins. Exch.),* 146 Cal.JA4th 648, 661 (2007):

> [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.

Court held "[i]f 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 (3d Cir. 2012). The language is clear. The article "an" is, by definition, a *singular* article. It means "one."

> 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., No. 2:11–cv–560, 2011 WL 5509004, at *2 (D.Nev. Nov. 7, 2011). In another 2012 decision, the District Court of Hawaii dealt with a very similar environmental situation under this same CAFA mass action sub-section, holding "[p]laintiffs' complaint alleges that [defendant] failed to prevent soil erosion and routinely allowed pesticides and dust to drift into the neighboring community for over a decade. These actions do not constitute a single event." *Aana v. Pioneer Hi-Bred Int'l, Inc.*, No. CV 12–231, 2012 WL 3542503, at *2 (D.Haw. July 24, 2012) (citing *Nevada v. Bank of America Corp.*, 672 F.3d 661, 668 (9th Cir. 2012)); *see also Lafalier v. Cinnabar Serv. Co., Inc.*, No. 10–CV–05, 2010 WL 1486900, at *4 (N.D.Okla. Apr. 13, 2010) and *Galdasti v. Sunvest Communities USA, LLC*, 256 F.R.D. 673, 677 (S.D.Fla. 2009) ("applies to 'an event or occurrence' in the singular.") Thus, the language is plain, and when CAFA's language is plain this Court "must 'enforce it according to its terms' as long as the 'result is not absurd'." *Abrahamsen v. ConocoPhillips, Co.*, No.12-1199, 2012 WL 5359530, at *2 (3d Cir. Nov. 1, 2012) (citation omitted).

The District Court stated that it applied legislative history disfavored by this Court. Assuming, *arguendo*, Congress did *not* really intend the phrase "an event" to actually mean *an* event, how should it 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). But any such history must be "reliable." *Knepper v. Rite Aid Corp.*, 675 F.3d 249, 259 (3d Cir. 2012).

Absent briefing or argument, the District Court reasonably embraced what appeared to be (to it and other courts making a similar, incorrect distinction) the *reliable* legislative history of CAFA. Judge Bartle did so assuming that Congress voted on this bill after being advised that the Senate Committee intended continuing, environmental tort-like events or chemical spills to be considered "an event," and therefore excluded from federal jurisdiction. (Ex. C, JA1 p. 16.) But such a report would only be reliable as to Congressional intent if written by the submitting committee *and placed before Congress prior to the full vote*. 'After-the-fact' statements are not committee reports and are of little 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 specific Senate Committee Report (109-14) is not

truly legislative history at all, but rather was distributed *after passage* in an apparent effort to "shape" judicial actions by deals done out of Congress' sight.

> [I]t 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).[8] For the same reason, this Court has previously determined reliance on the report would be "misplaced." *Morgan v. Gay*, 471 F.3d 469, 472-73 (3d Cir. 2006). Indeed, CAFA's scant history beyond the floor debates consists of this one Senate *non-report* issued after CAFA's enactment and a sponsors' statement[9] from the House of Representatives.[10] It would be fair to say that a number of factions

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[8] The histories of CAFA (and its mass action provision 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. *See, e.g., Coll. of Dental Surgeons of Puerto Rico v. Triple S Mgmt., Inc.*, Civil No. 09–1209, 2011 WL 414991, at *4 (D.P.R. Feb. 8, 2011) (citation omitted) ("This committee report, however, is of questionable value. . . .the Second Circuit has noted that this report's 'probative value for divining legislative intent is minimal'.")

[9] House Sponsors Statement, 151 Cong. Rec. H727-29 (daily ed. Feb. 17, 2005) (The House debated and voted on CAFA in less than four hours.)

[10] *See e.g., Blockbuster, Inc. v. Galeno,* 472 F.3d 53, 58 (2d Cir. 2006) (rejecting reliance on this report; noting it was issued ten days after enactment). *But cf. Lowery v. Ala. Power Co.*, 483 F.3d 1184, 1206 n. 50 (11th Cir. 2007) (incorrectly reading the "Committee Reports" notes in the Congressional Record (S978, February 3, 2005) as to the Committee's reporting out *of the S.5 bill* on February 3, 2005, to mean that the Committee's *Report* regarding S.5 was sent to the Senate then—despite the fact that the report was not distributed (without signature dates) until February 28th. The Senate Report itself confirms, at 3, that the mark-up of S.5 was completed and reported out on February 3rd, not the report.)

wanted *very* different things from the bill; thus its history is hardly a basis for ignoring the clear statutory language. The U.S. Supreme Court warned of this very problem just prior to *Lowery* and *Morgan*—in *Exxon Mobil Corp. v. Allapattah Serv. Inc.*, 545 U.S. 546, 568 (2005) (emphasis added).

> 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. . . .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.***

The statute says *nothing* of limiting CAFA where there are different but "regular" discrete events at a site over many years—nor does any *reliable* history. Moreover, there is other statutory language in (d)(11)(B)(ii)(I) that already defines what is meant by a "localized" controversy: "in the State in which the action was filed, and that allegedly resulted in injuries in that State or in States contiguous to that State." "An event" is a separate point. Thus, it is error to apply some special scrutiny or standard in also defining an event in "cases involving environmental torts such as a chemical spill" without any valid legislative basis. All decisions which find such intent to exclude "cases involving environmental torts" can be traced to this *post facto, post-vote* scam; one that is allowing a narrow range of cases to stay mired in local courts despite an intent to provide a federal forum.

Clearly this favored a segment of the *class action bar's* interests. It is impossible to know what bargains got struck to produce late 'trades' for wording in that report.

Similarly, as discussed in detail in SCRG's Motion to Strike (Exhibit J, JA2 pp. 149-163), plaintiffs try to label this a "purely home state controversy" based on the 'local' subject matter of the dispute. Having done so, they then contend such a classification should affect the definition of "an event" to preclude classification as a mass action. It is critical to note that in somewhat the same way the District Court did, plaintiffs argue, *sub voce*, that the "mass actions" provisions of CAFA are subject to an additional, *hidden requirement.* Even if there are what would otherwise be seen as multiple events, when courts believe that cases might be what plaintiffs label "purely home state controvers[ies]," they contend the phrase "an event" should be read to avoid mass actions. For the reasons discussed in that motion, which SCRG incorporates, this argument is equally flawed.[11]

In fact, the contrary legislative 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 both the discussions that

[11] As noted in that motion, "this ignores the first half of sub-paragraph (B)(ii)(I), other of the 'findings' from when the statute was enacted and the other half of the legislative history. . . . this exception for local actions was intentionally and explicitly defined down to exclude just cases where there was '*an* event' as a counter-balance—because half of the proponents wanted to protect one thing and the other half wanted to protect another. To give extra meaning to 'local' but to avoid its limitation to 'an event' is to do exactly what Senator Lott warned would happen – 'gut' the other side of the protection." *Id*. at 7-12.

occurred when the bill was being debated, and in individual comments on the floor, the need to stop "thinly disguised class actions" was discussed in this context. For example, Senator Lott distinguished between mass actions and *exactly* the type of continuing "mass tort by only marginally related events" found by Judge Bartle.

> 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.*

151 Cong. Rec. S1082 (daily ed. Feb. 8, 2005) (emphasis added). This case presents what the Senator (and commentators from both chambers) railed against—a mass action. This is a thinly disguised class action which CAFA was designed to address but is being circumvented by classification as a mass tort with what the Court refers to as "regular" occurrences. (Judge Bartle uses the terms "regular" and "continuous," but what he actually describes are events that are '*similar*' and only

remotely related; truly 'discrete' in both time and cause.) Thus, there was *no* stated intent to exclude such cases from CAFA protections prior to its passage.[12]

Even if accepted, the unreliable Senate Report does not support the District Court. Useful or not, the House and Senate comments both make it clear that (d)(11)(B)(ii) provisions are *exceptions* to CAFA—to be *narrowly construed*. "[A]ll doubts [are to be] resolved 'in favor of exercising jurisdiction over the case'." *Evans v. Walter Indus., Inc.*, 449 F.3d 1159, 1163-64 (11th Cir. 2006) ("Congress contemplated *broad federal court jurisdiction*. . . .") With that in mind, it is noteworthy that even the Senate Report, at worst, discusses the exclusion of "a spill," nothing about how such a spill might include 30+ years of events.

The decisions relied on by the District Court are also inapposite. The Court relied solely on a discussion of what the phrase "an event" means in strained "plain" language[13], aided by two inapposite decisions; its own in *Abednego v. Alcoa*[14] and one by the Northern District of Florida in *Allen v. Monsanto Co.*[15]

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[12] The only discussion of substituting the sort of regular, arguably similar events or "continuous tort" language referenced by the Court below was in the negative—*rejecting* any such attempt to turn such a concept into a CAFA-limiting mas tort 'exception to the exception' subsuming CAFA's application to mass actions.

[13] Under the theory that the Civil War was "an event," so were the Roman Empire, the 20th Century and the "Age of Man." This would truly limit CAFA's application in mass actions. Marginally related events that occurred in a given location after the Cretaceous Era would have to be excepted from CAFA mass actions as being this sort of continuous tort—as they took place during the one 'event' called the Age of Man. A name just doesn't turn many events into one event.

[14] Civ. No. 1:10-cv-09, 2011 WL 941569 (D.V.I. Mar. 17, 2011).

[15] Civ. No. 3:09-cv-471, 2010 WL 8752873 (N.D. Fla. Feb. 1, 2010).

First, in *Abednego*, Judge Bartle found the *exact opposite*; that a *single* event *had* occurred—one hurricane resulted in the injuries. Moreover, he stated that the *single event* finding was dispositive. In fact, *Abednego* has been cited at length as authority for this point. *Armstead v. Multi-Chem Group,* Civ. No. 6:11–2136, 2012 WL 1866862, at *8-9 (W.D.La., May 21, 2012).

> Accordingly, courts have consistently construed the "event or occurrence" language to apply only in cases involving a single event or occurrence in the forum state. . . . *Abednego v. Alcoa, Inc*. . . .

Id. at 8 (citing *Lafalier* at *4 (*citing Galdasti at* 256 F.R.D. 676)).

Second, to rely on *Allen* (which has <u>never</u> *been followed or even referred to by any other court*) creates a series of problems. *Allen* actually accepts the view of *Evans*, but departs from both other courts (and Judge Bartle here) by finding "[s]ection 1332(d)(11)(B)(ii) is *not an exclusion or exception* to the meaning of "mass actions," but rather, defines what a mass action "is not." *Allen*, 2010 WL 8752873, at *3 (emphasis added). Thus, the *Allen* court went against Congressional comments and all decisions regarding "mass actions" on this issue, deciding that *even in the absence of evidence to the contrary*, defendants have to submit proof at this stage to demonstrate that "the complaint is comprised of more than one event or occurrence" to meet the mass action criteria. *Id*. at *9.

> What *Defendants fail to disprove*, however, is that through the passage of time the release of PCB's is in essence a continuous event…*Defendants could perhaps discuss various aspects of the pollution problem that might have occurred.*..and use these to argue that the complaint is comprised of more than one event or occurrence.

Id. (emphasis added). However, as the District Court here and other courts in this Circuit[16] have held, satisfaction of the three elements or 'criteria' of 28 U.S.C. §1332(d)(11)(B)(i) allows classification of a case as a mass action.[17] *See, e.g.*, *Lewis v. Ford Motor Co.*, 610 F. Supp. 2d 476, 480 (W.D. Pa. 2009) (emphasis added) (citations omitted):

> [T]he Third Circuit has determined that, as in ordinary removal cases, the burden of proof. . .is on the party seeking removal. This includes the burden of establishing that *all <u>three</u> criteria of CAFA are met*.

Once those three criteria were established, in the absence of evidence to the contrary—and where the record did not demonstrate otherwise—the Court should have proceeded no further. A finding on the burden (and who might or might not have borne it under facts lacking any support of record) was not necessary.

---

[16] Other Circuits have found this, but numbered slightly differently. *See Thomas v. Bank of Am. Corp.*, 570 F.3d 1280, 1282 (11th Cir. 2009) (same, but four criteria.)

[17] It is not just CAFA, but rather longstanding §1441(a) doctrine which places the burden on plaintiffs to show an exclusionary provision prevents remand. *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)); *see also Wiggins v. Daymar Colleges Group*, No. 5:11–CV–36–R, 2012 WL 884907 (W.D. Ky. Mar. 14, 2012).

When the court in *Lao v. Wickes Furniture Co., Inc.*, 455 F. Supp. 2d 1045, 1060 (C.D. Cal. 2006) came to the opposite conclusion while considering §1332(d)(4)(B)—the Ninth Circuit overruled in *Serrano v. 180 Connect, Inc.* 478 F.3d 1018, 1023 (9th Cir. 2007) ("That the provisions. . .are not labeled as "exceptions" does not prevent them from operating as such. . . .We thus hold that the provisions set forth in §§ 1332(d)(3) and (4) are not part of the prima facie case for establishing minimal diversity jurisdiction under CAFA, but, instead, are exceptions to jurisdiction.")

However, identical characterizations of the (d)(11)(B)(ii) provisions as "exceptions" (and that they are to be strictly construed) are made in both in the House sponsors' comments (Cong. Rec. H729, February 17, 2005) and the Senate Report (at 47) ("For these reasons, it is the Committee's intent that the exceptions [giving (B)(ii)(I) as the first example] to this provision be interpreted strictly by federal courts.") *See also Mississippi ex rel. Hood v. AU Optronics Corp.*, 876 F. Supp. 2d 758, 766-67, (S.D. Miss. 2012) (emphasis added) *rev'd and remanded on other grounds*, 701 F.3d 796 (5th Cir. 2012).

> Once the removing party meets its burden to establish federal jurisdiction, the party seeking remand can attempt to prove one of CAFA's exceptions to jurisdiction. *Hollinger*, 654 F.3d at 571. One of those exceptions states that *"the term 'mass action' shall not include* any civil action in which . . .all of the claims in the action are asserted on behalf of the general public. . . .28 U.S.C. § 1332(d)(11)(B)(ii) and (d)(11)(B)(ii)(III).

II. <u>The Court erred: (a) in finding two facts relied on as to jurisdiction where there was no support of record for those findings; or, alternatively (b) such findings were clearly erroneous based on plaintiffs' own facts.</u>

The Court should have assigned the burden to plaintiffs in reality and not simply stated it was doing so. Instead, it accepted incorrect averments from the complaint as facts. Admitting that it was relying on the complaint as its source, the Court found:

> 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. . . .

(Ex. C, JA1 p. 13) (emphasis added). Neither finding is even remotely true, and more to the point, neither is in *any* way supported by the record.

As described in the complaint (and mentioned in *Bennington*) SCRG had not "done nothing"—quite the opposite. As to the asbestos, it contracted for a total, certified abatement. With regard to the residue, while SCRG was denied the ability to do anything in Area A (pending the government's actions which also involved Alcoa's maneuvering) SCRG successfully litigated and obtained a global solution that had eluded the USVI and federal governments for two decades.

As to the second 'finding' that the alleged *post-2002 failure* by SCRG to stop the release of newly discovered structural asbestos was part of a continuous post-2002 release of industrial wastes—even plaintiffs aver it was not discovered until 2006 (and a real record would show what SCRG *did* fully abate and when.)

CONCLUSION

There was no record to support the Court's two findings—requiring reversal and remand with instructions regarding the correct definition of "an event"—one which is singular and, therefore, does not include 30 years of occurrences at a site.

Respectfully Submitted:

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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of March, 2013, true and correct copies of the foregoing Letter Brief of Appellant St. Croix Renaissance Group, L.L.L.P. and the Joint Appendix were filed with the Clerk of the Court using CM/ECF.

I also certify that the original and nine paper copies of the Letter Brief of Appellant with Volume 1 of the Joint Appendix attached, and four paper copies of Joint Appendix Volume 2, were sent by Overnight Federal Express, addressed to:

MARCIA M. WALDRON, CLERK

OFFICE OF THE CLERK
601 Market Street, 21400 U.S. Courthouse
Philadelphia, PA 19106

with a copy of each hand delivered to Plaintiffs' counsel the same day, at the following address:

LEE J. ROHN, ESQ.
Counsel for the Appellees-Plaintiffs

LEE J. ROHN AND ASSOCIATES, LLC
1101 King Street
Christiansted, St. Croix VI 00820

Carl J. Hartmann III

-ADDENDUM-
JOINT APPENDIX

Volume 1 *(Appended to Appellant's Brief)*

Volume 2 *(Filed Separately)*

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Case No. 13-1725

St. Croix Renaissance Group, LLLP,

Appellant,

v.

Eleanor Abraham, *et al.*,

Appellees.

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

JOINT APPENDIX
VOLUME 1 of 2

EXHIBIT A

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

January 10, 2013
DCO-038

No. 12-8114

ELEANOR ABRAHAM, et al.

v.

ST CROIX RENAISSANCE GROUP, L.L.L.P.,
Petitioner

(D.V.I. No. 1-12-cv-00011)

Present: AMBRO, SMITH, and CHAGARES, Circuit Judges

1. Petition by Petitioner for Leave to Appeal pursuant to 28 U.S.C. Section 1453(c) Class Action Fairness Act Review of Remand Orders.

2. Response by Respondent in Opposition to Petition for De Novo Review of a CAFA Remand Order Pursuant to 28 U.S.C. Section 1453(c)(1).

3. Motion by Petitioner to Strike Portions of Respondent's Response in Opposition or in the alternative for Leave to File a Cross-Answer in Opposition to Respondent's De Facto Cross-Petition for Review of a CAFA Remand Order Pursuant to 28 U.S.C. Section 1453(c)(1).

4. Response by Respondent in Opposition to Motion to Strike or in the alternative for Leave to File a Cross-Answer in Opposition Regarding Respondent's De Facto Cross-Petition for Review of a CAFA Remand Order Pursuant to 28 U.S.C. Section 1453(c)(1).

5. Reply by Petitioner to Respondent's Opposition to Motion to Strike or in the alternative for Leave to File a Cross-Answer in Opposition to Respondent's De Facto Cross-Petition for Review of a CAFA Remand Order pursuant to 28 U.S.C. Section 1453(c)(1).

Respectfully,
Clerk/dwb

ORDER

The foregoing Petition is hereby GRANTED. The motion to strike is DENIED.

This order granting the petition for leave to appeal will serve as the notice of appeal and will be forwarded to the district court. Petitioner/Appellant must pay the $455.00 docketing and filing fee in the district court within two days of the date of this order. Petitioner/Appellant is directed to notify the Clerk's Office, in writing, that the fee has been paid in accordance with this order. Petitioner/Appellant may file the notification electronically in No. 12-8114 using the Letter to the Court event in the Court's electronic case filing (ECF) system. Upon payment, this miscellaneous proceeding will be closed and a new appeal will be opened on the general docket. All filing discussed below must be done electronically in the new appeal.

The appeal will be EXPEDITED. The parties are hereby ordered to file informal, double-spaced letter briefs on the following schedule:

1. Appellant's Letter Brief and Joint Appendix to be filed and served by March 21, 2013;

2. Appellees' Letter Brief to be filed and served by March 28, 2013; and

3. Appellant's Reply Brief, if any, to be filed and served by April 2, 2013.

Opening briefs must not exceed 20 pages and the reply brief must not exceed 10 pages. The appeal will be calendared before this Panel for oral argument on April 16, 2013 at 3:00 p.m. The Clerk is directed to file a copy of this order in the new appeal.

By the Court,

/s/ D. Brooks Smith
Circuit Judge

Dated: March 14, 2013
DWB/cc:
Lee J. Rohn, Esq.
Carl J. Hartmann, III, Esq.
Joel H. Holt, Esq.

A True Copy:
Marcia M. Waldron
Marcia M. Waldron, Clerk

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

January 10, 2013
DCO-038

No. 12-8114

ELEANOR ABRAHAM, et al.

v.

ST CROIX RENAISSANCE GROUP, L.L.L.P.,
Petitioner

(D.V.I. No. 1-12-cv-00011)

Present: AMBRO, SMITH, and CHAGARES, Circuit Judges

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3. Motion by Petitioner to Strike Portions of Respondent's Response in Opposition or in the alternative for Leave to File a Cross-Answer in Opposition to Respondent's De Facto Cross-Petition for Review of a CAFA Remand Order Pursuant to 28 U.S.C. Section 1453(c)(1).

4. Response by Respondent in Opposition to Motion to Strike or in the alternative for Leave to File a Cross-Answer in Opposition Regarding Respondent's De Facto Cross-Petition for Review of a CAFA Remand Order Pursuant to 28 U.S.C. Section 1453(c)(1).

5. Reply by Petitioner to Respondent's Opposition to Motion to Strike or in the alternative for Leave to File a Cross-Answer in Opposition to Respondent's De Facto Cross-Petition for Review of a CAFA Remand Order pursuant to 28 U.S.C. Section 1453(c)(1).

Respectfully,
Clerk/dwb

ORDER

The foregoing Petition is hereby GRANTED. The motion to strike is DENIED.

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The appeal will be EXPEDITED. The parties are hereby ordered to file informal, double-spaced letter briefs on the following schedule:

1. Appellant's Letter Brief and Joint Appendix to be filed and served by March 21, 2013;

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3. Appellant's Reply Brief, if any, to be filed and served by April 2, 2013.

Opening briefs must not exceed 20 pages and the reply brief must not exceed 10 pages. The appeal will be calendared before this Panel for oral argument on April 16, 2013 at 3:00 p.m. The Clerk is directed to file a copy of this order in the new appeal.

By the Court,

/s/ D. Brooks Smith
Circuit Judge

Dated: March 14, 2013
DWB/cc:

Lee J. Rohn, Esq.
Carl J. Hartmann, III, Esq.
Joel H. Holt, Esq.

A True Copy:

Marcia M. Waldron

Marcia M. Waldron, Clerk

EXHIBIT B

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

ELEANOR ABRAHAM, et al.	:	CIVIL ACTION
v.	:	
ST. CROIX RENAISSANCE GROUP, L.L.L.P.	:	NO. 12-11

ORDER

AND NOW, this 7th day of December, 2012, for the reasons set forth in the accompanying Memorandum, it is hereby ORDERED that the motion of plaintiffs to remand the action to the Superior Court of the Virgin Islands (Doc. #36) is GRANTED.

BY THE COURT:

/s/ Harvey Bartle III
HARVEY BARTLE III J.
SITTING BY DESIGNATION

EXHIBIT C

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

ELEANOR ABRAHAM, et al.	:	CIVIL ACTION
v.	:	
ST. CROIX RENAISSANCE GROUP, L.L.L.P.	:	NO. 12-11

MEMORANDUM

Bartle, J. December 7, 2012

Four hundred fifty-nine plaintiffs originally filed this action in the Superior Court of the Virgin Islands against defendant St. Croix Renaissance Group, L.L.L.P. ("SCRG"). Plaintiffs claim personal injury and property damage arising out of the alleged emission of hazardous materials including bauxite residue (red mud and red dust), coal dust, and friable asbestos from SCRG's property on St. Croix into the adjoining neighborhoods over a period of years. They allege that SCRG has maintained an abnormally dangerous condition, that its conduct has constituted a public nuisance, a private nuisance, and negligence, and that its actions have resulted in intentional and negligent infliction of emotional distress. Compensatory and punitive damages as well as injunctive relief are sought.

SCRG timely removed the action to this court on the ground that this is a mass action for which diversity subject matter jurisdiction exists under the Class Action Fairness Act

("CAFA"), 42 U.S.C. § 1332(d). Pending before the court is the plaintiffs' motion to remand.

Preliminarily, we note that under CAFA, the requirement of complete diversity has been relaxed. Only one plaintiff and one defendant must be of diverse citizenship. 28 U.S.C. § 1332(d)(2). In addition, for purposes of CAFA, the citizenship of an unincorporated association is determined like that of a corporation. We need only consider the state in which the unincorporated association was organized and where it has its principal place of business. 28 U.S.C. § 1332(d)(10). We do not equate its citizenship, for present purposes, with the citizenship of each of its partners or members. See Carden v. Arkoma Assoc., 494 U.S. 185 (1990); Zambelli Fireworks Mfg. Co. v. Wood, 592 F.2d 412 (3d Cir. 2010); Swiger v. Allegheny Energy, Inc., 540 F.3d 179 (3d Cir. 2008).

SCRG is an unincorporated association. It is a limited liability limited partnership organized under the laws of the state of Delaware with its principal place of business in the Commonwealth of Massachusetts under the "nerve center" test. See Hertz Corp. v. Friend, 130 S. Ct. 1181 (2010). Most plaintiffs are citizens of the Virgin Islands while the remainder are citizens of a number of different states. Since all plaintiffs do not have to be of diverse citizenship from all defendants, the fact that several plaintiffs are citizens of Massachusetts is of no moment for jurisdictional purposes.

With respect to the jurisdictional amount of $75,000 exclusive of interest and costs, however, any plaintiff in a mass action who does not meet this threshold must be dismissed. 28 U.S.C. § 1332(d)(11)(b)(i). Defendant is not contesting this aspect of subject matter jurisdiction as to any plaintiff.

To be a removable mass action, it must meet the criteria for class actions set forth in 28 U.S.C. § 1332(d)(2) through (10) as well as the following:

> **(B)(i)** As used in subparagraph (A), the term "mass action" means any civil action (except a civil action within the scope of section 1711(2)) in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact, except that jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under subsection (a).

Section 1332(d)(11)(B)(ii) then excepts certain civil actions from this definition. In support of their motion to remand, plaintiffs rely on the exclusion found in § 1332(d)(11)(B)(ii)(I) for civil actions in which -

> **(I)** all of the claims in the action arise from an event or occurrence in the State in which the action was filed, and that allegedly resulted in injuries in that State or in States contiguous to that State[1];

The plaintiffs, who are the parties seeking to remand, have the burden of establishing this exception. Kaufman v. Allstate, 561 F.3d 144, 153 (3d Cir. 2009).

---

1. The word States in the statute includes Territories such as the Virgin Islands. 28 U.S.C. § 1332(e).

Plaintiffs maintain that all the claims arise from "an event or occurrence" in the Virgin Islands and that all injuries resulted there. SCRG counters that the exception does not apply since there was more than one event or occurrence and that such events or occurrences took place over a number of years.

The amended complaint recites that since 2002 SCRG has owned an industrial property in St. Croix that was once occupied by an alumina refinery. Alumina is extracted from an ore known as bauxite. A large volume of bauxite residue, a hazardous material called red mud or red dust, remained in huge piles on the property after SCRG's purchase. Since 1995, when Hurricane Marilyn struck and "continuously" thereafter, the bauxite residue has blown over the neighboring areas containing residential dwellings and caused personal injuries and property damage, including contamination of cisterns which are the primary source of potable water for many plaintiffs. In addition, the amended complaint alleges that plaintiffs have been exposed to friable asbestos emanating from SCRG's property. 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.

The question presented is whether the allegations as pleaded concerning the continual release of red mud, red dust, and coal dust as well as the friable asbestos over a period of years fit within the meaning of "an event or occurrence" as set forth in § 1332(d)(11)(B)(ii)(I).

SCRG, in opposition to plaintiffs' motion to remand, relies on several cases where the court has retained jurisdiction over a mass action because plaintiffs failed to establish that the claims arose out of "an event of occurrence." In Galstaldi v. Sunvest Communities USA, LLC, 256 F.R.D. 673 (S.D. Fla. 2009), the defendants allegedly defrauded a number of different buyers in connection with a series of sales of condominium units. The sales took place during 2006 and 2007. The court found that "an event or occurrence" exception to CAFA did not apply and thus retained jurisdiction. As it explained, "[b]ecause the facts alleged involved numerous sales to numerous parties over a period of approximately one and one-half years, the single occurrence exception is inapplicable." Id. at 676.

Defendant also cites Aburto v. Midland Credit Management, Inc., No. 08-1473, 2009 WL 2252518 (N.D. Tex. July 27, 2009). There, a group of 154 plaintiffs sued a number of defendants including a credit management company as well as its lawyers and law firms for unlawful debt collection practices. In concluding that CAFA's "an event or occurrence" exception did not apply, it reasoned that many occurrences had taken place as the plaintiffs were complaining about numerous underlying lawsuits brought against them at different times, by many different law firms and lawyers, and in many different Texas state courts. Id. at *4.

Plaintiffs, in support of their motion to remand, focus on this court's recent decision in Abednego v. Alcoa, No. 10-9,

2011 U.S. Dist. LEXIS 27892 (D.V.I. Mar. 17, 2011). There, a number of plaintiffs sued the defendant in the Virgin Islands Superior Court for physical injuries and property damage allegedly caused by the release of various hazardous substances from the defendant's alumina refinery on St. Croix as a result of Hurricane Georges. The defendants removed the lawsuit under CAFA on the ground that it was a mass action. This court remanded. It concluded that the personal injury and property damage claims arose out of a single "event or occurrence," that is, Hurricane Georges, which traversed St. Croix on September 21, 1998. As such, the action fit within the exception to jurisdiction under § 1332(d)(11)(B)(ii)(I) of CAFA.

The present case is also similar to Allen v. Monsanto Co., No. 09-471, 2010 WL 8752873 (N.D. Fla. Feb. 1, 2010), where the plaintiffs alleged that the defendants actively used toxic chemicals in the manufacturing process at their plant in Florida and allowed those chemicals to be released into the Escambia River over a period of forty years. The court, in granting plaintiffs' motion to remand, concluded that the environmental tort constituted "an event or occurrence" for the purpose of the CAFA mass action exception notwithstanding the fact that the contamination allegedly occurred over a long period of time:

> At least superficially speaking, the case involves the simple, singular matter of the release of... toxins into the local waterway... that this event is alleged to have been ongoing does not thereby "pluralize" the event or occurrence. It is not required that the event be an indivisible

> or irreducible unit. If that were the case, it would be difficult to see virtually any situation as a singular event... so long as the event is relatively uniform and ongoing in nature and is not interrupted by some other interceding event of sufficient weight or importance, it remains a single event or occurrence....

Id. at *29-30 (emphasis added).

The present action involves allegedly continuing environmental damage. According 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. 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). The present action, like Abednego and Allen, involves an environmental tort. It contrasts with Gastaldi and Aburto which alleged a series of separate and independent non-environmental occurrences involving different people with no continuity between or among those occurrences.

The word event in our view is not always confined to a discrete happening that occurs over a short time span such as a fire, explosion, hurricane, or chemical spill. For example, one

can speak of the Civil War as a defining event in American history, even though it took place over a four-year period and involved many battles. We think that an event, as used in CAFA, encompasses a continuing tort[2] which results in a regular or continuous release of toxic or hazardous chemicals, as allegedly is occurring here, and where there is no superseding occurrence or significant interruption that breaks the chain of causation. A very narrow interpretation of the word event as advocated by SCRG would undermine the intent of Congress to allow the state or territorial courts to adjudicate claims involving truly localized environmental torts with localized injuries. We see no reason to distinguish between a discrete happening, such as a chemical spill causing immediate environmental damage, and one of a continuing nature, such as is at issue here. The allegations in the amended complaint clearly fit within the meaning of an event as found in CAFA.

The plaintiffs' amended complaint does not qualify as a mass action under 28 U.S.C. § 1332(d)(11)(B)(ii)(I) because all the claims arise from an event or occurrence, that is, the continuous release of toxic substances from a single facility located in the Virgin Islands, where the resulting injuries are confined to the Virgin Islands.

The action will be remanded to the Superior Court of the Virgin Islands.

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2. The concept of a continuing tort is well established. See, e.g., Restatement (Second) of Torts § 161 cmt. b (1965).