No. _____

In The
Supreme Court of the United States

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

Petitioner,

v.

ELEANOR ABRAHAM, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Third Circuit is correct in its view that the "single event or occurrence exception" to "mass actions" under the Class Action Fairness Act, 28 U.S.C. § 1332(d)(11)(B)(ii)(I), applies when the record merely "demonstrates circumstances that share some commonality and persist over a period of time" such as forty years of alleged releases by different owners, of different materials by different mechanisms – or the Ninth Circuit is correct in its view that it applies only in "cases involving a single event or occurrence, such as an environmental accident."

2. Whether the Third Circuit incorrectly assigned the burden with regard to such an exception to the Defendant-Petitioner.

PARTIES AND RULE 29.6 STATEMENT

Petitioner St. Croix Renaissance Group, L.L.L.P. was the appellant in the Court below. Respondents are four hundred and fifty-nine plaintiffs who originally filed this action in the Superior Court of the Virgin Islands and were the appellees below. There are no parent corporations or publicly held companies owning 10% or more of Petitioner's stock.

There are no additional entities involved.

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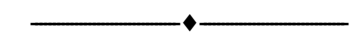
PETITION FOR WRIT OF CERTIORARI

Petitioner St. Croix Renaissance Group, L.L.L.P. respectfully petitions for a Writ of Certiorari to review the judgment of the U.S. Court of Appeals for the Third Circuit in this case.



INTRODUCTION

A clearly defined, explicit circuit conflict has led to inconsistent jurisdictional outcomes in the Third and Ninth Circuits. Review is also warranted because the Third Circuit's judgment runs counter to the elementary principles of statutory construction – and conflicts with this Court's precedent regarding the purpose and construction of the Class Action Fairness Act ("CAFA") in *Standard Fire Ins. Co. v. Knowles*, ___ U.S. ___ (Mar. 19, 2013).

The Court of Appeals incorrectly defined the phrase "an event or occurrence" in the context of 28 U.S.C. § 1332(d)(11)(B)(ii)(I) mass actions. It concocts a virtually limitless definition of the phrase "an event" – a mishmash of vague platitudes and the concept of continuing environmental torts from the Restatement (Second) of Torts § 161 cmt. b (1965). (The Restatement remains incorporated as an effect of the district court decision which was upheld.) This will divert a significant number of mass actions, particularly single site environmental claims involving multiple owners, unrelated substances and dozens of years to state courts – and will allow a

"tail wags dog" situation to similarly divert many, if not all 'convertible' environmental class actions as well. Class actions can be converted into mass actions and then diverted to state courts under this new definition.

In addition, the Third Circuit exacerbated the problem created by its holding when it assigned the burden for a CAFA mass action exception to the defendant.

This Court's review is warranted.

OPINIONS BELOW

The opinion of the Third Circuit is reported at ___ F.3d ___. *See also* App. at 1. The decision of the District Court of the Virgin Islands is reported at ___ F. Supp. 2d ___. *See also* App. at 26.

JURISDICTION

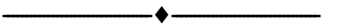
The Third Circuit issued its decision on May 17, 2013, and issued its Judgment on May 17, 2013. *See* App. at 24. This Court has jurisdiction to consider the Petition pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The Class Action Fairness Act of 2005 ("CAFA"), Pub. L. No. 109-2, 119 Stat. 4, provides in relevant part:

28 U.S.C. § 1332(d)(11)(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).
>
> *(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*, and that allegedly resulted in injuries in that State or in States contiguous to that State. . . . (Emphasis supplied.)



STATEMENT OF THE CASE

The Third and Ninth Circuits[1] stand directly opposed on a very simple, well-defined issue. The Third Circuit also erred in assigning the burden for a CAFA mass action exception to a defendant.

A. The Facts – A 40-Year, 9-Owner, Two Intervening Acts *Single "Event"* Involving Two Different Substances at Two Different Times

Respondents' complaint avers releases by at least nine unrelated owners/operators of at least two wholly different and *unrelated* substances by several *entirely* different and unrelated mechanisms at many different times over more than forty years.[2]

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[1] *Nevada v. Bank of Am. Corp.*, 672 F.3d 661 (9th Cir. 2011).

[2] *Letter Reply Brief of Appellant*, App. at 150, discussing four decades of different types of acts in Area A by 9 parties and multiple contractors – interrupted by a number of major hurricanes (both before and after SCRG's purchase). In fact, [Plaintiff's counsel] was counsel in a recent case where her clients sought a determination against several of the same 9 parties. That court gave her clients *exactly* what they asked for – a holding that when Hurricane Georges hit this Site in 1998 and caused this same type of dispersion, it was a discrete, single event; *necessary* to avoid a CAFA mass action.

Abednego v. Alcoa, Civ. No. 1:10-cv-09, 2011 WL 941569, at *1 (D.V.I. Mar. 17, 2011).

One major claim relates to refinery byproducts and begins in 1972. Another claim involves structural asbestos not exposed until after 2002. As stated below[3]:

> 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, pp. 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.)

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[3] *Letter Brief of Appellant*, App. at 99-100.

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

> 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 Grp.,* Civ. No. 1:06-cv-154, 2010 WL 1608483 (D.V.I. Apr. 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.

The Court's decision makes these two entirely unrelated situations into one, single, *very long* 40-year event. (Moreover, in two other decisions regarding this identical property and the identical piles of refining byproduct, the district court found that at least two other, completely different CAFA-cognizable

"events" occurred in the middle of this single, long instant *event* – one in 1995 and the other in 2002.[4])

Thus, the Court below held that a single event exists regardless of the length, two intervening judicially-determined events, diverse parties and mechanisms *all as pleaded by Respondents*. It held that "an event or occurrence" is now virtually boundless, with one district court utilizing this same logic to find the 100-year operation of a wood processing facility to be "an event." The Court's decision diverts virtually all long-term environmental releases brought by large numbers of plaintiffs into state courts in direct derogation of the plain language of CAFA.

The Third Circuit changes critical Congressional language from application to claims which

arise from ***an*** *event or occurrence*

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[4] One decision of the District Court of the Virgin Islands (App. at 45, 47-51) attributed a series of releases in 2002 to a subcontractor of Alcoa's and even then refused to hold Alcoa responsible due to the inability to legally attribute the subcontractor's negligence to Alcoa. *St. Croix Renaissance Grp., LLLP, et al. v. St. Croix Alumina, LLC, et al*., Civ. No. 1:04-cv-67, 2011 WL 2160910 (D.V.I. May 31, 2011).

The decision dealing with the 1995 event by the same court interpreting this same statutory provision found that this release at the site was a separate event under CAFA, triggering remand to state court. *Abednego v. Alcoa, supra*.

By "grouping" anything with "*some commonality"* together, the instant decision ignores the intervening events and makes it all one big amorphous, multi-decade, single event.

to claims which

> arise out of circumstances that share ***some commonality*** and persist over a [limitless] period of time.

B. The Law – The Court of Appeals Incorrectly Defined "an event or occurrence" as to 28 U.S.C. § 1332(d)(11)(B)(ii)(I) Mass Actions

There is no disagreement that 28 U.S.C. § 1332(d)(11)(B)(ii)(I) provides *mass actions*, as defined in CAFA, will be heard by state courts if:

> [A]ll 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. (Emphasis supplied.)

In defining "an event or occurrence," the Third Circuit held that all mass action cases will be so diverted if the acts raised merely "share *some commonality* and *persist* over a period of time."

> Important events in history are not always limited to discrete incidents that happened at a specific and precise moment in time.
>
> As further support for this construction, we note that the plain text of the exclusion and the statutory scheme do not delimit the words "event or occurrence" to a specific incident with a fixed duration of time. Because the words "event" and "occurrence" do not commonly or necessarily refer in every instance to

> what transpired at an isolated moment in time, there is no reason for us to conclude that Congress intended to limit the phrase "event or occurrence" in § 1332(d)(11)(B)(ii)(I) in this fashion. Accordingly, where the record demonstrates **circumstances that share some commonality and persist over a period of time**, these can constitute "an event or occurrence" for purposes of the exclusion in § 1332(d)(11)(B)(ii)(I).
>
> In short, treating a continuing set of circumstances collectively as an "event or occurrence" for purposes of the mass-action exclusion is consistent with the ordinary usage of these words, which do not necessarily have a temporal limitation. (Emphasis supplied.)

Like most district courts,[5] the Ninth Circuit has held the direct opposite: the mass action "event or

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[5] *See, e.g., Aana v. Pioneer Hi-Bred Int'l,* No. CV 12-00231 JMS-BMK, 2012 WL 3542503 (D. Haw. July 24, 2012) (environmental, pesticides); *Adams v. Macon Cnty. Greyhound Park*, 829 F. Supp. 2d 1127 (M.D. Ala. 2011) (gaming industry); *Lafalier v. Cinnabar Serv. Co., Inc.,* No. 10-CV-0005-CVE-TLW, 2010 WL 1486900 (N.D. Okla. Apr. 13, 2010) (tornado); *Armstead v. Multi-Chem Grp.,* Civ. No. 6:11-2136, 2012 WL 1866862 (W.D. La. May 21, 2012) (environmental, chemical plant explosion); *Dunn v. Endoscopy Ctr. of S. Nev.*, No. 2:11-cv-00560-RLH-PAL, 2011 WL 5509004 (D. Nev. Nov. 7, 2011) (medical); *Galstaldi v. Sunvest Communities,* No. 08-62076-CIV., 2009 WL 415258 (S.D. Fla. Feb. 17, 2009) (condominium sales); *Aburto v. Midland Credit Mgmt., Inc.*, No. 08-1473, 2009 WL 2252518 (N.D. Tex. July 27, 2009) (debt collection).

occurrence" exclusion applies only where all claims arise from a *single* event or occurrence.

> The district court ruled that this action does not qualify as a "mass action" under the "event or occurrence" exclusion in CAFA, which expressly provides that the term "mass action" excludes any civil action in which "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. . . ." 28 U.S.C. § 1332(d)(11)(B)(ii)(I). The district court reasoned that it lacked mass action jurisdiction because "the claims all allegedly arise from activity in Nevada and all injuries allegedly resulted in Nevada." This was a misapplication of the "event or occurrence" exclusion.
>
> The "event or occurrence" exclusion applies only where all claims arise from a single event or occurrence. "[C]ourts have consistently construed the 'event or occurrence' language to apply only in cases involving a single event or occurrence, such as an environmental accident, that gives rise to the claims of all plaintiffs." *Lafalier v. Cinnabar Serv. Co., Inc.*, 2010 WL 1486900, at *4 (N.D. Okla. Apr. 13, 2010).

Nevada v. Bank of Am. Corp., 672 F.3d at 668.

The district court cases which have been decided along the lines of the Third Circuit's reasoning highlight the paucity of its extreme construction: one involves a "100 year chain of actions" in running of wood treatment plant by various owners using various methods and materials and another is a 2008 claim for continuing release of PCB's whose use ended in the 1970's.[6]

[6] *See Hamilton v. Burlington*, No. A-08-CA-132-SS, 2008 WL 8148619 (W.D. Tex. Aug. 8, 2008) (cited by Respondents below (App. at 129-130), it involves "an event" created by a "100 year chain of actions" in running of wood treatment plant by various owners using various methods and materials.) Similarly, at App. 19-20, the Third Circuit cites to *Allen v. Monsanto Co.*, No. 3:09-cv-471, 2010 WL 8752873, at *10 (N.D. Fla. Feb. 1, 2010) (A continuing release of PCB's whose use ended in the 1970's deemed to be "an event" that ran for 50 years.).

REASONS FOR GRANTING THE PETITION

I. The Third Circuit is incorrect in its view that the "single event or occurrence exception" to "mass actions" under the Class Action Fairness Act, 28 U.S.C. § 1332(d)(11)(B)(ii)(I), applies when the record merely "demonstrates circumstances that share some commonality and persist over a period of time" such as forty years of alleged releases by different owners, of different materials by different mechanisms – the Ninth Circuit is correct in its view that it applies only in "cases involving a single event or occurrence, such as an environmental accident"

A. The legislative history demonstrates that Congress considered and rejected such an environmental exception

When CAFA was passed, there was an attempt to include "environmental exceptions" similar to the one the Third Circuit has now created – it was rejected. As the minority railed:

* * *

> *D. Special punishment for the environment and civil rights.* By removing many important environmental class actions from state to federal court, S. 5 not only denies to state courts the opportunity to interpret their own state's environmental protection laws, it hampers and deters plaintiffs from pursuing important environmental litigation. . . .

> *Moreover, by failing to carve out an exception in S. 5 to protect the environment,* the majority ignores the advice of the Judicial Conference of the United States. . . .

Senate Committee Report 109-14 (2005) (Feb. 28, 2005) Section XI, *Minority Views*, at 89. Ignoring the failure of the prior attempts to create an exception in Congress, the Third Circuit holds that it *can somehow discern* that the words "an event or occurrence" mean little or nothing. App. at 16. Now all environmental sites, regardless of 40 years of different ownership, substances, mechanisms and times of alleged releases are "an event." This violates both the plain meaning rule and the maxim that courts should give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies that the legislature was ignorant of the meaning of the language it employed. The Third Circuit held:

> Giving the words "event" or "occurrence" their ordinary meaning is not at odds with the purpose of the statutory scheme of CAFA. Congress clearly contemplated that some mass actions are better suited to adjudication by the state courts in which they originated. This intent is evident in both the "event or occurrence" exclusion for mass actions, as well as the local-controversy and home-state exceptions in § 1332(d)(4)(A) and (B) for class actions. *See Kaufman v. Allstate N.J. Ins. Co.*, 561 F.3d 144, 149 (3d Cir. 2009) (referring to § 1332(d)(4)(A) as the "local

> controversy exception" and subsection (B) as the "home-state" exception). These provisions assure that aggregate actions with substantial ties to a particular state remain in the courts of that state.

B. This interpretation of the language obviates any meaning in Congress' insertion phrase "an event or occurrence" in the statute

This Court has stated that Congress intends to use ordinary English words in their ordinary senses. In *Caminetti v. United States,* 242 U.S. 470, 485 (1917), this Court stated:

> [i]t is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain . . . the sole function of the courts is to enforce it according to its terms.

If a statute's language is plain and clear, the Court further counseled that:

> the duty of interpretation does not arise, and the rules which are to aid doubtful meanings need no discussion.

Compare the following original version of the operative language as enacted by Congress,

> (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, and that allegedly resulted in injuries in that State or in States contiguous to that State. . .

with the Court's new version,

> (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 out of circumstances that share *some commonality* and persist over a[ny] period of time 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. . . .

What different meaning does the phrase "from *an* event or an occurrence" have as compared to the phrase "circumstances that share some commonality"? Congress did not use the phrase "related events or occurrences." It did not state that this exception applies to "continuing torts" – or "apply the Restatement."[7]

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[7] The district court opinion, which was upheld, stated:

> 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.

(Continued on following page)

Perhaps the second most basic principle of statutory interpretation after the "plain meaning rule" is that courts should "give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies that the legislature was ignorant of the meaning of the language it employed." *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883). The modern variant is that statutes should be construed "so as to avoid rendering superfluous" any statutory language. *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 112 (1991); *Sprietsma v. Mercury Marine*, 537 U.S. 51, 63 (2003) (interpreting word "law" broadly could render word "regulation" superfluous in preemption clause applicable to a state "law or regulation"). *See also Bailey v. United States*, 516 U.S. 137, 146 (1995) ("we assume that Congress used two terms because it intended each term to have a particular, nonsuperfluous meaning.").

Courts should not add absent words to a statute; "there is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted." *Lamie v. United States Tr.*, 540 U.S. 526, 538 (2004).

[*Footnote 2 in the original.*] The concept of a continuing tort is well established. *See, e.g.,* Restatement (Second) of Torts § 161 cmt. b (1965).

App. at 33-34 (emphasis supplied).

C. The plain language of the statute cannot include a 40-year history of different owners, materials and causes

The very phrase distinguished by the district court, "discrete happening" (App. at 33) has been used in *defining* the word "event" as being singular in the context of the dispersion of pollutants. *London Mkt. Insurers v. Sup. Ct. (Truck Ins. Exch.),* 146 Cal. App. 4th 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.

Leave this definition aside: Even applying the *new* Third Circuit standard "***some commonality*** and persist[ing] over a period of time" an event cannot exist where there are:

a. Multiple owners

b. Different substances and unrelated mechanisms

c. A 40-year history, and

d. Many intervening, judicially-found other events.

1. Multiple Owners

How is it possible for nine unrelated owners/operators to have been involved in one event?

2. Different Substances and Mechanisms

How can structural asbestos exposed after building demolition in 2002 be part of an event that took place in a totally unrelated pile of industrial byproducts beginning in 1972?

3. 40-Year History

The Court upheld this case at 40 years and, effectively, the *Hamilton v. Burlington* case where the "event" was 100 years. What meaning does "an event" have?

4. Other Intervening, Judicially-Found Events

How can there be one *long event* when the court in two other cases found parts of the *long event* to themselves be distinct events for the purpose of CAFA?

D. If this interpretation were applied to *Nevada v. Bank of America* or almost all of the other cases which have been decided under this statute, they would all have been diverted to state court

All except one of the decisions in footnote 5 above are wrong under the Third Circuit's definition. There have only been two other decisions in the entire body of law that *are* correct: *Allen v. Monsanto Co.* which is a train wreck of a decision, and the 100-year wood processing case, *Hamilton v. Burlington.*

E. The decision is contrary to this Court's discussion of CAFA in *Standard Fire Ins. Co.*

This Court recently stated that

> when judges must decide jurisdictional matters, simplicity is a virtue. See *Hertz Corp. v. Friend,* 559 U.S. 77, 94, 130 S.Ct. 1181, 175 L.Ed.2d 1029 (2010).

Standard Fire Ins. Co. v. Knowles, ___ U.S. ___, 133 S. Ct. 1345, 1350, 185 L. Ed. 2d 439 (2013). The Third Circuit has created an arcane and complex rule of law out of an already too complex statutory scheme.

II. The Third Circuit incorrectly shifted the burden with regard to 28 U.S.C. § 1332(d)(11)(B)(ii)(I)

As pointed out both by the district court[8] and Petitioner's moving brief (App. at 115-116) and reply below,[9] the district court improperly reversed the burden applicable to the exception created by 28 U.S.C. § 1332(d)(11)(B)(ii)(I).

By accepting the unsupported and factually incorrect averments in the complaint as facts, the burden for proving the exception was shifted to Petitioner. When the Third Circuit refused to address this issue on appeal despite granting leave to appeal the issue, it incorrectly determined the burden. As Petitioner stated in its Brief below (App. at 115-116):

> 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:

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[8] The district court correctly stated:

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

[9] Petitioner's moving brief is at App. 91 et seq. and its reply is at App. 142 et seq.

> 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 supplied).

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.).

Also, at App. 113-114:

> However, as the District Court here and other courts in this Circuit[10] 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.[11] *See, e.g., Lewis v. Ford Motor Co.*, 610 F. Supp. 2d 476, 480 (W.D. Pa. 2009) (emphasis supplied) (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 **three** criteria of CAFA are met*.

---

[10] 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.)

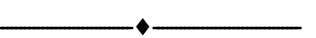
[11] It is not just CAFA, but rather longstanding 28 U.S.C. § 1441(a) doctrine which places the burden on plaintiffs to show an exclusionary provision prevents remand. *See generally Frazier v. Pioneer Americas LLC*, 455 F.3d 542, 546 (5th Cir. 2006) (citing *Breuer v. Jim's Concrete of Brevard, Inc.,* 538 U.S. 691, 697-98 (2003)); *see also Wiggins v. Daymar Colleges Grp.*, 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 [28 U.S.C.] §§ 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.").

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.

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. H.729, 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 supplied) *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).



CONCLUSION

It is respectfully concluded that the Writ of Certiorari should issue for the stated reasons.

Respectfully submitted,

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PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 13-1725

ELEANOR ABRAHAM, et al.

v.

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

On Appeal from the District Court
of the Virgin Islands
District Court No. 1-12-cv-00011
District Judge: The Honorable Harvey Bartle, III

Argued April 16, 2013

Before: AMBRO, SMITH, and CHAGARES,
Circuit Judges

(Filed: May 17, 2013)

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OPINION

SMITH, *Circuit Judge*.

The St. Croix Renaissance Group, L.L.L.P. (SCRG) sought leave under the Class Action Fairness Act (CAFA), 28 U.S.C. § 1453(c)(1), to appeal an order of the District Court of the Virgin Islands remanding a civil action to the Superior Court of the Virgin Islands. We granted SCRG's request. Because we conclude that the civil action here is not a removable "mass action" under CAFA, we will affirm the order of the District Court.

I.

In early 2012, "[m]ore than 500 individual plaintiffs" sued SCRG in the Superior Court of the Virgin Islands. On February 2, 2012, SCRG removed the civil action to the District Court of the Virgin Islands. SCRG, which was the only named defendant in the action, asserted that the civil action was a "mass action" under CAFA, making it removable under 28

U.S.C. §§ 1332(d)(11)(A) and 1453(b).[1] Thereafter, plaintiffs filed a first amended complaint (referred to for simplicity's sake as "the complaint").[2] Most of the

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[1] CAFA defines a "mass action" as

> 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).

28 U.S.C. § 1332(d)(11)(B)(i). Section 1711(2) defines "class action" as any civil action filed under Federal Rule of Civil Procedure 23 or a state statute or rule authorizing a representative action. 28 U.S.C. § 1711(2). Unlike a class action, a mass action has no representative or absent members because all plaintiffs in a mass action are named in the complaint and propose a joint trial of their claims. A mass action is more akin to an opt-in than it is to a class action. *See, e.g.,* 29 U.S.C. § 216(b) (establishing opt-in requirement for Fair Labor Standards Act claims).

[2] We recognize that "[f]or jurisdictional purposes, our inquiry is limited to examining the case 'as of the time it was filed in state court.'" *Std. Fire Ins. Co. v. Knowles,* ___ U.S. ___, 133 S. Ct. 1345, 1349 (2013) (quoting *Wis. Dep't of Corr. v. Schacht,* 524 U.S. 381, 390 (1998)). This would necessitate reviewing the initial complaint filed in the Superior Court. That complaint is not in the record that the parties have submitted. It was, however, part of the record submitted with the petition for permission to appeal. Our review indicates that the allegations of the original complaint are substantively the same as the first amended complaint. We have not attempted to further clarify the nature of the amendments at this late stage for several reasons. First, this is an expedited appeal under 28 U.S.C. § 1453(c)(2) that must be resolved within sixty days of the date the notice of appeal was filed, unless "for good cause shown and in the interests of justice," an extension of no more than ten days is

(Continued on following page)

459 plaintiffs were citizens of the United States Virgin Islands. Several plaintiffs, however, were citizens of various states.

SCRG purchased a former alumina refinery on the south shore of St. Croix in 2002. The plaintiffs alleged that "[f]or about thirty years, an alumina refinery located near thousands of homes on the south shore of the island of St. Croix was owned and/or operated by a number of entities." According to the complaint, the "facility refined a red ore called bauxite into alumina, creating enormous mounds of the by-product, bauxite residue, red mud, or red dust."

> From the beginning of the alumina refinery's operations, hazardous materials, including chlorine, fluoride, TDS, aluminum, arsenic, molybdenum, selenium, as well as coal dust and other particulates were buried in the red mud, and the red mud was stored outdoors in open piles that at times were as high as approximately 120 feet and covered up to 190 acres of land.

In addition to these hazardous materials, friable asbestos was present. All of the substances described were dispersed by wind and disseminated as a result of erosion.

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granted, *id.* § 1453(c)(3)(B). Second, it appears from the record that the amendments to the original complaint were not substantive in nature and neither party contends otherwise. Finally, the issue before us is legal in nature.

According to the plaintiffs, SCRG purchased the refinery site knowing that the loose bauxite and piles of red mud "had the propensity for particulate dispersion when exposed to wind" that would be "inhaled by [p]laintiffs, deposited onto [p]laintiffs' persons, and real and personal properties, and deposited into the cisterns that are the primary source of potable water for many [p]laintiffs." Yet SCRG "did nothing to abate it, and instead, allowed the series of the continuous transactions to occur like an ongoing chemical spill." SCRG "failed to take proper measures to control those emissions[.]" With regard to the friable asbestos, the plaintiffs alleged that SCRG discovered its presence, concealed its existence, and did nothing to remove it from the premises. The plaintiffs averred that the improper maintenance of the facility, inadequate storage and containment of the various hazardous substances, as well as failure to remediate the premises, caused them to sustain physical injuries, mental anguish, pain and suffering, medical expenses, damage to their property and possessions, loss of income and the capacity to earn income, and loss of the enjoyment of life.

The plaintiffs asserted six causes of action against SCRG:

- Count I: Abnormally Dangerous Condition
- Count II: Public Nuisance
- Count III: Private Nuisance
- Count IV: Intentional Infliction of Emotional Distress

- Count V: Negligent Infliction of Emotional Distress
- Count VI: Negligence.[3]

In addition to money damages, the plaintiffs sought injunctive relief to end the ongoing release of hazardous substances and to remediate the property.

In October of 2012, the plaintiffs moved to remand their civil action to the Superior Court, claiming that the District Court lacked federal subject-matter jurisdiction. The plaintiffs asserted that the removal had been improper because § 1332(d)(11)(B)(ii)(I) excluded their action from the definition of "mass action." This section of CAFA excludes from "mass action[s]"

> 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, and that allegedly resulted in injuries in that State or in States contiguous to that State.[4]

28 U.S.C. § 1332(d)(11)(B)(ii)(I). From the plaintiffs' perspective, their civil action satisfied the criteria for this exclusion because "every operative incident occurred in St. Croix and caused injury and damages to the [p]laintiffs' persons and property in St. Croix."

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[3] A seventh count is denominated "Punitive Damages." This, however, is not a freestanding cause of action.

[4] Section 1332(e) specifies that the "word 'States,' as used in this section includes the Territories[.]" 28 U.S.C. § 1332(e).

Each plaintiff's claim arose "from an event or occurrence in St. Croix" that happened "at a single location, the alumina refinery." In addition, the plaintiffs argued that their civil action had been improvidently removed because it qualified as a uniquely local controversy excepted from removal under § 1332(d)(4)(A) or (B).

SCRG opposed the motion to remand. It argued that the plaintiffs had interpreted the statute to exclude from mass actions claims that arise in "one location" instead of as a result of "an event or occurrence" as set forth in the statute. 28 U.S.C. § 1332(d)(11)(B)(ii)(I). SCRG asserted that the exclusion for "an event or occurrence" did not apply because it requires a single incident and the plaintiffs' complaint alleged that "there were multiple events and occurrences over many years." It emphasized that the exclusion "requires that to avoid removal there had to have been just 'an event or occurrence' – a 'single' event or occurrence."

On December 7, 2012, the District Court granted the plaintiffs' motion to remand this action to the Superior Court of the Virgin Islands. *Abraham v. St. Croix Renaissance Grp., L.L.L.P.,* No. 12-11, 2012 WL 6098502 (D.V.I. Dec. 7, 2012). The District Court considered several district court decisions that addressed whether an action qualified as a mass action. It noted that the plaintiffs' complaint alleged "continuing environmental damage," and cited a statement from a Senate Report that the purpose of the "event or occurrence" exclusion was "'to allow cases involving

environmental torts such as a chemical spill to remain in state court.'" *Id.* at *3 (quoting S. Rep. 109-14, at 44 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 47 (2005)). The Court reasoned that

> [t]he word *event* . . . 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.

Id. The Court then declared 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. 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.

Id. at *3-4.

Under 28 U.S.C. § 1453(c)(1), a party aggrieved by a district court's ruling on a motion to remand may seek permission to appeal if the application is made "not more than 10 days after entry of the order." SCRG filed a timely petition. We granted the petition on March 14, 2013.

II.

The District Court exercised jurisdiction under 28 U.S.C. §§ 1332(d)(11)(A) and 1453(b). We granted leave to appeal under 28 U.S.C. §§ 1332(d)(11)(A) and 1453(c)(1).

Under CAFA, § 1453(b) provides for the removal to federal district courts of class actions as defined in § 1332(d)(1). 28 U.S.C. § 1453(b). Consistent with federal practice, once an action has been removed under CAFA, the plaintiff may move to remand. *Id.* § 1453(c) (applying 28 U.S.C. § 1447, which governs procedures after removal, to removal of class actions). Under traditional federal practice, an order remanding a case to state court is not reviewable. 28 U.S.C.

§ 1447(d). CAFA, however, diverges from traditional federal practice by providing for discretionary appellate review of "an order of a district court granting or denying a motion to remand a *class action* to the State court from which it was removed." 28 U.S.C. § 1453(c)(1) (emphasis added).

Plaintiffs contend that we lack appellate jurisdiction under § 1453. They assert that the provision in CAFA which permits an appeal of a remand order applies to only "class actions – not mass actions." They point out that § 1453 refers to *class actions* alone and does not use the term "mass actions." *See* 28 U.S.C. § 1453(a) (specifying that for purposes of § 1453, "the term[ ] . . . 'class action' . . . shall have the meaning[ ] given such term[ ] under section 1332(d)(1)"). According to plaintiffs, because their civil action does not meet the definition of a removable class action under § 1332(d)(1), we lack appellate jurisdiction.

Plaintiffs' argument fails to acknowledge a critical "deemer" provision in CAFA. While § 1453 makes only certain "class actions" removable and does not use the term "mass action," § 1332(d)(11)(A) states that "[f]or purposes of this subsection [(1332(d)] and section 1453, a mass action shall be deemed to be a class action removable under paragraphs (2) through (10) if it otherwise meets the provisions of those paragraphs." 28 U.S.C. § 1332(d)(11)(A). The plain text of this provision makes § 1453's treatment of "class actions" equally applicable to "mass actions." 28 U.S.C. § 1332(d)(11)(A). *See Lowery v. Ala. Power Co.,* 483 F.3d 1184, 1195 (11th Cir. 2007) (noting that

the "plain language" of § 1332(d)(11)(A) "makes it clear that any 'mass action' is also considered a 'class action' for the purposes of CAFA's removal provisions"). And nothing limits that deeming provision to subsection (b), which permits removal. Rather, § 1453's applicability to "mass actions" includes subsection (c), which establishes our discretionary appellate jurisdiction over remand orders. Accordingly, we have appellate jurisdiction under § 1453(c)(1).

III.

The issue in this case is one of statutory interpretation.[5] We must determine the meaning of the phrase "an event or occurrence" as it appears in the mass-action exclusion. The exclusion provides:

> (ii) . . . 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, and that allegedly resulted

[5] We review issues of statutory interpretation de novo. *Kaufman v. Allstate N.J. Ins. Co.,* 561 F.3d 144, 151 (3d Cir. 2009). De novo review also applies because whether the plaintiffs' civil action fits within the mass-action exclusion in § 1332(d)(11)(B)(ii)(I) concerns the subject-matter jurisdiction of the District Court. *Id.* The District Court's application of law to the factual averments of the complaint is also subject to de novo review. *See In re Sch. Asbestos Litig.,* 56 F.3d 515, 519 (3d Cir. 1995).

> in injuries in that State or in States contiguous to that State[.]"

28 U.S.C. § 1332(d)(11)(B)(ii)(I) (emphasis added). "As in all statutory construction cases, we begin with the language of the statute. The first step 'is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case.'" *Barnhart v. Sigmon Coal Co.,* 534 U.S. 438, 450 (2002) (quoting *Robinson v. Shell Oil Co.,* 519 U.S. 337, 340 (1997)). "When the meaning of statutory text is plain, our inquiry is at an end." *Roth v. Norfalco, L.L.C.,* 651 F.3d 367, 379 (3d Cir. 2011).

If the text is "reasonably susceptible of different interpretations," it may be ambiguous. *Edwards v. A.H. Cornell and Son, Inc.,* 610 F.3d 217, 222 (3d Cir. 2010) (internal quotation marks and citation omitted). As the Supreme Court instructed in *AT&T Mobility, L.L.C. v. Concepcion,* ___ U.S. ___, 131 S. Ct. 1740 (2011), when a statute appears to be ambiguous, we must

> look to other portions of the [Act because s]tatutory interpretation focuses on "the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.,* 519 U.S. 337, 341 (1997). "A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the

> law." *United Sav. Assn. of Tex. v. Timbers of Inwood Forest Assocs., Ltd.,* 484 U.S. 365, 371 (1988).

AT&T Mobility, 131 S. Ct. at 1754. Only if we conclude that a statute is ambiguous, after consideration of the statutory scheme, may we then consider the legislative history or other extrinsic material – and then, only if it "shed[s] 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 (2005) (emphasis added).

SCRG relies heavily on the article "an," which precedes "event or occurrence," and the singular nature of that article. In SCRG's view, this "an" before "event or occurrence" means that the exclusion is not applicable if the complaint alleges injuries that are not the result of a single, discrete incident. In SCRG's view, this means that the exclusion does not apply to the plaintiffs' claims, which are based on a series of incidents resulting in their continued exposure to the hazardous substances. These incidents include the erosion of the red mud containing the various hazardous substances, the dispersion by wind of the same, and the improper storage of and the failure to remove all of these substances from the premises.

SCRG's argument is not completely devoid of merit. Its contention that this statutory language refers to a single incident is semantically consistent with Congress's decision to use the singular form of the words "event" or "occurrence" in the exclusion.

See Dunn v. Endoscopy Ctr. of S. Nev., No. 2:11-CV-560, 2011 WL 5509004, at *2 (D. Nev. Nov. 7, 2011) (noting that the statute did not state "events and occurrences," and that the "use of the singular in the statutory language is important and sufficient").

But SCRG's reliance on the article "an" does not end the inquiry. We must determine what the phrase "event or occurrence" means. "In the absence of a statutory definition" in the CAFA, we are bound to give the words used their "'ordinary meaning.'" *United States v. Diallo,* 575 F.3d 252, 256-57 (3d Cir. 2009) (quoting *Moskal v. United States,* 498 U.S. 103, 108 (1990) (omitting internal quotation marks and citation)); *see also Asgrow Seed Co. v. Winterboer,* 513 U.S. 179, 187 (1995) ("When terms used in a statute are undefined, we give them their ordinary meaning."); *FDIC v. Meyer,* 510 U.S. 471, 476 (1994) ("In the absence of such a definition, we construe the statutory term in accordance with its ordinary or natural meaning."). In common parlance, neither the term "event" nor "occurrence" is used solely to refer to a specific incident that can be definitively limited to an ascertainable period of minutes, hours, or days.[6]

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[6] The word "event" is defined, *inter alia,* as "something that takes place, especially a significant occurrence." The American Heritage Dictionary of the English Language 615 (5th ed. 2011). *See also* Merriam-Webster's Collegiate Dictionary 433 (11th ed. 2003) (including among its definitions of "event" "something that happens," "occurrence," and "a noteworthy happening"). The definition of "occurrence," not surprisingly, is "the action, fact, or instance of occurring . . . 'something that takes place; an event

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As the District Court explained, 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." *Abraham,* 2012 WL 6098502, at * 3. The Court's construction of the word is consistent with the word's common usage. Important events in history are not always limited to discrete incidents that happened at a specific and precise moment in time.

As further support for this construction, we note that the plain text of the exclusion and the statutory scheme do not delimit the words "event or occurrence" to a specific incident with a fixed duration of time. Because the words "event" and "occurrence" do not commonly or necessarily refer in every instance to what transpired at an isolated moment in time, there is no reason for us to conclude that Congress intended to limit the phrase "event or occurrence" in § 1332(d)(11)(B)(ii)(I) in this fashion. Accordingly, where the record demonstrates circumstances that share some commonality and persist over a period of time, these can constitute "an event or occurrence" for purposes of the exclusion in § 1332(d)(11)(B)(ii)(I).

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or incident." The American Heritage Dictionary of the English Language 1219 (5th ed. 2011); Merriam-Webster's Collegiate Dictionary 858 (11th ed. 2003 (defining "occurrence" as "something that occurs . . . the action or instance of occurring")).

In short, treating a continuing set of circumstances collectively as an "event or occurrence" for purposes of the mass-action exclusion is consistent with the ordinary usage of these words, which do not necessarily have a temporal limitation. Giving the words "event" or "occurrence" their ordinary meaning is not at odds with the purpose of the statutory scheme of CAFA. Congress clearly contemplated that some mass actions are better suited to adjudication by the state courts in which they originated. This intent is evident in both the "event or occurrence" exclusion for mass actions, as well as the local-controversy and home-state exceptions in § 1332(d)(4)(A) and (B) for class actions. *See Kaufman v. Allstate N.J. Ins. Co.,* 561 F.3d 144, 149 (3d Cir. 2009) (referring to § 1332(d)(4)(A) as the "local controversy exception" and subsection (B) as the "home-state" exception). These provisions assure that aggregate actions with substantial ties to a particular state remain in the courts of that state.

The local-controversy and home-state exceptions for class actions in § 1332(d)(4) and the "event or occurrence" exclusion for mass actions, however, are different creatures entirely. Indeed, in light of the statutory structure of CAFA, the exceptions and the exclusion have to be different because a "mass action," to be removable, must meet the provisions of § 1332(d)(2) through (10). 28 U.S.C. § 1332(d)(11)(A). This means that to be removable a mass action must present something other than a uniquely local controversy that may not be removed under either the local-controversy

or home-state exception in § 1332(d)(4)(A) and (B), respectively. If the mass action complaint pleads neither a local-controversy nor a home-state cause of action under subsection (d)(4), it may be removed unless the "event or occurrence" exclusion in subsection (d)(11)(B)(ii)(I) applies.

It is notable that the local-controversy exception contains broad language instructing a district court to decline to exercise jurisdiction where the "principal injuries resulting from *the alleged conduct or any related conduct* . . . were incurred in the State in which the action was originally filed." 28 U.S.C. § 1332(d)(4)(A)(i)(III) (emphasis added). The use of this broad language in the local-controversy exception for class actions and not in the mass-action exclusion might suggest that Congress intended to limit the mass-action exclusion to claims arising from a discrete incident. *See Duncan v. Walker,* 533 U.S. 167, 173 (2001) (observing that "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion" (internal quotation marks and citations omitted)). Because the local-controversy class action exception and the "event or occurrence" exclusion for mass actions are not the same, the broad language in the local-controversy exception in § 1332(d)(4)(A) for class actions does not control our interpretation of the phrase "event or occurrence" in the mass-action exclusion in § 1332(d)(11)(B)(ii)(I). Consequently, the

statutory scheme of CAFA does not require limiting the construction of "event or occurrence" to something that happened at a discrete moment in time.

We conclude that the District Court did not err in its interpretation of the "event or occurrence" exclusion in § 1332(d)(11)(B)(ii)(I). Our broad reading of the words "event" and "occurrence" is consistent with their ordinary usage.[7] Further, such a reading does not thwart Congress's intent, which recognized that some aggregate actions are inherently local in nature and better suited to adjudication by a State court. Accordingly, there is no reason to consider the legislative history of the CAFA to interpret the phrase "event or occurrence" in the mass-action exclusion. *Morgan v. Gay,* 471 F.3d 469, 473 (3d Cir. 2006) (noting that we "need not look to legislative history at all when the text of the statute is unambiguous").[8]

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[7] The ordinary meaning of the words "event" and "occurrence" do not easily lend themselves to fashioning a precise definition that can be applied to all litigation under CAFA. It is sufficient for purposes of this appeal to determine that the phrase "event or occurrence" in the exclusion is not as temporally limited as SCRG contends. We note, however, that the exclusion contains other limitations, demanding a commonality of the claims and requiring a substantial link with the forum state. 28 U.S.C. § 1332(d)(11)(B)(ii)(I) (providing that (1) "all" of the claims must arise from the event; (2) the event must happen in the state in which the action was filed; and (3) the plaintiffs' injuries must have "allegedly resulted . . . in that state").

[8] Although we need not consider legislative history, we doubt that the Senate Report would aid us in any way in interpreting this exclusion in CAFA. The Senate Report was issued

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In light of our determination that the words "event" or "occurrence" in § 1332(d)(11)(B)(ii)(I) should be given their ordinary meaning, we turn to whether the plaintiffs' complaint falls within this exclusion For mass actions.[9] We conclude that the complaint

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after CAFA was enacted. *See Bruesewitz v. Wyeth, L.L.C.,* ___ U.S. ___, 131 S. Ct. 1068, 1081 (2011) (noting that "[p]ost-enactment legislative history (a contradiction in terms) is not a legitimate tool of statutory interpretation"). In addition, because either party in this controversy can cite the Senate Report as authority for their respective interpretations, the Senate Report sheds little light on Congress's true intent. *See Exxon Mobil Corp. v. Allapattah Servs., Inc.,* 545 U.S. 546, 568 (2005) (cautioning that legislative history has a role in statutory interpretation only if it "shed[s] a reliable light on the enacting Legislature's understanding of otherwise ambiguous terms," and instructing that legislative history is not a reliable source if it is contradictory).

[9] We recognize that the District Court concluded that the word "event" in § 1332(d)(11)(B)(ii)(I) included the "continuous release of toxic or hazardous chemicals, as allegedly is occurring here, and where there is no *superseding* occurrence." *Abraham,* 2012 WL 6098502, at *3 (emphasis added). In *Allen v. Monsanto Co.,* No. 3:09cv471, 2010 WL 8752873, at *10 (N.D. Fla. Feb. 1, 2010), the District Court used the term "*interceding*" in its analysis of whether the circumstances constituted "an event or occurrence" for purposes of the exclusion in § 1332(d)(11)(B)(ii)(I). *Id.* (emphasis added). It is clear from the text and structure of the CAFA that Congress drafted the statute with an awareness of the various types of aggregate action, including class actions, mass actions, and mass torts. *See generally* 28 U.S.C. § 1332(d)(11) (defining "class action" for purposes of diversity jurisdiction); *id.* § 1332(d)(11) (establishing the "mass action" as a non-class aggregate action and distinguishing it from mass tort actions that may be the subject of multidistrict litigation under 28 U.S.C. § 1407). Yet Congress neither used the word "tort" in the mass action exclusion nor the terms "interceding" or

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sufficiently alleges that all of the plaintiffs' claims arise from "an event or occurrence" in the Virgin Islands where the action was filed and that allegedly resulted in injuries there.

The complaint alleges circumstances that persisted over a fixed period of time – specifically, from 2002, when SCRG acquired the former alumina refinery, to the present. These circumstances included: (1) the presence throughout the former refinery site of the red mud and the various hazardous substances that were buried therein; (2) the plaintiffs' continual exposure to the red mud and its particulates as a result of erosion by wind and water; and (3) the persistent failure of SCRG to contain or abate the hazardous substances and to remediate the premises. In short, the condition of the site during the period of SCRG's ownership provided a source for the ongoing emission of the red mud and the hazardous substances and the subsequent dispersion onto the plaintiffs' persons and their property. We believe that these circumstances, which the District Court characterized as the "continuous release of toxic substances from a single facility located in the Virgin Islands," constituted "an event or occurrence" for purposes of the mass-action exclusion. *Abraham,* 2012 WL 6098502, at *4.

"superseding." Because giving the terms in the exclusion their ordinary meaning does not create a result that is at odds with Congress's intent to keep some actions in state court, we see no reason to utilize these terms of art in our analysis.

We recognize that multiple substances are alleged to have emanated from SCRG's site. But the complaint does not allow us to isolate a specific substance and trace it to a particular course of action taken by SCRG at a precise point in time. Instead, the complaint alleges that the red mud containing the various hazardous substances was present throughout the site. There are no averments that SCRG removed any of the hazardous substances and thereby heightened the risk of exposure to any particular substance. Nor are there any allegations that SCRG engaged in any manufacturing at the site to increase the emission of any particular substance. There is simply the ongoing emission from the site of the red mud and its hazardous substances. Because we cannot identify separate and discrete incidents causing the emission of the various substances at any precise point in time, we reject SCRG's argument that the plaintiffs' claims arose from multiple events or occurrences.[10]

[10] In addition to the dispersion of red mud, plaintiffs have also alleged that SCRG has failed to prevent the dispersion of friable asbestos. Though these are two distinct hazardous substances, we do not believe this should alter the result. Plaintiffs allege that both substances were present on the same site and have been released into the environment due to SCRG's neglect of that site. This commonality is enough for the release of the two substances to constitute "an event or occurrence" under the statute.

We agree with the District Court that the complaint was not a removable mass action because "all of the claims in the action arose from an event or occurrence" that happened in the Virgin Islands and that resulted in injuries in the Virgin Islands. Accordingly, the District Court appropriately remanded the plaintiffs' action to the Superior Court of the Virgin Islands.[11]

IV.

In sum, we agree with SCRG that the statute excludes from mass actions those civil actions in which all of the claims arise from a single event or occurrence in the state where the action was filed. But the ordinary meaning of the words "event" and "occurrence" is not always limited to something that happened at a particular moment in time. Indeed, "event" and "occurrence" admit of temporal flexibility. For this reason, we find no error in the District Court's conclusion that the "continuous release" of hazardous substances from SCRG's premises constituted "an event or occurrence" for purposes of the mass-action exclusion in § 1332(d)(11)(B)(ii)(I). We

[11] Because plaintiffs' complaint meets the criteria of the "event or occurrence" exclusion in § 1332(d)(11)(B)(ii)(I), we need not resolve whether the District Court erred by denying their request for discovery regarding SCRG's citizenship.

will affirm the District Court's order granting the motion to remand.[12]

[12] CAFA requires a court of appeals to "complete all action" on an appeal, "including rendering judgment not later than 60 days after the date on which such appeal was filed." 28 U.S.C. § 1453(c)(2). This means that judgment must be filed no later than May 13, 2013. "[F]or good cause shown and in the interests of justice," we may extend this filing date for ten days. *Id.* § 1453(c)(3)(B). Because compliance with the 60 day deadline would result in an abbreviated circulation period for this precedential opinion, *see* Third Circuit I.O.P. § 5.6, we conclude that good cause exists for an extension and that the ten-day extension is in the interest of justice.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 13-1725

ELEANOR ABRAHAM, et al.

v.

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

Appellant

On Appeal from the District Court of the
Virgin Islands
District Court No. 1-12-cv-00011
District Judge: The Honorable Harvey Bartle, III

Argued April 16, 2013

Before: AMBRO, SMITH, and
CHAGARES, *Circuit Judges*

JUDGMENT

This cause came on to be considered on the record from the District Court of the Virgin Islands and was argued on April 16, 2013.

On consideration whereof, it is now hereby ADJUDGED and ORDERED that the order of the District Court entered December 7, 2012, be and the same is hereby AFFIRMED. All, of the above in

accordance with the opinion of this Court. Costs taxed against Appellant.

Attest:

/s/ Marcia M. Waldron
Clerk

DATED: May 17, 2013

2012 WL 6098502
District Court of the Virgin Islands,
Division of St. Croix

Eleanor ABRAHAM, et al.
v.
ST. CROIX RENAISSANCE GROUP, L.L.L.P.

CIVIL ACTION NO. 12-11 | December 7, 2012

Opinion

MEMORANDUM

Bartle, J.

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).

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

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

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

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

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.

28 USC § 1332 – DIVERSITY OF CITIZENSHIP; AMOUNT IN CONTROVERSY; COSTS

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between –

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state, except that the district courts shall not have original jurisdiction under this subsection of an action between citizens of a State and citizens or subjects of a foreign state who are lawfully admitted for permanent residence in the United States and are domiciled in the same State;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603 (a) of this title, as plaintiff and citizens of a State or of different States.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $75,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may

deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title –

(1) a corporation shall be deemed to be a citizen of every State and foreign state by which it has been incorporated and of the State or foreign state where it has its principal place of business, except that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of –

(A) every State and foreign state of which the insured is a citizen;

(B) every State and foreign state by which the insurer has been incorporated; and

(C) the State or foreign state where the insurer has its principal place of business; and

(2) the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen only of the same State as the infant or incompetent.

(d)

(1) In this subsection –

(A) the term "class" means all of the class members in a class action;

(B) the term "class action" means any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action;

(C) the term "class certification order" means an order issued by a court approving the treatment of some or all aspects of a civil action as a class action; and

(D) the term "class members" means the persons (named or unnamed) who fall within the definition of the proposed or certified class in a class action.

(2) The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs, and is a class action in which –

(A) any member of a class of plaintiffs is a citizen of a State different from any defendant;

(B) any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a State; or

(C) any member of a class of plaintiffs is a citizen of a State and any defendant is a

foreign state or a citizen or subject of a foreign state.

(3) A district court may, in the interests of justice and looking at the totality of the circumstances, decline to exercise jurisdiction under paragraph (2) over a class action in which greater than one-third but less than two-thirds of the members of all proposed plaintiff classes in the aggregate and the primary defendants are citizens of the State in which the action was originally filed based on consideration of –

(A) whether the claims asserted involve matters of national or interstate interest;

(B) whether the claims asserted will be governed by laws of the State in which the action was originally filed or by the laws of other States;

(C) whether the class action has been pleaded in a manner that seeks to avoid Federal jurisdiction;

(D) whether the action was brought in a forum with a distinct nexus with the class members, the alleged harm, or the defendants;

(E) whether the number of citizens of the State in which the action was originally filed in all proposed plaintiff classes in the aggregate is substantially larger than the number of citizens from any other State, and the citizenship of the other members of the proposed class is dispersed among a substantial number of States; and

(F) whether, during the 3-year period preceding the filing of that class action, 1 or more other class actions asserting the same or similar claims on behalf of the same or other persons have been filed.

(4) A district court shall decline to exercise jurisdiction under paragraph (2) –

(A)

(i) over a class action in which –

(I) greater than two-thirds of the members of all proposed plaintiff classes in the aggregate are citizens of the State in which the action was originally filed;

(II) at least 1 defendant is a defendant –

(aa) from whom significant relief is sought by members of the plaintiff class;

(bb) whose alleged conduct forms a significant basis for the claims asserted by the proposed plaintiff class; and

(cc) who is a citizen of the State in which the action was originally filed; and

(III) principal injuries resulting from the alleged conduct or any related conduct of each defendant

were incurred in the State in which the action was originally filed; and

(ii) during the 3-year period preceding the filing of that class action, no other class action has been filed asserting the same or similar factual allegations against any of the defendants on behalf of the same or other persons; or

(B) two-thirds or more of the members of all proposed plaintiff classes in the aggregate, and the primary defendants, are citizens of the State in which the action was originally filed.

(5) Paragraphs (2) through (4) shall not apply to any class action in which –

(A) the primary defendants are States, State officials, or other governmental entities against whom the district court may be foreclosed from ordering relief; or

(B) the number of members of all proposed plaintiff classes in the aggregate is less than 100.

(6) In any class action, the claims of the individual class members shall be aggregated to determine whether the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs.

(7) Citizenship of the members of the proposed plaintiff classes shall be determined for purposes of paragraphs (2) through (6) as of the date of filing of the complaint or amended complaint, or, if

the case stated by the initial pleading is not subject to Federal jurisdiction, as of the date of service by plaintiffs of an amended pleading, motion, or other paper, indicating the existence of Federal jurisdiction.

(8) This subsection shall apply to any class action before or after the entry of a class certification order by the court with respect to that action.

(9) Paragraph (2) shall not apply to any class action that solely involves a claim –

(A) concerning a covered security as defined under 16(f)(3) of the Securities Act of 1933 (15 U.S.C. 78p(f)(3)) and section 28(f)(5)(E) of the Securities Exchange Act of 1934 (15 U.S.C. 78bb(f)(5)(E));

(B) that relates to the internal affairs or governance of a corporation or other form of business enterprise and that arises under or by virtue of the laws of the State in which such corporation or business enterprise is incorporated or organized; or

(C) that relates to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security (as defined under section 2(a)(1) of the Securities Act of 1933 (15 U.S.C. 77b(a)(1)) and the regulations issued thereunder).

(10) For purposes of this subsection and section 1453, an unincorporated association shall be deemed to be a citizen of the State where it has

its principal place of business and the State under whose laws it is organized.

(11)

(A) For purposes of this subsection and section 1453, a mass action shall be deemed to be a class action removable under paragraphs (2) through (10) if it otherwise meets the provisions of those paragraphs.

(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).

(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, and that allegedly resulted in injuries in that State or in States contiguous to that State;

(II) the claims are joined upon motion of a defendant;

(III) all of the claims in the action are asserted on behalf of the general public (and not on behalf of individual claimants or members of a purported class) pursuant to a State statute specifically authorizing such action; or

(IV) the claims have been consolidated or coordinated solely for pretrial proceedings.

(C)

(i) Any action(s) removed to Federal court pursuant to this subsection shall not thereafter be transferred to any other court pursuant to section 1407, or the rules promulgated thereunder, unless a majority of the plaintiffs in the action request transfer pursuant to section 1407.

(ii) This subparagraph will not apply –

(I) to cases certified pursuant to rule 23 of the Federal Rules of Civil Procedure; or

(II) if plaintiffs propose that the action proceed as a class action pursuant to rule 23 of the Federal Rules of Civil Procedure.

(D) The limitations periods on any claims asserted in a mass action that is removed to

Federal court pursuant to this subsection shall be deemed tolled during the period that the action is pending in Federal court.

(e) The word "States", as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.

2011 WL 2160910

District Court of the Virgin Islands,
Division of St. Croix.

ST. CROIX RENAISSANCE GROUP, LLLP, et al.
v.
ST. CROIX ALUMINA, LLC, et al.

Civil Action No. 04-67. | May 31, 2011.

Opinion

MEMORANDUM

BARTLE, Chief Judge.

The court is presently faced with the post-trial motion of defendant St. Croix Alumina, LLC ("SCA") under Rule 50(b) of the Federal Rules of Civil Procedure for judgment as a matter of law on all claims after an adverse jury verdict. Alternatively, SCA moves for a new trial under Rule 59. We also address the request of plaintiff St. Croix Renaissance Group. LLLP ("SCRG") for prejudgment interest.

This diversity action arises out of the June 2002 sale to Brownfield Recovery Corporation ("Brownfield Recovery") and Energy Answers of Puerto Rico ("Energy Answers") of SCA's large industrial site in St. Croix, which contained a now-closed alumina refinery (the "Property"). Immediately after closing on the Property on June 14, 2002, Brownfield Recovery and Energy Answers transferred the Property and all their rights and obligations under the purchase agreement to SCRG, an entity created for the sole

purpose of owning and managing the Property.[1] In the Second Amended Complaint, SCRG pleaded claims for fraud in the inducement (count 1), breach of contract (count 2), and negligence (count 3).[2] SCRG sought compensatory and punitive damages. SCRG's claim for breach of contract was based on SCA's breach of a warranty set forth in the March 2002 purchase agreement for the Property and confirmed at closing. Its claim for fraud in the inducement was

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[1] The Second Amended Complaint named SCRG, Brown Recovery Corp., and Energy Answers of Puerto Rico as plaintiffs. It listed SCA and Alcoa World Alumina as defendants. Just prior to trial, the parties entered into a stipulation to simplify the proceedings. The parties agreed that in addressing the jury, SCRG would be the sole plaintiff mentioned, but that it maintained the rights of Brown Recovery and Energy Answers, and that any judgment would be entered as to SCRG only. SCRG agreed to have Brown Recovery and Energy Answers voluntarily dismissed with prejudice. In addressing the jury, SCA was referred to as the sole defendant but maintained all rights and duties as if Alcoa World Alumina were identified at trial. Defendants SCA and Alcoa World Alumina made the representation that SCA had sufficient funds to satisfy any judgment so that Alcoa World Alumina could be dismissed from the case when final judgment was entered. They were dismissed by stipulation on January 19, 2011 (Docket No. 422).

[2] The Second Amended Complaint also contained claims for fraud in the performance (count 4) and punitive damages (count 5). The claim for fraud in the performance was premised upon concealment of certain activities on the Property after closing, including the misrepresentation of doing certain work on the Property pursuant to a government permit. SCRG agreed to the dismissal of count 4 prior to trial. While the punitive damages claim as a separate count was also dismissed, the request for relief in the form of punitive damages remained.

predicated on the same warranty, which allegedly was false and induced SCRG to agree to purchase the Property with a $3 million cap on damages for any breach of contract. Finally, SCRG sued SCA for damages to the Property as a result of SCA's alleged negligence which occurred after the closing when contractors were doing remedial work on the Property pursuant to an obligation of SCA under the purchase agreement.

After a seven-day trial, the jury returned a verdict in favor of SCRG on all three counts. It awarded $12,617,867 for breach of contract and fraud in the inducement, $10,000,000 as a result of SCA's negligence, and $6,142,856 in punitive damages.

I.

With respect to SCA's motion for judgment as a matter of law, the court must view the evidence, along with all reasonable inferences therefrom, in the light most favorable to the verdict winner, in this case, SCRG. *Alexander v. Univ. of Pittsburgh Med. Ctr. Sys.,* 185 F.3d 141, 145 (3d Cir.1999).

SCA first asserts that there is no evidence to support the jury's verdict in favor of SCRG on its negligence claim. SCRG alleged that, after the June 2002 closing, SCA negligently ripped up vegetation and irrigation piping on the north side of Area A, a section of the Property where large piles of "red mud" were stored. Red mud is a caustic byproduct of the alumina refinement process, and piles of left-over red

mud erode into the environment if not secured by vegetation or retaining walls. SCA was working on the Property after the closing pursuant to a contractual obligation with SCRG to undertake certain remediation activities necessitated by an April 2002 red mud spill on the south side of Area A.

At trial, SCRG presented testimony from Patrick Mahoney, the President of Energy Answers and a partner in SCRG, and Ken Haines, an environmental consultant for SCRG and former employee of a prior owner of the Property. The court also admitted into evidence several photographs of Area A showing bulldozer tracks and the absence of vegetation.

Mahoney testified that he had seen bulldozers on the north slope of Area A starting in early 2003. He observed parts of the Area being "cut back down to the red mud." Haines testified that in April 2003 he saw extensive damage to the irrigation piping and vegetation on the north side of Area A as well as bulldozer tracks. There was sufficient evidence for a jury to infer that someone had bulldozed the north side of Area A and that this activity had caused damage to the vegetation and irrigation piping.

It is undisputed that neither SCA nor SCRG had employees on the Property who were operating bulldozers at any relevant time. However, SCA had engaged an independent contractor to do remediation work, which included the use of this type of equipment.

It is the general rule that a party is not liable for the negligence of an independent contractor it engages to perform work. *See* Restatement (Second) Torts § 409. There are two exceptions. First, if the party gave orders or directions to the independent contractor to commit the particular negligent act, the party is liable for the resulting harm. *See* Restatement (Second) Torts § 410. There is nothing in the record to suggest that SCA directed any bulldozer driver to tear up the irrigation piping and vegetation or even to work on the north side of Area A. On the contrary, Eric Black, an SCA employee and its on-site representative during the post-closing remediation, testified that he did not authorize any work at that location. Even if Black had authorized work to be done, such authority does not establish that he directed any negligent acts to be performed. SCA cannot be held liable for an independent contractor's negligence under this exception.

Second, a party may be liable for the contractor's negligence if a party "retained at least some degree of control over the manner in which the work was done." Restatement (Second) Torts 414, cmt. c. Nonetheless, such control must involve more than the day-to-day activities of a general overseer. *See Figueroa v. Hess Oil V.I. Corp.,* 198 F.Supp.2d 632, 644 (D.V.I.2002). Liability attaches only where the party "assumes affirmative duties, directs the method of performance of those duties, or offers specific instruction regarding the manner of performance." *Id.*

SCRG points to evidence in the record that in its view supports the finding that SCA exercised sufficient control over the bulldozer driver to hold SCA liable for his acts. It focuses on the testimony of Black that when the bulldozer driver came onto the property he "worked at the direction of SCA." Further, Ken Haines told the jury that he observed a bulldozer being operated on the north side of Area A. When Haines questioned the driver, the latter stated that he was there doing work for Black and had entered through the back gate, to which SCA had a key.

Again, even if the bulldozer driver worked at the direction of SCA, it does not prove SCA's liability. It is no different, in our view, than a homeowner directing a house painter to paint her living room a certain shade of yellow. This does not make the painter her agent if he negligently dumps a can of paint on a guest in the house. Here, no evidence exists that Black directed the method of performance of the bulldozer driver or gave him specific instructions as to how to engage in any remediation work.

Furthermore, the statement of the bulldozer driver to which Haines testified cannot establish liability. It is well established under Virgin Islands Law that "[e]vidence of a statement by an agent concerning the existence or extent of his authority is not admissible against the principal to prove its existence or extent, unless it appears by other evidence that the making of such statement was within the authority of the agent or, as to persons dealing with the agent, within the apparent authority or other power of the

agent." Restatement (Third) Agency § 285; *see also Mendez v. HOVENSA, L.L.C.,* 49 V.I. 849, 862 (D.V.I. Mar. 31, 2008). No other evidence exists in the record of actual, implied, or apparent authority. While, as noted, Black testified that the bulldozer driver worked at his direction, he also stated that he did not authorize any work on the north side of Area A. Even if the jury disbelieved Black, it may not infer the opposite of his statement, that is, that he did authorize bulldozing on the north side of Area A. *See U.S. v. Urban,* 404 F.3d 754, 782 (3d Cir.2005); *Bose Corp. v. Consumers Union of the United States, Inc.,* 466 U.S. 485, 512 (1984).

There is no competent evidence that Black directed specific negligent acts or otherwise exercised any greater control than that of a general overseer. SCRG has failed as a matter of law to establish that SCA can be held liable for an independent contractor's negligence in damaging the vegetation and irrigation piping on the north side of Area A.

Accordingly, we will enter judgment in favor of SCA and against SCRG on SCRG's claim for negligence.[3]

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[3] In its motion for judgment as a matter of law, SCA also contended that the jury's award of $10,000,000 to SCRG for SCA's negligence was excessive in light of the fact that SCRG sought only $6,142,856 at trial. SCRG agreed that the award was in excess of what it sought. In light of our decision in favor of SCA on SCRG's negligence claim, we need not address this issue.

II.

SCA next attacks the jury's verdict as to breach of contract and fraud in the inducement. In these claims, SCRG alleged that SCA made intentional, knowing misrepresentations with the intent to defraud SCRG through the representations and warranties set forth in the March 2002 purchase agreement and reaffirmed at the June 2002 closing. Brownfield Recovery and Energy Answers, predecessors to SCRG, signed the purchase agreement along with SCA and its parent company Alcoa World Alumina.[4] The purchase agreement stated that it "shall be construed under the laws of the State of Delaware, excluding those related to conflicts or choice of law." As previously stated, SCA reaffirmed all the warranties and representations in the purchase agreement at the closing on June 14, 2002.

The warranties in the purchase agreement provided that there were no undisclosed hazardous materials on the Property, that SCA had not received any written notices of violations of environmental law that it had not disclosed, and that "there are no such violations outstanding of the Environmental Law, except as disclosed on Exhibit 8.1.6 attached hereto and made part hereof, or in the Environmental Reports." Exhibit 8.1.6 listed a variety of known violations of

[4] On the day of the closing, June 14, 2002, SCRG assumed all the rights and obligations set forth in the purchase agreement held by Brown Recovery and Energy Answers.

environmental law and any governmental actions that had been taken with respect to them. The purchase agreement limited the knowledge of the sellers to the knowledge of Eric Black, Tom Russell, Larry Grace, or Joe Norton. Black and Norton served as the chief environmental officers for SCA and Alcoa World Alumina, respectively. Russell acted as SCA's plant manager on the Property. Grace was President of Alcoa World Alumina.

The purchase agreement also stated that "[n]o party making a claim under any breach of a representation or warranty may recover any losses in excess of $3,000,000.00." SCRG maintains that SCA knew about red mud releases that were violations of environmental law, as defined in the purchase agreement, but failed to disclose them in either Exhibit 8.1.6 or the Environmental Reports in order to induce SCRG's predecessors to close on the Property and agree to a $3 million cap on damages for any contractual breach.

In its earlier motion for summary judgment, SCA contended that Virgin Islands law should apply to SCRG's claim for fraud in the inducement and that Virgin Islands law barred such a claim under its "gist of the action" doctrine. *See Werwinski v. Ford Motor Co.,* 286 F.3d 661, 680 (3d Cir.2002). SCRG argued, in contrast, that Delaware law, which does not bar such a claim, was applicable. *See Abry Partners V, L.P. v. F. & W. Acquisition LLC,* 891 A.2d 1032, 1035-36 (Del. Ch.2006). We agreed with SCRG. SCA now urges us to revisit the issue because, in its view, the evidence adduced at trial reveals that the contacts with the

Virgin Islands were "more numerous and substantial" than those with Delaware.

We first addressed this choice-of-law issue in our December 23, 2009 Memorandum (Doc. No. 256) addressing SCA's motion for summary judgment. In that Memorandum, we stated:

> While the location of the Property is an important factor, the close relationship of the alleged fraud to the contract sways us in favor of Delaware as the jurisdiction with the most significant relationship to the occurrence. The Restatement (Second) of Conflicts § 6, as noted above, counsels us to consider the expectation of the parties in selecting the applicable law. Here, the parties recognized the inherent problem with a multi-party, multi-jurisdiction negotiation and transaction and agreed that Delaware law should govern their agreement. Because the alleged fraud is so intertwined with these negotiations and the resulting agreement, we believe that Delaware has a stronger relationship to the occurrence of the alleged fraud than does the Virgin Islands.

St. Croix Renaissance Group, LLLP v. St. Croix Alumina, LLC, 2009 U.S. Dist. LEXIS 120525, *34 (D.V.I. Dec. 23, 2009).

We further explained in our December 23, 2009 Memorandum (Doc. No. 256):

> There is no one state where the reliance occurred or where the allegedly false or

> fraudulent statements were made. Consequently, we must determine "the state which, with respect to the particular issue, has the most significant relationship to the occurrence and the parties." Restatement (Second) of Conflicts § 148(2). In making this determination, we must consider a number of factors in § 148(2), as well as the general principles enumerated in § 6 of the Restatement (Second) of Conflicts.

Id. at 32 (footnotes omitted). Section 148(2) of the Restatement (Second) of Conflicts § 148(2) lists six non-exclusive factors to consider when determining which state has the most significant relationship to the occurrence and the parties. They are:

> (a) the place, or places, where the plaintiff acted in reliance upon the defendant's representations,
>
> (b) the place where the plaintiff received the representations,
>
> (c) the place where the defendant made the representations,
>
> (d) the domicile, residence, nationality, place of incorporation and place of business of the parties,
>
> (e) the place where a tangible thing which is the subject of the transaction between the parties was situated at the time, and
>
> (f) the place where the plaintiff is to render performance under a contract which he has

> been induced to enter by the false representations of the defendant.

Restatement (Second) of Conflicts § 148(2). Section 6 of the Restatement (Second) of Conflicts lists additional non-exclusive factors to consider. They are:

> (a) the needs of the interstate and international systems,
>
> (b) the relevant policies of the forum,
>
> (c) the relevant policies of the other interested states and the relative interests of those states in the determination of the particular issue,
>
> (d) the protection of justified expectations,
>
> (e) the basic policies underlying the particular field of law,
>
> (f) certainty, predictability and uniformity of result, and
>
> (g) ease in the determination and application of the law to be applied.

Restatement (Second) of Conflicts § 6(2).

We will review each of the § 148(2) factors in light of the evidence presented at trial. Section § 148(2)(a) requires us to consider "the place, or places, where the plaintiff acted in reliance upon the defendant's representations." Any reliance on SCA's representations did not occur until the purchase agreement was signed in March 2002 and the closing on the Property took place June 2002. The record is

unclear as to where each party signed the purchase agreement in March 2002, but it does reflect that the execution of the closing documents occurred in Miami, Florida in June 2002, not the Virgin Islands.

Subsection (b) references "the place where the plaintiff received the representations." The representation in question is the allegedly false warranty in the purchase agreement, which the parties finalized when they executed the closing documents in Florida.

We must next weigh "the place where the defendant made the representations." Restatement (Second) Conflicts § 148(2)(c). SCA contends that it made the representations in the Virgin Islands since all due diligence related to the environmental conditions of the Property occurred on-site in St. Croix. We disagree. The representations were not made during the due diligence but when SCA signed the purchase agreement containing the false representations in question. It was not until this point that the reliance of SCRG or any of its predecessors began. As noted above, the contract was executed in Florida. Furthermore, the negotiations leading up to the contract took place over a period of months in various places other than the Virgin Islands.

Under subsection (d) of § 148(2), we must consider "the domicile, residence, nationality, place of incorporation and place of business of the parties." It is undisputed that both SCRG, a limited liability limited partnership, and SCA, as well as Alcoa World Alumina, both signatories to the purchase agreement,

are organized under the laws of Delaware. Brownfield Recovery and Energy Answers, also signatories to the purchase agreement, are corporations organized under the laws of Florida and Puerto Rico, respectively. SCA maintains that the "place of business" of the parties is the Virgin Islands. While SCRG does business in the Virgin Islands, it did not begin doing so until after the closing in June 2002, and thus only after any fraud took place. SCA ceased operating its alumina refinery on the Property in St. Croix before the purchase agreement was executed. The other parties to the purchase agreement had places of business in Massachusetts, Pennsylvania, New York, Florida, and Puerto Rico. Thus, this factor does not strongly weigh in favor of applying Virgin Islands law.

Subsection (e) of § 148(2) directs that we take into account "the place where a tangible thing which is the subject of the transaction between the parties was situated at the time." The Property which was the subject of the purchase agreement was in the Virgin Islands.

Finally, § 148(2)(f) sets forth as a factor "the place where the plaintiff is to render performance under a contract which he has been induced to enter by the false representations of the defendant." SCA again argues that this subsection of the Restatement supports application of Virgin Islands law. We are not persuaded. The performance which the predecessors of SCRG were to render was the payment of monies for the Property. As stated above, all moneys paid for the Property were wired to a bank in Florida, not the

Virgin Islands. It cannot even be said that SCRG took possession of the Property in the Virgin Islands as the deed was executed and notarized in Pennsylvania and the closing documents were executed in Florida.

The Property, we acknowledge, is located in the Virgin Islands. Nonetheless, most of the parties to the purchase agreement were multi-state enterprises with employees located in New York, Pennsylvania, Florida, Delaware, Puerto Rico, and Massachusetts. The representations made by SCA at issue here are not representations made in St. Croix during due diligence, as SCA would have us believe, but rather the representations made in the contract for the sale of the Property. Most of the parties were not doing business in the Virgin Islands when the closing occurred in June 2002. The factors listed in § 148(2) of the Restatement (Second) of Conflicts do not strongly weigh in favor of the application of Virgin Islands law to SCRG's fraud claim.

In addition, we must focus on § 6 of the Restatement (Second) of Conflicts which lists further non-exclusive factors "relevant to the choice of the applicable rule of law." As we wrote in our December 23, 2009 Memorandum (Doc. No. 256):

> The Restatement (Second) of Conflicts § 6, as noted above, counsels us to consider the expectation of the parties in selecting the applicable law. Here, the parties recognized the inherent problem with a multi-party, multi-jurisdiction negotiation and transaction and agreed that Delaware law should govern

> their agreement. Because the alleged fraud is so intertwined with these negotiations and the resulting agreement, we believe that Delaware has a stronger relationship to the occurrence of the alleged fraud than does the Virgin Islands. Additionally, Delaware is more significantly related to the parties themselves than are the Virgin Islands because both SCRG and SCA are Delaware entities.

St. Croix Renaissance Group, 2009 U.S. Dist. LEXIS at *34. This analysis remains sound after thorough consideration of the evidence presented at trial. As we have previously stated, the fraud in the inducement is intertwined with the contractual negotiations. There is no evidence that the negotiations took place in the Virgin Islands. Finally, we reiterate that the execution of the contract itself occurred outside the Virgin Islands. To bring certainty to this multi-party transaction which involved parties located in a number of different jurisdictions and some of which were Delaware entities, the parties agreed that the purchase agreement should be governed by Delaware law. The state of Delaware clearly had a strong interest in having its law apply to a fraud-in-the-inducement claim involving a contract governed by its laws. *See* Restatement (Second) Conflicts § 6(c). Furthermore, application of Delaware law clearly protects the justified expectations of the parties under the circumstances. *See* Restatement (Second) Conflicts § 6(d). Accordingly, we again conclude that

Delaware law applies to SCRG's claim for fraud in the inducement.[5]

III.

SCA further argues that SCRG did not prove any element of its fraud claim by clear and convincing evidence. As explained in our instructions to the jury, to prevail on its claim for fraud, SCRG was required to prove the following elements by clear and convincing evidence:

> (1) the warranty contained in the purchase agreement was false, that is that Eric Black, Tom Russell, Larry Grace, or Joe Norton knew about an outstanding violation of the Environmental Law and failed to disclose it on Exhibit 8.1.6 or in the Environmental Reports;[6]
>
> (2) any of the four individuals, that is Eric Black, Tom Russell, Larry Grace, or Joe Norton, knew prior to June 14, 2002 that the

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[5] This is in contrast to fraud in the performance, which was a separate count in the Second Amended Complaint and which related to post-closing conduct of SCA that took place on the Property in the Virgin Islands and would be governed by Virgin Islands law. SCRG did not pursue this claim once objected to in SCA's motion for summary judgment.

[6] As previously noted, the purchase agreement limited the requirement to disclose all known environmental violations on the Property to those violations known by Black, Russell, Grace, or Norton.

> warranty was false at the time that it was made;
>
> (3) any of the four individuals made the false warranty with the intent to induce the plaintiff to sign the purchase agreement;
>
> (4) the plaintiff justifiably relied on the warranty in the purchase agreement in deciding whether to sign it; and
>
> (5) the plaintiff was damaged as a result of its reliance on the false warranty.

SCA can only prevail on its motion for judgment as a matter of law if, viewing all the evidence in the light most favorable to SCRG, the record is "'critically deficient of that minimum quantum of evidence from which the jury might reasonably afford relief.'" *Fineman v. Armstrong World Indus.,* 980 F.2d 171, 190 (3d Cir.1992). We recognize that a "scintilla of evidence is not enough to sustain a verdict of liability." *Jaguar Cars, Inc. v. Royal Oaks Motor Car Co., Inc.,* 46 F.3d 258, 270 (3d Cir.1995). The question before us is "whether there is evidence upon which the jury could properly find a verdict" for SCRG. *Id.* In doing so, we may not weigh the evidence nor pass on the credibility of witnesses. *Id.* at 269-70.

There was sufficient evidence for the jury to find by clear and convincing evidence that the warranty stated in the purchase agreement and reaffirmed at closing was false in representing that all known environmental violations had been disclosed. The record clearly reveals that SCA had not disclosed certain

multiple releases of red mud from Area A into the waters of the Virgin Islands. Such releases constituted unremediated violations of environmental law.

The Virgin Islands Water Pollution Control Act prohibits the discharge of any pollutant into a "water of the Virgin Islands." *See* 12 V.I.C. § 185(a). The court ruled that the West Ditch, a drainage system on the Property, constituted a "water of the Virgin Islands" as defined in that statute.[7] *See* 12 V.I.C. § 182(f). Thus, any discharge of red mud, a pollutant, into the West Ditch constituted a violation of that local environmental law.

At trial, Bruce Green, an employee of the Virgin Islands Department of Planning and Natural Resources assigned to monitor the environmental issues at the Property, testified that he observed multiple layers of red mud outside of and below Area A in the West Ditch in September 2002. He further testified that when he found these layers of red mud, he was

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[7] The statute, in relevant part, provides that:

> "Waters of the United States Virgin Islands" means all waters within the jurisdiction of the United States Virgin Islands including all harbors, streams, lakes, ponds, impounding reservoirs, marshes, water-courses, water-ways, wells, springs, irrigation systems, drainage systems and all other bodies or accumulations of water, surface and underground, natural or artificial, public or private, situated wholly or partly within or bordering upon the United States Virgin Islands, including the territorial seas, contiguous zones, and oceans. 12 V.I.C. § 185(f).

with Black, SCA's environmental officer, who admitted to him that the layers of red mud pre-dated April 2002. These releases, unlike the single April 2002 release, had not been disclosed before closing to the buyers of the Property.[8] Green, it is important to emphasize, was a witness who was not affiliated with any party to this litigation.

There was also sufficient evidence presented for the jury to infer that Eric Black, Tom Russell, Larry Grace, or Joe Norton of SCA knew of these environmental violations prior to closing.[9] Black and Russell were on the Property regularly at all relevant times. Black testified that he knew that if red mud migrated away from Area A through a breach in an exterior dike wall, it would be "an environmental problem." A 1993 geotechnical and engineering report prepared by Bromwell & Carrier documented instabilities in the dike walls of Area A due to debris landfilled in the walls. This report had not been disclosed to SCRG or its predecessors prior to the closing. The report found that the instability had caused releases of red mud from the southern dike wall prior to 1993. The report further noted that there was significant potential for future releases based on the continued instability of the walls caused by the debris. Black supervised the team that prepared SCA's draft Master Plan, which

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[8] While the release occurred in March or April 2002, it is being described as the April 2002 release for ease of reference.

[9] As noted above, Russell acted as plant manager on the Property, and Grace was President of Alcoa World Alumina.

incorporated the Bromwell & Carrier report and discussed its findings. Dana Smith, a former SCA employee, testified that she gave a copy of the draft Master Plan to Black.

SCRG also introduced into evidence an April 16, 2002 email from Black to Norton, the chief environmental officer for Alcoa World Alumina. The e-mail immediately alerted Norton about an April 2002 release, which was subsequently disclosed to SCRG prior to closing. That email provides in pertinent part:

> As a followup [sic] to this mornings [sic] e-mail regarding EA's concerns about residue runoff. I went with Pat Mahoney late this afternoon to the area which he found to be impacted by residue runoff. It is far more extensive than initially thought, extending to and possibly into the ocean. I will be calling the local agency to report this today (completed to Aaron Hutchins at 17:00). It appears the runoff occurred several weeks ago during a very heavy storm event.

This email establishes that Black and Norton understood the seriousness of red mud releases. The jury could reasonably infer that they had a motive to mislead SCRG about the extent of the problem. SCRG also relies on a 2002 environmental analysis of the Property prepared by Garver Engineering for SCA in response to the disclosed April 2002 red mud release. That analysis documented several releases of red mud from Area A over the facility's history. It is

undisputed that SCA withheld this report during due diligence and represented to the buyers that the April 2002 release had been a "one-time event." The jury could infer that SCA knew about the red mud releases prior to closing and warranted to the contrary in the purchase agreement in March 2002 and at the closing in June 2002.

Finally, as to SCA's claim that SCRG did not prove justifiable reliance, the court has previously explained that under Delaware law the predecessors of SCRG were permitted to rely on any warranties in the purchase agreement unless they had made such an investigation as would make the environmental violations obvious to them. *See Craft v. Bariglio,* 421 at 24 (Del. Ch. Mar. 1, 1984); *Omar Oil and Gas Co. v. Mackenzie Oil Co.,* 128 A. 392, 396 (Del.1926). On the verdict sheet, the court posed the following special interrogatory to the jury: "Do you find that the defendant has proven by a preponderance of the evidence that the plaintiff made an investigation on its own that did or should have made obvious to it those outstanding violations of the environmental law?" The jury answered, "No."

Based on the testimony of Mahoney and Haines, the jury could reasonably find that the buyers' investigation was not of such a nature and character that the multiple, prior red mud releases would or should have come to light, especially if the jury believed that SCA purposefully withheld the Bromwell & Carrier report which described a past release and predicted future releases.

There is sufficient evidence in the record for the jury to have found that SCRG proved its fraud claim by clear and convincing evidence. Furthermore, since all of the elements of SCRG's breach of warranty claim are included in the elements of its fraud claim and the standard of proof is lower for SCRG's breach of warranty claim, SCA's contention that SCRG did not prove its breach of warranty claim by a preponderance of the evidence also fails.

IV.

The jury awarded $12,617,867 on SCRG's claims for breach of warranty and fraud in the inducement. SCA contends that SCRG failed to prove recoverable damages for these claims. SCRG sought as damages the cost to build a retaining wall on the south side of Area A to prevent future releases of red mud due to dike wall instability. At trial, SCA presented expert testimony that proper vegetation of Area A would prevent any future releases without the need to build an expensive retaining wall. SCRG's experts held the opinion that building a retaining wall was necessary. The jury clearly agreed with SCRG and awarded it the full cost of doing so. SCA now asserts that the cost of a containment wall was not the proper measure of damages for the breach of warranty and fraud claims and that the cost was solely speculative.

First, SCA maintains that the cost of a retaining wall bore no logical relationship to the relevant measure of damages, that is, the loss in value of the

refinery property. The court instructed the jury on breach of warranty and fraud damages as follows:

> 62. If you find that the defendant breached its warranty in the purchase agreement for the refinery property, then you may award compensatory damages to the plaintiff. The plaintiff would be entitled to compensation in an amount that will place it in the same position it would have been in if the contract had been properly performed. The measure of damages is the loss actually sustained as a result of the breach of the warranty. Your award should reflect the loss in value of the refinery property as a result of any pre-April 2002 releases of red mud. Compensation for this loss can be achieved by awarding St. Croix Renaissance Group the reasonable cost of putting the refinery property in the condition in which it was represented to be.
>
> 63. Plaintiff claims the only way to do so is to construct a containment wall along the southern perimeter of Area A. Defendant maintains that contouring and vegetating Area A would have eliminated plaintiff's damages, if any. Any contouring and vegetating of Area A is the responsibility of plaintiff under the purchase agreement. If plaintiff has not proven that the construction of the containment wall is the necessary remedy to the breach of warranty, you may not award any damages for this breach.

The Delaware pattern jury instructions for breach of contract provide that "If you find that one party

committed a breach of contract, the other party is entitled to compensation in an amount that will place it in the same position it would have been in if the contract had been properly performed. The measure of damages is the loss actually sustained as a result of the breach of the contract." This is virtually identical to the first three sentences of our instructions. In this case, proper performance of the contract would have been the transfer of the Property in the condition in which it was represented to be in the warranties in the purchase agreement. The court merely explained to the jury that compensation could be the reasonable cost of placing SCRG in the position it would have been in had those representations been true.

The Restatement (Second) of Torts, which has been cited with approval by Delaware courts, explains the proper measure of damages for fraudulent misrepresentation in a contract. *See Envo, Inc. v. Walters,* 2009 Del. Ch. LEXIS 216, *24-*25 (Del. Ch. Dec. 30, 2009). The Restatement (Second) of Torts provides that:

> (1) The recipient of a fraudulent misrepresentation is entitled to recover as damages in an action of deceit against the maker the pecuniary loss to him of which the misrepresentation is a legal cause, including: (a) the difference between the value of what he has received in the transaction and its purchase price or other value given for it; and (b) pecuniary loss suffered otherwise as a consequence of the recipient's reliance upon

> the misrepresentation. (2) The recipient of a fraudulent misrepresentation in a business transaction is also entitled to recover additional damages sufficient to give him the benefit of his contract with the maker, if these damages are proved with reasonable certainty.

Restatement (Second) Torts § 549. Compensating SCRG by repairing the Property such that it is in the condition warranted in the purchase agreement has the effect of giving SCRG "the benefit of [its] contract with" SCA. Here, the retaining wall would prevent ongoing releases of red mud. Such releases are the basis of SCRG's claims for breach of warranty and fraud. The court's instructions to the jury were correct, and the reasonable cost of repairing the Property such that it would be in the condition that it was represented to be in the purchase agreement is a proper measure of damages.

SCA next contends that, even if a retaining wall could be a proper measure of damages, SCRG did not prove the cost of that remedy to a reasonable certainty. While "speculative damages are not recoverable," SCRG did introduce two expert witnesses who testified about the efficacy, construction, and cost of building a containment wall on the property to prevent future releases of red mud from Area A. *See Tanner v. Exxon Corp.,* 1981 Del.Super. LEXIS 819, *6 (Del.Super. July 23, 1981). These witnesses, John Ahlschwede and Jared Brown of Stanley Consulting, were qualified as experts under *Daubert.* The court

found that they had the requisite qualifications to render these opinions, that their methodology was sufficiently reliable, and that their opinions fit the questions presented in this case. Their testimony was unrebutted during the course of the trial. SCRG has proved its damages with reasonable certainty based on the evidence in the record concerning the necessity of a containment wall to remedy the underlying problem that caused the undisclosed environmental violations and concerning the cost of the wall's construction.

V.

Finally, in its motion for judgment as a matter of law, SCA challenges the jury's award of $6,142,856 in punitive damages. Under Delaware law, a jury may only award punitive damages "to punish a party for outrageous conduct and to deter a party, and others like it, from engaging in similar conduct in the future." Delaware Pattern Jury Instructions (2010); *see also State Farm Mutual Auto. Ins. Co. v. Campbell,* 538 U.S. 408 (2003); *Tackett v. State Farm Fire and Cas. Ins. Co.,* 653 A.2d 254, 265-66 (Del.1995). There was sufficient factual basis of SCA's hidden misrepresentations and the involvement of top officials at the company to sustain the jury's finding that the fraud was "outrageous." The punitive award is less than fifty percent of the compensatory damages and bears a "reasonable relationship" to the harm SCRG suffered. *See Philip Morris USA v. Williams,* 549 U.S.

346, 352-53 (2007). There is no basis on which to overturn the jury's award of punitive damages.

VI.

We next turn to SCA's motion for a new trial under Rule 59 of the Federal Rules of Civil Procedure on the ground that the court committed a myriad of evidentiary errors. SCA contends that the court erred in allowing SCRG to present to the jury a case different than the case it had pleaded, in admitting hearsay and improper expert testimony over SCA's objections, in refusing to admit evidence important to SCA's defense, and in improperly defining various terms for the jury. In most instances, we explained in detail before or during trial our rulings which are challenged again here. The arguments of SCA are without merit and require no further discussion.

VII.

SCRG has requested that the court amend its January 20, 2011 judgment by adding prejudgment interest to the jury's award of $12,617,867 for breach of warranty and fraud. SCA opposes this request because it contends that SCRG has not satisfied Delaware's statutory requirements for obtaining prejudgment interest for a tort claim such as fraud in the inducement.

In tort actions under Delaware law, prejudgment interest is available only where "prior to trial the

plaintiff had extended to defendant a written settlement demand valid for a minimum of 30 days in an amount less than the amount of damages upon which the judgment was entered." Del.Code. Ann., tit. 6, § 2301(d). SCRG concedes that it made no such demand. However, it maintains that the jury's award of $12,617,867 is properly considered an award for a breach of warranty, not under a tort theory for fraud.

Under Delaware law, the court may award prejudgment interest in all contract actions where the damages are unliquidated and proven by pecuniary testimony. *See Rollins Envtl. Servs., Inc. v. WSMW Indus., Inc.,* 426 A.2d 1363, 1366 (Del.Super.1980). There are no additional requirements for requesting prejudgment interest on contract claims.[10]

The terms of the purchase agreement between SCA and SCRG precluded SCRG from recovering in excess of $3,000,000 for any breach of warranty. The

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[10] We note that in Delaware state courts, parties must specifically plead a claim for prejudgment interest in its complaint. *See Chrysler Corp. v. Chaplake Holdings, Ltd.,* 822 A.2d 1024, 1037 (Del.2003). However, procedural issues before this court are governed by the Federal Rules of Civil Procedure, which provide that "final judgment should grant the relief to which each party is entitled, even if that party has not demanded that relief in its pleadings." Fed.R.Civ.P. 54(c). *See also, W.R. Huff Asset Mgmt. Co. v. William Soroka 1989 Trust,* Civ.A. No. 04-3093, 2009 U.S. Dist. LEXIS 68809, *7-*8 (D.N.J. Aug. 6, 2009), *aff'd* 398 Fed. App'x. 806 (3d Cir.2010); *Telecordia Techs., Inc. v. Cisco Syst., Inc.,* 592 F.Supp.2d 727, 749 (D.Del.2009), *aff'd in relevant part* 612 F.3d 1365, 1379 (3d Cir.2010).

court constructed a series of special interrogatories which it posed to the jury. It first asked, "Do you find that the plaintiff St. Croix Renaissance Group has proven by a preponderance of the evidence that the defendant St. Croix Alumina knew about and nonetheless failed to disclose to the plaintiff in the purchase agreement or Exhibit 8.1.6 or either of the two identified Environmental Reports any outstanding violations of the environmental law?" If the jury answered that question in the affirmative, it was also asked to answer the following interrogatory: "Do you find that the plaintiff has proven by clear and convincing evidence that the defendant committed fraud by knowingly making a false warranty in § 8.1.6 of the purchase agreement?" Since the jury answered "Yes" to both of those questions, it was required to answer the following damages interrogatory: "What amount of compensatory damages, if any, do you award to the plaintiff for the defendant's breach of the warranty in the purchase agreement and for the defendant's fraud in the inducement?"

The jury awarded a total of $12,617,867. This sum represented damages for both breach of warranty and fraud, not merely for breach of warranty alone.[11] While the purchase agreement provided a cap

[11] The jury was not told about the $3,000,000 cap in the purchase agreement in the jury instructions on the ground that it would be confusing the jury and unduly prejudicial to SCA. SCRG objected to this omission from the charge, but the court overruled that objection. Had the jury returned a verdict for

(Continued on following page)

of $3,000,000 in damages for breach of contract, the jury awarded an additional sum of $9,617,867. Without the breach of warranty, there could have been no damages for fraud. We conclude that the first $3,000,000 represented damages for breach of contract and the remaining $9,617,867 is properly considered an award of damages for SCA's fraud. Accordingly, we will add prejudgment interest on $3,000,000.

Under Delaware law, SCRG is entitled to prejudgment interest at a rate of 5% over the Federal Reserve discount rate as of the time that interest became due. *See* Del.Code Ann. tit. 6, § 2301(a). Interest is calculated from the date of the loss, which in this case is June 14, 2002, the date that SCRG's predecessors closed on the Property, until January 20, 2011, the date when judgment was first entered.[12] *See Pierce Assoc., Inc. v. Nemours Foundation,* 865 F.2d 530, 547 (3d Cir.1988). The Federal Reserve discount rate on June 15, 2002 was 1.25%. Making the calculation based on simple interest, the prejudgment interest due is $1,613,527. We will amend the judgment to reflect this amount.

SCRG on the breach of contract claim only, the court would have molded the verdict if necessary.

[12] SCRG, of course, is entitled to post-judgment interest on the entire amended judgment from January 20, 2011. *See* 28 U.S.C. § 1961.

DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

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

DEFENDANT ST. CROIX RENAISSANCE GROUP L.L.L.P.'S NOTICE OF REMOVAL OF A MASS ACTION UNDER 28 U.S.C. 1332(d)

COMES NOW Defendant, St. Croix Renaissance Group, L.L.L.P. ("SCRG") and gives notice pursuant to the *Class Action Fairness Act of 2005* ("CAFA") 28 U.S.C. 1442(d) and *28 U.S.C. 1441* – of the removal of a mass civil action.

I. Introduction

More than 500 individual Plaintiffs domiciled in various jurisdictions brought this action in the Superior Court of the U.S. Virgin Islands: *Abraham v. St. Croix Renaissance Group, LLLP,* CIVIL NO. SX-11 CV-550. *See* Complaint, attached as **Exhibit A,** and Summons attached as **Exhibit B.** Defendant has not answered, filing only a motion for more definite statement and to sever, attached as **Exhibit C.** There are no other pleadings before the Superior Court.

Service of the Complaint on defendant SCRG occurred less than thirty (30) days prior to the filing of this notice of removal.

Federal jurisdiction exists for "mass actions" pursuant to the *Class Action Fairness Act of 2005* – as those requirements of CAFA were codified within *42 U.S.C. § 1332(d)*. A mass action requires that there be 100 or more plaintiffs, common questions of law or fact, and that it not be a class action certified under Federal Rule of Civil Procedure 23. *Cappuccitti v. DirecTV, Inc.* 611 F.3d 1252, 1255 (11th Cir. 2010). Plaintiffs must meet several requirements for CAFA jurisdiction, such as a $5,000,000 aggregate amount in controversy and minimal diversity – and must not fall within certain, delineated exceptions.[1]

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[1] In general jurisdictional statutes must be narrowly construed. However CAFA's express, unique stated purpose is to "restore the intent of the framers" by extending federal court jurisdiction over "interstate cases of national importance under diversity jurisdiction." *See* CAFA, Pub. L. No. 109-2, § 2, 119 Stat. 4, 4-5 (2005). **Congress intended the *exceptions* to CAFA to be narrowly 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), as reprinted in 2005 U.S.C.C.A.N. 3, 40). Once a defendant makes a *prima facie* showing of jurisdiction under CAFA, **the burden shifts to the plaintiff to demonstrate that some exception might apply.** *See Kaufman v. Allstate New Jersey Ins. Co.*, 561 F.3d 144, 153 (3d Cir. 2009) ("*Kaufman I*") (burden for establishing applicability of exceptions to CAFA falls on party seeking remand). This burden shifting applies both to the local controversy exception and to the exceptions to the mass action

(Continued on following page)

"Congress's goal[ ] in enacting CAFA [was] to place more [statutorily delineated] actions in federal court by lifting barriers to their removal (which would result in most published CAFA cases being heard in a removal posture)." *Cappuccitti* at 611 F.3d 1255.

II. Applicable Law

The CAFA provisions of section 1332 provide:

> **d(11)(A)** For purposes of this subsection and section 1453, a mass action shall be *deemed* to be a class action removable under paragraphs (2) through (10) if it otherwise meets the provisions of those paragraphs.
>
> **(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).

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provision. *See Lowery v. Honeywell Int'l, Inc.,* 460 F. Supp. 2d 1288, 1301 (N.D. Ala. 2006) (plaintiffs have burden of proof for local controversy and mass action exceptions).

(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, and that allegedly resulted in injuries in that State or in States contiguous to that State;

(II) the claims are joined upon motion of a defendant;

(III) all of the claims in the action are asserted on behalf of the general public (and not on behalf of individual claimants or members of a purported class) pursuant to a State statute specifically authorizing such action; or

(IV) the claims have been consolidated or coordinated solely for pretrial proceedings.

* * * *

(D) The limitations periods on any claims asserted in a mass action that is removed to Federal court pursuant to this subsection shall be deemed tolled during the period that the action is pending in Federal court.

(e) The word "States", as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.

III. Argument

A. The Elements of CAFA are Met

This action meets the requirements set forth in the statute in that, with regard to the causes herein[2]:

A. "monetary relief claims" are being made by

B. "100 or more persons" and are

C. "proposed to be tried jointly"

D. "on the ground that the plaintiffs' claims involve common questions of law or fact" and

E. the "plaintiffs . . . claims . . . satisfy the jurisdictional amount requirements under subsection (a) in that each claim has a value that exceeds $75,000."

---

[2] SCRG notes that:

> **(II)** the claims are [not] joined upon motion of a defendant;
>
> **(III)** all of the claims in the action are [not] asserted on behalf of the general public (and not on behalf of individual claimants or members of a purported class) pursuant to a State statute specifically authorizing such action; or
>
> **(IV)** the claims have [not] been consolidated or coordinated solely for pretrial proceedings.

and that:

> **(I)** to cases [have not been] certified pursuant to rule 23 of the Federal Rules of Civil Procedure; or
>
> **(II)** if plaintiffs [do not] propose that the action proceed as a class action pursuant to rule 23 of the Federal Rules of Civil Procedure.

F. not "all of the claims in the action arise from *an event or occurrence*[3] 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*" as (1) this is not a single event or occurrence such as the Court noted was the case in *Abednego v. Alcoa Inc.,* 2011 Westlaw 941569 (D.V.I. March 17, 2011) (emphasis added), and in any case, (2) many of the plaintiffs are now in other jurisdictions where the injuries are allegedly occurring.

D. For the purposes of CAFA, "an unincorporated association shall be deemed to be a citizen of the State where it has its principal place of business and the State under whose laws it is organized." 28 U.S.C. (d)(10). SCRG is a citizen of (1) its state of incorporation (Delaware) and (2) its "principal place of business," which is Massachusetts – pursuant to the "nerve center" test set forth in *Hertz Corp. v. Friend,* 130 S.Ct. 1181 (2010). Plaintiffs are domiciled in the U.S. Virgin Islands, non-contiguous states and other countries.

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[3] One series of the plaintiffs' claims stems from "red mud" which was left on the property by alumina refining operators of the Site prior to SCRG's ownership. Another, series of claims relates to another, totally unrelated, source and circumstances – those claims arise from (non-red mud) asbestos which was only coincidentally present in the structure/construction of the plant facility. Such asbestos was not a byproduct of the "Bayer Process" used in the refining of bauxite ore into alumina, and had nothing to do with the industrial disposal of a waste by-product.

B. Related Disputes Shed Light on the Individual Amounts in Controversy

Plaintiff's counsel and various of the plaintiffs have been involved in other, longstanding litigation of intimately related claims involving many of the same plaintiffs going back as far as 1999. *See e.g. Henry v. St. Croix Alumina, LLC,* 2000 U.S. Dist. LEXIS 13102, *8 (D.V.I. Aug. 7, 2000) (along with subsequent related actions "*Henry*"). During that period various combinations of plaintiffs' counsel and hundreds of persons (and experts) have made numerous representations and claims about the facts[4] – and amounts – at issue.

In *Abednego v. St. Croix Alumina LLC et al.,* Civ. No. 1:10-cv-00009, plaintiff could not dispute the $5,000,000 collective amount[5], but did contest the

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[4] For example, in the *Abednego* case (1:10-cv-00009 at D.E. 126), when it was convenient to do so, plaintiffs alleged the direct opposite of what is alleged here:

> When they sold the site to SCRG, Alcoa and SCA left behind bauxite, red mud, asbestos, coal dust, and other particulates **and concealed from SCRG** and Plaintiffs **the true nature of the toxic materials.** Doc. No. 12-3, at ¶ 2924-2926; 111-2, at ¶¶ 2083-87, 2091-94.

[5] In any case, this would be less than $10,000 per plaintiff due to the more than 500 plaintiffs here. In *Abednego* the Court noted that "This lawsuit meets many of the criteria of a mass action. It contains claims by more than 100 persons whose claims involve common questions of law and fact and whose claims in the aggregate exceed $5 million exclusive of interest

(Continued on following page)

$75,000 per plaintiff amount.[6] *See e.g.* Defendants' Response in Opposition to Plaintiffs' Third Motion to Remand, at D.E. 128, page 7. As noted in that Opposition at 7-10:

> In *Frederico v. Home Depot,* 507 F.3d 188 (3d Cir. 2007), the Third Circuit unified several lines of cases to clarify the test for determining whether the jurisdictional amount is satisfied. The Third Circuit recognized that there are two types of cases, to which different standards apply. In the first, "where the plaintiffs complaint specifically (and not impliedly) and precisely (and not inferentially) states that the amount sought in a class action diversity complaint" will not exceed the jurisdictional minimum, "'the party wishing to establish subject matter jurisdiction has the burden to prove by a legal certainty that the amount in controversy exceeds the statutory threshold.'" *Id.* at 196 (quoting *Morgan v. Gay,* 471 F.3d 469, 471 (3d Cir. 2006)). This is commonly referred to as the *Morgan* standard. In the second type of case, **where**

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and costs." See 28 U.S.C. § 1332(2). [1:10-cv-00009, D.E. 133 at 3].

[6] Although Plaintiffs' complaint is extremely confusing (persons listed in the caption are not in the body and *vice versa*) it appears that approximately 80% of the plaintiffs in the instant case are plaintiffs in *Abednego.* In turn, many of "the same individuals [plaintiffs in Abednego] sought essentially the same relief for essentially the same alleged injuries in Henry. (*See* Third Am. Compl., ¶ 2108 ("Plaintiffs herein are former members of the original class in *Henry*. . . .").) *Id.* at 11.

the plaintiff has *not* disclaimed recovery above the jurisdictional minimum, jurisdiction exists unless "it appears to a legal certainty that the plaintiff *cannot* recover the jurisdictional amount." *Raspa v. Home Depot,* 533 F. Supp. 2d 514, 522 (D.N.J. 2007) (emphasis added) (citing *Samuel-Bassett v. Kia Motors America, Inc.,* 357 F.3d 392 (3d Cir. 2004)). This is commonly referred to as **the *Samuel-Bassett* standard.**

This case must be decided under the *Samuel-Bassett* standard, as Plaintiffs have not disclaimed recovery above the jurisdictional minimum or stipulated that they would not accept an award of damages in excess of that figure. *See, e.g., Lohr v. United Fin. Cas. Co.*, 2009 U.S. Dist. LEXIS 75388, *11 (W.D. Pa. Aug. 25, 2009) (citing *Frederico,* 507 F.3d at 196-97) ("Because Plaintiffs have not explicitly limited the damages sought to an amount less than $5,000,000, we conclude this case does not fall into the scope of *Morgan,* but rather *Samuel-Bassett.*"); *Lorah v. Suntrust Mortgage, Inc.,* 2009 U.S. Dist. LEXIS 12318, *14 (E.D. Pa. Feb. 17, 2009). Instead, they have merely stated that "they reasonably believe their individual damages do not exceed $75,000.00."2 [sic] (Third Am. Compl., ¶ 2.) Courts analyzing similar language have held that such unsupported, equivocal allegations regarding plaintiffs' subjective belief – here, purportedly held universally by each of the thousands of Plaintiffs – are insufficient to impose on

defendants a burden of proving to a legal certainty that a plaintiff could recover more than the jurisdictional minimum. For instance, in *Lorah,* while the class representatives did

> specifically and precisely expressly limit their individual damages to below $75,000, they do not state that the class damages are below five million dollars. Rather, they state, "there is no CAFA jurisdiction . . . because it is not certain or likely that more than 100 persons will opt-in to the class or that the aggregate amount in dispute in this opt-in class will exceed the five million dollar requirement of CAFA." The Court finds that ***the wording of the Lorahs' class action complaint is sufficiently equivocal*** so as to make the instant case subject to *Samuel-Bassett* standard rather than the *Morgan* standard.

2009 U.S. Dist. LEXIS 12318 at *13-14 (emphasis added, internal citations omitted, ellipses in original) (citing *Samuel-Bassett,* 357 F.3d 392; *Morgan,* 471 F.3d 469). *See also Salce v. First Student, Inc.,* 2009 U.S. Dist. LEXIS 94589, *5-6 (D.N.J. Oct. 8, 2009) (statement that plaintiff "would likely accept a settlement offer at or below $75,000 in support of the argument that the amount in controversy will not exceed $75,000" did not permit application of *Morgan*).

* * * *

> While Plaintiffs ask the Court to apply the higher standard of *Morgan,* they seek to avoid having the Court do so at the expense of their potential recovery. But *Frederico* is intended to proscribe exactly that sort of double dealing. Because Plaintiffs have not "specifically (and not impliedly) and precisely (and not inferentially)" limited their recovery, but instead have made vague, non-binding statements about their subjective beliefs of the value of their claims, the *Morgan* standard is inapplicable. Instead, the *Samuel-Bassett* standard applies, and Defendants need only show by a preponderance of evidence that it is not a legal certainty that Plaintiffs will recover less than the jurisdictional minimums. *See Frederico,* 507 F.3d at 198 (to the extent that a dispute exists regarding the facts relevant to jurisdiction, a "preponderance of the evidence standard [is] appropriate. Once the findings of fact have been made, the court may determine whether [the] 'legal certainty' test for jurisdiction has been met") (citing *McNutt v. General Motors Acceptance Corp. of Indiana,* 298 U.S. 178 (1936)).

Here Plaintiffs have claimed exposure to both red dust and also to structural asbestos completely unrelated to the Bayer Process. The complaint recites extensive damages from two entirely independent sources – and punitive damages, alleging:

> 482. As a result of Defendant's conduct, plaintiffs suffered and continue to suffer

> physical injuries, medical expenses, damage to their properties and possessions, loss of income, loss of capacity to earn income, mental anguish, pain and suffering and loss of enjoyment of life, a propensity for additional medical illness, and a reasonable fear of contracting illness in the future, all of which are expected to continue into the foreseeable future.
>
> 483. To this date, Defendant is continuing to expose plaintiffs to red dust, bauxite, asbestos and other particulates and hazardous substances, Defendants' conduct is also continuing to prevent plaintiffs from freely enjoying their properties.

In the *Henry* case(s) individuals sought relief for lesser alleged injuries over a far smaller time period. However, as has been noted in the related cases:

> Plaintiffs' counsel represented to this Court during a telephonic conference on September 12, 2008, that she expected to be able to recover $150,000 not only for each class representative in *Henry,* but also for every Rule 23(b)(3) class member – that is to say, Plaintiffs. *See* Declaration of Bernard C. Pattie, Esq., ¶ 8 ("Pattie Dec.")[7], attached as Exhibit 1. Plaintiffs' counsel stated that this would be her demand even if all of her key experts were struck (as they eventually were).

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[7] That Pattie Declaration is incorporated by reference herein.

See e.g. Defendants' Response in Opposition to Plaintiffs' Third Motion to Remand at D.E. 128, page 18. This was a discussion with the Court – definitely **not** a settlement discussion between the parties.[8] Moreover, although the experts were later struck – plaintiff submitted averments as the statements of her clients containing amounts in excess of $75,000 each – which are probative under the *Samuel-Bassett* standard.

In addition, in determining the amount in controversy, the Court must also consider "the value of the right sought to be protected by the injunctive relief." *Byrd v. Corestates Bank, N.A.,* 39 F.3d 61, 65 (3d Cir. 1994) as well as requests for punitive damages. *See Frederico,* 507 F.3d at 198-99 (citing *Golden v. Golden,* 382 F.3d 348, 356 (3d Cir. 2004)).

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[8] *Id.* at 12:

> [T]he statements were not made during "settlement negotiations," but rather during a status conference with this Court. Second, courts have repeatedly held that even statements made in the settlement context can be used to establish the amount in controversy for jurisdiction purposes. *See, e.g., McPhail v. Deere & Co.*, 528 F.3d 947, 956 (10th Cir. 2008) ("a plaintiffs proposed settlement amount is relevant evidence of the amount in controversy," and is admissible for that purpose under Fed. R. Evid. 408); *Rising-Moore v. Red Roof Inns, Inc.,* 435 F.3d 813, 816 (7th Cir. 2006) (same); *Cohn v. Petsmart, Inc.,* 281 F.3d 837, 840 n.3 (9th Cir. 2002) ("reject[ing] the argument that Fed. R. Evid. 408 prohibits the use of settlement offers in determining the amount in controversy").

Finally, it should be noted that Plaintiffs' counsel and many of the plaintiffs themselves are now well-educated regarding the concept that plaintiffs are "masters of their own complaint." The $75,000 amount could have been summarily pled, but was not. This was clearly intentional – because plaintiffs seek, and do not wish to be limited to a lesser amount than $75,000. While understandable, this *choice* results in the application of the Samuel-Bassett standard. Thus, Defendants have the right to rely [sic] the plaintiffs calculated decision not to plead the $75,000 amount, the prior statements of plaintiffs through counsel and the asserted calculations of plaintiffs' own experts.

A copy of this Notice will be filed with the Clerk of the Superior Court after filing with this Court.

Dated:
February 2, 2012

/s/ Joel H. Holt

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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of February, 2012, I filed the foregoing with the Clerk of the Court, and hand-delivered said filing to the following:

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Counsel for the Plaintiffs

/s/ Joel H. Holt
Joel H. Holt, Esq.

[Exhibits Omitted In Printing]

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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]

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

---

[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)."

> **(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 <u>*event*</u> 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]

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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

(Continued on following page)

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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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"

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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:

(Continued on following page)

> [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 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,

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> '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.

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 <u>an</u> 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 wanted *very* different things from the bill; thus its history is hardly a basis for ignoring the clear

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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.)

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 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

[11] As noted in that motion, "this ignores the first half of subparagraph (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.

> 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 's*imilar'* 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

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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 [sic] 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

(Continued on following page)

decisions; its own in *Abednego v. Alcoa*[14] and one by the Northern District of Florida in *Allen v. Monsanto Co.*[15]

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

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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).

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

[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.)

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 three 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.

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[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. 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.

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:

/s/ Carl J. Hartmann

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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:

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/s/ Carl J. Hartmann
Carl J. Hartmann III

[Addendum And Exhibits Omitted In Printing]

RIGHTING WRONGS

March 28, 2013

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

RE: Letter Brief of Appellees Eleanor Abraham, et al. in No. 13-1725, *Abraham, et al. v. St. Croix Renaissance Group, L.L.L.P.*

INTRODUCTION

The question in this appeal is whether this toxic tort suit, which was filed in Virgin Islands court on behalf of several hundred St. Croix residents who were injured by a local Superfund site owned by Appellant-Defendant St. Croix Renaissance Group (SCRG), is removable to federal court under the Class Action Fairness Act (CAFA). JA136. The district court held that, because the suit concerns a local "event or occurrence," the case does not constitute a removable "mass action" under CAFA. JA17. That ruling was correct as a matter of law.

Before addressing the merits, however, it is useful to understand why CAFA was enacted in the first place. CAFA's principal goal is to ensure that "*interstate* cases of *national* importance" – in particular, large, national class actions – are decided in federal, not state, court. *See* 28 U.S.C. § 1711 note (emphasis added). To this end, CAFA relaxes the requirements for federal court diversity jurisdiction

over class actions *except* where the action concerns a local controversy: where more than two-thirds of the plaintiffs are citizens of the state where the action was filed and the defendant is also a citizen of that state. 28 U.S.C. § 1332(d)(4)(B).

CAFA also provides that "mass actions" are removable to federal court if they meet the same criteria applicable to class actions. § 1332(d)(11)(A). Congress clarified, however, that a case is not a removable "mass action" under CAFA if "all of the claims in the action arise from an event or occurrence in the State in which the action was filled, and that allegedly resulted in injuries in that State." § 1332(d)(11)(B)(ii)(I).

The two "local controversy" provisions, §§ 1332(d)(4) and (d)(11)(B)(ii)(I), serve to keep class and mass actions in state court if they concern local plaintiffs and local events. They reinforce that CAFA' s primary concern was making sure that national, interstate class actions are decided in federal court.

Here, the district court was correct in recognizing that this is not such a case. Appellees all live or lived in St. Croix at the time they were injured; all of their injuries were incurred in St. Croix; and – most pertinent to this appeal – all of the Appellees' injuries resulted from a single "event or occurrence": the continuous, ongoing exposure of the populace to wind-blown residue from SCRG's industrial property, a defunct alumina refinery. In light of these facts, the district court's holding that this lawsuit falls within

the local controversy provision applicable to mass actions – § 1332(d)(11)(B)(ii)(I) – is unassailable.

If this Court disagrees, however, removal would still be improper because this action *also* falls within the local controversy exception applicable to both class actions and mass actions, § 1332(d)(4). Appellees raised this alternative argument below, and sought discovery on whether SCRG is a citizen of the Virgin Islands, one of the requirements for meeting the § 1332(d)(4) exception. The district court, however, denied the requested discovery and found that SCRG is not a citizen of the Virgin Islands, but did not discuss whether § 1332(d)(4) applies. If this Court disagrees with the lower court's ruling as to the mass action local controversy provision (§ 1332(d)(11)(B)(ii)(I)), the district court's ruling as to SCRG's citizenship should be vacated, and this case should be remanded to district court for discovery on whether it qualifies for the § 1332(d)(4) exception.

ISSUES

1. Whether the district court was correct in remanding the case to Virgin Islands state court based on its holding that the "regular or continuous release of toxic or hazardous chemicals" is a local "event or occurrence" within the meaning of the local controversy provision of CAFA applicable to mass actions, 28 U.S.C. § 1332(d)(11)(B)(ii)(I)?

2. In the event the Court answers "no" to the first issue, whether the district court erred in not permitting Appellees to take discovery to determine

whether this case also falls within the local controversy provision of CAFA applicable to both mass actions and class actions, 28 U.S.C. § 1332(d)(4)?

STATEMENT OF JURISDICTION

This Court lacks jurisdiction to review the district court's remand order under 28 U.S.C. § 1453(c) because the case is not a "class action" as defined by § 1332(d)(1). Typically, orders remanding actions to state court are not appealable at all, § 1447(d), but CAFA created an exception for remand orders applicable to class actions – not mass actions. § 1453(c)(1). Section 1453 limits the definition of "class actions" to the definition in § 1332(d)(1): representative actions filed under Rule 23 or a similar state procedure. *See* § 1453(a). There is no dispute here that this case does not meet the definition of "class action" in § 1332(d)(1) and § 1453 because it is not a representative action filed under a class action procedure – all the plaintiffs are named parties. JA21-48. This Court therefore lacks jurisdiction over this appeal.[1]

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[1] SCRG contends that this is a removable mass action. Mass actions, however, are deemed to be class actions removable under § 1332(d)(2)-(10), not under (d)(1), the section referenced in the appeal statute. § 1332(d)(11)(A). The appeal statute itself makes no mention of any of the sections governing mass actions or the provision linking mass actions to class actions. *See* § 1453. While it is true that § 1331(11)(A) mentions § 1453, that does not change the limited definition of "class action" in §§ 1453 and 1332(d)(1).

STANDARD OF REVIEW

The issue of whether Appellees' claims give rise to federal court jurisdiction under CAFA is a question of statutory interpretation and subject matter jurisdiction subject to *de novo* review. *Kaufman v. Allstate N.J. Ins. Co.,* 561 F.3d 144, 151 (3d Cir. 2009). A district court's decision on whether to grant jurisdictional discovery is reviewed for abuse of discretion. *Toys "R" Us, Inc. v. Step Two, S.A.,* 318 F.3d 446, 455 (3d Cir. 2003).

STATEMENT OF THE CASE

SCRG's defunct alumina refinery sits on the south shore of the island of St. Croix, close to thousands of homes. JA48-49. The byproduct of the alumina refining process is a bauxite residue called "red mud" or "red dust." JA49. At the alumina refinery site, which is now a Superfund site, red dust is stored outdoors in uncovered, unsecured piles as high as 120 feet and covering up to 190 acres. JA50. *See* SCRG Br. 2. These piles of industrial byproduct include hazardous materials such as arsenic, molybdenum, selenium, coal dust, and other particulates. JA50. The remaining unrefined bauxite, meanwhile, is stored in a damaged shed that does not prevent the bauxite from blowing off the property. *Id.* Red dust and bauxite can cause damage to the skin, eyes, and respiratory system, and it is a cancer hazard. JA49-50. The toxic dust also causes property damage. JA49. Finally, the refinery is also rife with loose

(friable) asbestos fibers, which, like the red dust and bauxite, are not secured and are carried by the wind onto and into the homes of Appellees – as well as into the cisterns from which Appellees get their drinking water. JA51.

The unsecured red dust, bauxite, and friable asbestos existed at the refinery when it was purchased by SCRG in 2002. JA51-52. SCRG has done nothing to seal, secure, clean up, or otherwise prevent the toxins from continuously blowing off the SCRG property onto Appellees' property. *Id.*[2]

In November 2011, Appellees sued SCRG in Virgin Islands court, bringing tort and nuisance claims for the continuous release of the toxic particles from SCRG's 2002 purchase through the present. JA53-59. Appellees seek damages for personal injury and property damage, an injunction preventing the further dispersal of the particles, and punitive damages. *Id.* SCRG did not answer the complaint. JA136. Instead, SCRG filed a notice of removal in federal district court, contending that there is federal court jurisdiction under CAFA's "mass action" provisions. *Id.* Appellees responded by filing a motion to remand to Virgin Islands court, arguing that there is no federal court jurisdiction under either of CAFA's local

[2] SCRG protests that it has entered into a consent decree with the government and the prior owner to clean up the refinery site. SCRG admits, however, that the consent decree was not approved until *after* the residents filed this suit. *See* SCRG Br. 2.

controversy provisions, §§ 1332(d)(4) and (d)(11)(B)(ii)(I). JA67-69, 71-72.

SCRG countered that its ongoing failure to secure the red dust, bauxite, and asbestos does not constitute a single "event or occurrence" under § 1332(d)(11)(B)(ii)(I), and, thus, this case is a removable "mass action" under CAFA. JA94. SCRG also argued that the local controversy exception set forth in § 1332(d)(4) does not apply because it is not a citizen of the Virgin Islands. JA99. In support of the latter claim, SCRG filed an affidavit, unsupported by any documentation, stating that, as of May 2011, SCRG's principal place of business is in Massachusetts, and that it is, therefore, not a citizen of the Virgin Islands. JA114-15. Appellees countered with evidence from SCRG's website indicating that it is headquartered in St. Croix and requested the opportunity to conduct discovery on the question of SCRG's citizenship. JA121-22, 133-34.

Without explicitly ruling on Appellees' motion for discovery, the district court held that SCRG is a Massachusetts citizen. JA11. That finding was not relevant to the court's decision, however, because it did not address whether the case was excepted from CAFA jurisdiction under § 1332(d)(4), which only applies if the defendant is a local citizen. Instead, the district court remanded the case to state court under § 1332(d)(11)(B)(ii)(I), which does not require that the defendant be a local citizen, based on its conclusion that "an event" includes the "continuous release of toxic or hazardous chemicals . . . where there is no

superseding occurrence or significant interruption that breaks the chain of causation." JA 17.

SCRG sought discretionary review of the district court's decision to remand under § 1332(d)(11)(B)(ii)(I), and this Court granted review. JA3. SCRG does not dispute that this case meets § 1332(d)(11)(B)(ii)(I)'s requirements that the case involve local events and injuries – SCRG's sole argument is that its ongoing, continuous release of toxins is not "*an* event or occurrence" under § 1332(d)(11)(B)(ii)(I).

ARGUMENT

I. The District Court Correctly Remanded this Case to Virgin Islands State Court Under § 1332(d)(11)(B)(ii)(I).

A. The District Court Was Correct in Holding that SCRG's Continuous Release of Toxins Is an "Event or Occurrence" Under § 1332(d)(11)(B)(ii)(I).

The district court held 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." JA17 (emphasis in original). That conclusion comports with common sense, the use of "occurrence" in the claim preclusion and supplemental jurisdiction contexts, industry practice, and the structure and purpose of CAFA.

First, there is no sensible way to break down the ongoing, continuous release of toxins into multiple events or occurrences, and SCRG fails to explain how to do so. Over how short of a period of time does the release of toxins have to last to qualify under SCRG's theory? One day? One month? One year? For the duration of each breeze? Any attempt to say that SCRG's failure to properly store and secure red dust, for example, at 11:59 pm on December 31, 2003, is separate event from its failure to do so at 12:00 am on January 1, 2004, would be purely arbitrary line drawing. Thus, the district court's conclusion is the only sensible one: Unless there is an intervening action that changes the causal chain, an ongoing release of toxins is a single event or occurrence.

Other courts facing similar facts have reached the same conclusion as the district court here. In *Allen v. Montsanto Co.,* the plaintiffs, like Appellees here, owned property near a facility that continuously released toxins over a period of 40 years because of the facility's failure to properly store industrial byproducts. No. 3:09cv471, 2010 WL 8752873, at *1 (N.D. Fla. Feb. 1, 2010). In rejecting removal, the district court held that the fact "[t]hat the event is alleged to have been ongoing through time does not thereby 'pluralize' the event or occurrence." *Id.* at *10. The court rejected the facility's argument that because the release of the toxins spanned a number of years, it was not "an event or occurrence," pointing out that any event could always theoretically be broken down into other events mere seconds long. *Id.*

at *10 & *10 n.12. SCRG calls *Allen* "inapposite," but does not make any actual attempt to distinguish it from this case for good reason: It is indistinguishable. SCRG Br. 16-18.[3]

Similarly, in *Mobley v. Cerro Flow Products, Inc.,* the court found that the plaintiffs' claims for damages from the defendants' improper disposal of toxic industrial waste over many years fell within § 1332(d)(11)(B)(ii)(I). No. 09-697-GPM, 2010 WL 55906, at *3 (S.D. Ill. Jan. 5, 2010). If anything, this is an even easier case than *Mobley* because, while *Mobley* involved three different sites and several affiliated defendants, *id.* at *1, this case involves only one facility and only one defendant.

The *sole* case that has held the opposite – that the ongoing release of toxins is not an event or occurrence under § 1332(d)(11)(B)(ii)(I) – did so without any reasoning whatsoever. *Aana v. Pioneer Hi-Bred Int'l, Inc.,* No. CV 12-00231 JMS-BMK, 2012 WL 3542503, at *2 (D. Haw. July 24, 2012). *Aana* does not address *Allen* and *Mobley* and does not explain how it is logically possible to break down a continuous

[3] SCRG takes issue with *Allen*'s holding that because the local event or occurrence provision is part of the definition of "mass action" and not an exception, the burden to show federal jurisdiction remains on the party seeking removal and does not shift to the party opposing it. SCRG Br. 17-19; *see Allen,* 2010 WL 87528873, at *3. Appellees disagree with SCRG, but regardless of which party bears the burden, Appellees should prevail here because their complaint describes a claim that is "an event or occurrence" within the meaning of the statute.

release into multiple events. Thus, *Aana* stands in stark contrast to the carefully reasoned decisions here below and in *Allen,* and it is unpersuasive.

SCRG gains no further traction by pointing out that *Abednego v. Alcoa, Inc.* dealt with a local environmental tort based on the impact of a 1998 hurricane – indisputably "an event or occurrence" under § 1332(d)(11)(B)(ii)(I). No. 1:10-cv-09, 2011 WL 941569 (D.V.I. Mar. 17, 2011); *see* SCRG Br. 17. That conclusion, however, does not foreclose a finding that a similar environmental tort that takes place over a longer period of time is also "an event or occurrence." If anything, *Abednego,* which involved dispersal of red dust from the same site as the one at issue here, highlights the arbitrariness of SCRG's proposed interpretation of the statute. In SCRG's view, similar local environmental torts – indeed, torts brought against the same facility based on the improper storage of the same toxic particles – would be divided between federal and state court based solely on whether the release of toxins happened over a few days or over a few years. That cannot be the law.

This is not to say that the pollution emanating from a single facility is always a single event. Changes in ownership, changes in manufacturing processes, or damage done by a catastrophic natural event are all the sorts of intervening happenings described by the district court that might break the causal chain and turn the release of pollutants into multiple events. In *Hamilton v. Burlington Northern Santa Fe Railway Co.,* for example, the court held that more

than 100 years' worth of pollution from a plant owned by successive operators using different formulas for the pollutants does not constitute a single "event or occurrence" under CAFA. No. A-08-CA-132-SS, 2008 WL 8148619, at *1, *9, * 12 (W.D. Tex. Aug. 8, 2008). Here, in contrast, Appellants are suing a single defendant-owner for its failure to secure toxic particles throughout the period that the single defendant solely owned the dormant refinery.

Hamilton is helpful for another reason. In concluding that the plaintiffs' claims did not involve a single "event or occurrence," the *Hamilton* court looked to well-accepted standards for claim preclusion and supplemental jurisdiction. *Id.* at *11-*12 (citing Fed. R. Civ. P. 13(a)(1)(A) and 28 U.S.C. § 1367(a)). In both contexts, the concern is whether the "claims arising out of the same 'occurrence' are related in such a way that they should be litigated in a single proceeding." *Id.* at * 11. There is claim preclusion if the claims involve "essential similarity of underlying events." *United States v. Athlone Indus., Inc.,* 746 F.2d 977, 983-84 (3d Cir. 1984). The standard for supplemental jurisdiction is whether the claims "derive from a common nucleus of operative facts" that one "would ordinarily be expected to try . . . in one judicial proceeding." *Lyon v. Whisman,* 45 F.3d 758, 760 (3d Cir. 1995).[4]

[4] Borrowing the definition of "occurrence" from other areas is appropriate because when interpreting a statute, there is a

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All of Appellees' claims easily fall within the definition of "occurrence" in the claim preclusion and supplemental jurisdiction contexts, and there is no reason to think Congress intended "occurrence" to have a different meaning in CAFA. Here, Appellees allege that SCRG failed to properly store and secure toxins at the refinery and that it continually failed to do so over a period of years. Those claims involve the same underlying facts and would ordinarily and most sensibly be decided in the same proceeding – there is no reason to divide the failure to secure the toxic particles by, for example, year, when the plaintiffs, defendant, and failure of the defendant to act are all the same.

SCRG's insistence that the "events" at issue in this case are only "marginally" or "remotely" related lacks credibility and defies common sense. *See* SCRG Br. 15, 16. Notably, SCRG does not even attempt to specify what events are so remote from each other as to break a single course of conduct into multiple occurrences. This omission, standing alone, speaks volumes.

SCRG's fallback is to attempt to distinguish its failure to properly store and secure the red dust and bauxite from its failure to properly secure the friable

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presumption that Congress legislated against already established principles, and that presumption has particular force in the CAFA context, where Congress reversed "certain established principles but not others." *Abrego Abrego v. Dow Chem. Co.,* 443 F.3d 676, 684 (9th Cir. 2006).

asbestos. *Id.* at 7. SCRG cannot escape the fact, however, that *all* of its storage failures are part and parcel of the same "event or occurrence" for one simple reason: When SCRG purchased the defunct refinery, it failed to do anything about the loose toxic particulates that were being blown into the surrounding neighborhoods. Asbestos fibers and red dust particles being released from the same inoperational facility over the same period of time due to the same inaction on the part of SCRG are hardly "remotely" related. The conclusion might be different if SCRG were engaging in two separate industrial processes, one that emitted red dust and one that emitted asbestos. But that is not the case here: SCRG has never operated the refinery, which was defunct at the time of its purchase. Appellees' claims are that, as the owner of the refinery, SCRG has not done anything to secure the toxins subject to being blown off the property.[5]

The lower court's conclusion that ongoing pollution from a single facility over a number of years is an event or occurrence is consistent with how the insurance industry defines "occurrence" in its liability insurance contracts. In every such contract described in a case in this circuit located by counsel for Appellees, the insurance contract and/or the applicable

[5] If this court finds that the release of friable asbestos is a separate event or occurrence from the release of red dust and bauxite, Appellees ask this court, in the alternative, to remand to permit them to amend the complaint.

contract law defines "occurrence" to include events that are continuous or ongoing. *See, e.g., Sunoco, Inc. v. Ill. Nat'l Ins. Co.,* 226 Fed. Appx. 104, 107-08 (3d Cir. 2007) ("a single occurrence" is "one proximate, uninterrupted and continuing cause"); *Armotek Indus., Inc. v. Emp'rs Ins. of Wausau,* 952 F.2d 756, 758 (3d Cir. 1991) (occurrence defined as "an accident, including continuous or repeated exposure") (Alito, J.); *AC&S, Inc. v. Aetna Cas. & Sur. Co.,* 764 F.2d 968, 971 (3d Cir. 1985) (same). *See also Liberty Mut. Ins. Co. v. Treesdale, Inc.,* 418 F.3d 330, 333 (3d Cir. 2005) (damages arising out of "continuous and repeated exposure . . . shall be considered one and the same occurrence") (emphasis omitted); *Appalachian Ins. Co. v. Liberty Mut. Ins. Co.,* 676 F.2d 56, 59 n.8 (3d Cir. 1982) (same). Thus, not only is this definition the most sensible, but it is already used by industry in the context of ongoing toxic exposure – there is no reason to think that Congress intended something different.

The district court's conclusion that the ongoing release of toxins is a single "event or occurrence" under § 1332(d)(11)(B)(ii)(I) is also consistent with the structure and purpose of CAFA. As explained above, Congress enacted CAFA to ensure that "interstate cases of national importance" are decided in federal court. § 1711 note. But Congress took pains to include not one, but *two* CAFA provisions, §§ 1332(d)(4) and (d)(11)(B)(ii)(I), designed to keep *intra*state controversies between local actors in local court. Cases like the one here, which involve local plaintiffs

injured by a local facility, are not "interstate cases of national importance" whether the injuries are caused by an event that lasts one day or an event that lasts a decade.

CAFA's legislative history bears this out. The Senate Judiciary Committee Report for CAFA provides: "The purpose of this exception [for 'an event or occurrence'] was to allow cases involving environmental torts such as a chemical spill if both the event and the injuries were truly local, even though there are some out-of-state defendants." S. Rep. 109-14, at 47 (2005). There is no dispute that this [sic] an environmental tort in which the plaintiffs, the events, and the injuries are truly local.

Nonetheless, SCRG seizes on the example of a chemical spill used in the Report, and it contends that the Report actually supports its view because the example limits the kinds of event and occurrences that are covered by § 1332(d)(1 l)(B)(ii)(I) to those that take place over a short period of time. SCRG Br. 16. That would be helpful to SCRG if that were true, but that is not what the Report says. Instead, the Report explains that local environmental torts that cause local injuries belong in state court under the statute. That is exactly the case here, and the example provided is just that, an example.

SCRG fares no better by arguing that the Report's value is limited by the fact that it was drafted after CAFA was passed. *See* SCRG Br. 11-12. Committee reports remain the most authoritative source

for establishing Congress's intent, and there is nothing in CAFA's pre-enactment history that contradicts the Report. *See Zuber v. Allen,* 396 U.S. 168, 186 (1969); *Lowery v. Ala. Power Co.,* 483 F.3d 1184, 1205-06 (11th Cir. 2007). Further, the claim that SCRG continually failed to prevent toxins from blowing off its property fits comfortably within the meaning of "an event or occurrence" even without considering the Report – the Report simply confirms that result is consistent with Congress's intent in enacting CAFA.[6]

SCRG's attack on the district court for citing the Senate Report is, therefore, misguided. *See* SCRG Br. 11-16. Not only was the court correct in its approach, but its reliance on the Senate Report was only icing on the cake of its analysis. Contrary to SCRG's claims, the district court first analyzed the text of the statute and reviewed the applicable case law, including an extensive analysis of *Allen,* the most on-point case. JA12-16. Although the district court also quoted the Senate Report, it merely pointed to it as buttressing its analysis of the statute and the case law. JA16.

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[6] SCRG argues that the "real" legislative history – one Senator's floor remarks supports its reading of CAFA. SCRG Br. 14-15. Putting aside the authoritativeness of a single Senator's remarks, it is unclear how these remarks support SCRG's reading of § 1332(d)(11)(B)(ii)(I) to exclude occurrences that take place over several years. It appears that SCRG is quoting the remarks for the proposition that Congress intended to treat class actions and mass actions identically. Perhaps that is the point of the Senator's remarks, but that does not describe the statute that Congress enacted.

There is nothing improper about this approach – and the district court's ultimate conclusion is correct, with or without the Senate Report.

B. The District Court Did Not Make Any Improper Findings of Fact.

Nor is the district court guilty, as SCRG claims, of "accept[ing] incorrect averments from the complaint as facts." SCRG Br. 19-20. Although the district court relied on the allegations in the complaint in determining whether Appellees' claims were a local event or occurrence under § 1332(d)(11)(B)(ii)(I), the court made clear throughout its opinion that it was describing Appellees' *allegations,* not finding facts. JA 10, 13, 16, 17. And evaluating jurisdiction based on the allegations in the complaint is exactly what the statute requires. Section (d)(11)(B)(ii)(I) is couched in terms of the plaintiffs' *claims,* and the complaint reflects the plaintiffs' claims. Whether or not Appellees ultimately prove their claims is, of course, a merits question to be decided after discovery and trial – SCRG cannot evade the local occurrence or event provision with the bare assertion that the Appellees' claims are not true.

II. If Not Affirmed, this Case Should be Remanded to the District Court for Discovery to Enable Appellees to Meet Their Burden of Establishing a § 1332(d)(4) Local Controversy Exception.

Even if SCRG's ongoing failure to properly store and secure the toxic substances were not "an event or occurrence" under CAFA's definition of "mass action," removal to federal court would not be proper at this juncture. Instead, the case should be remanded to permit Appellees to take discovery with regard to SCRG's citizenship – a fact that is critical to a question the lower court did not decide: whether this case falls within the local controversy provision applicable to both class and mass actions, § 1332(d)(4).

Appellees sought discovery on this point in the district court. JA122. The district court did not grant the request, yet it concluded – Appellees believe erroneously – that SCRG is a citizen of Massachusetts instead of the Virgin Islands. JA11. This conclusion matters because, if SCRG is a citizen of the Virgin Islands, this case falls within § 1332(d)(4), which provides that federal courts lack jurisdiction over actions in which at least two-thirds of the plaintiffs are citizens of the state in which the action was originally filed and the primary defendant is also a citizen of that state, § 1332(d)(4)(B), or if any defendant is a citizen of that state and all the injuries were incurred in there, § 1332(d)(4)(A). There is no dispute here that more than two-thirds of the Appellees are citizens of the Virgin Islands. The parties disagree,

however, as to whether SCRG's "principal place of business" is in Massachusetts or the Virgin Islands. ("Principal place of business" is the relevant standard under CAFA for an unincorporated organization such as SCRG. *See* § 1332(d)(10)).[7]

In light of this disagreement, the district court erred in not granting Appellees' request for discovery regarding SCRG's principal place of business. That denial – and the acceptance of the truth of SCRG's affidavit – was an abuse of discretion because, under CAFA, the party objecting to federal jurisdiction has the burden of showing the local controversy exception applies. *See Kaufman,* 561 F.3d at 153. Where a party bears the burden of demonstrating another party's citizenship for the purposes of jurisdiction, as Appellees do here, courts are to permit that party to conduct jurisdictional discovery. *See Rubin v. Buckman,* 727 F.2d 71, 73 (3d Cir. 1984). *Cf. Toys "R" Us,* 318 F.3d at 456 ("Although the plaintiff bears the burden of demonstrating facts that support personal jurisdiction, courts are to assist the plaintiff by allowing jurisdictional discovery[.]") (citation omitted).

Permitting jurisdictional discovery on remand would not be a pointless exercise. In the district court, Appellees countered the affidavit submitted by SCRG with public information (from SCRG's website)

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[7] Below, the parties have variously referenced §§ 1332(d)(4)(A) and (d)(4)(B). Both are part of the local controversy exception, and both would be met if SCRG is a citizen of the Virgin Islands.

indicating that SCRG's principal place of business is in the Virgin Islands, not in Massachusetts. JA133-34. (The website states that SCRG was created for the sole purpose of purchasing and developing a piece of real property in St. Croix and that its principal partner is a longtime Virgin Islands businessman. In addition, the contact information on the website consists of Virgin Islands telephone numbers and addresses. *Id.*) Although the residents can recite this public information without discovery, they cannot learn about the inner workings of the partnership – the workings of its nerve center – without discovery. And given the publicly available facts pointing to the Virgin Islands, Appellees' concern that the affidavit might not be complete or accurate is far from frivolous. Thus, if this Court reverses the decision below, it should remand to permit Appellees to take the jurisdictional discovery they sought below.

CONCLUSION

For these reasons, the district court should be affirmed. In the event of reversal, this case should be remanded to permit discovery on SCRG's citizenship.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Case No. 13-1725

Eleanor Abraham, et al.,

Appellees,

v.

St. Croix Renaissance Group, L.L.L.P.,

Appellant.

CERTIFICATE OF SERVICE

I certify that on March 28, 2013, the foregoing Appellees' letter brief was filed with the Court and was served electronically via CM/ECF on the following. I also certify that, March 28, 2013, the following

were each sent two copies of the foregoing letter brief via commercial carrier.

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April 1, 2013

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Oral Argument Scheduled for April 16, 2013

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

Dear Ms. Waldron:

Appellant files its reply by letter as per the Court's Order of March 14, 2013.

I. Procedural Point 1: Reply to the Argument this Court Lacks Jurisdiction

Though 'mass actions' are not listed as a type of class action in 28 U.S.C. § 1332(d)(1), 28 U.S.C. § 1453 creates appellate jurisdiction as to a CAFA remand order when applied in conjunction with 28 U.S.C. § 1332(d)(11)(A).

II. Procedural Point 2: Reply to Plaintiffs' Request for Remand with Leave to Amend to Drop Their Asbestos Claims (to Defeat Removal)

Plaintiffs ask that if the Court determines their asbestos claims are not part of *an event,* they be granted remand – with leave to amend to drop those claims. Plaintiffs' letter brief ("Opposition") at 14, fn. 5. However, once removal occurs, a party cannot amend to avoid federal jurisdiction as it "is determined at the time of removal, and subsequent events, 'whether beyond the plaintiff's control or the result of his volition, do not oust the district court's jurisdiction once it has attached'." *Williamson v. Aetna Life Ins. Co.,* 481 F.3d 369, 375 (6th Cir. 2007) (quoting *St. Paul Mercury Indem. Co. v. Red Cab Co.,* 303 U.S. 283 (1938)); *see also Pate v. Huntington Nat. Bk,* 2013 WL 557195 (N.D. Ohio 2013) (for CAFA.)

III. Procedural Point 3: Reply as to the 28 U.S.C. § 1332(d)(4) Issue and the District Court's 'Principal Place of Business' Finding Under *Hertz*

Plaintiffs allege the Court improperly determined SCRG's principal place of business, and thus failed to correctly apply 28 U.S.C. § 1332(d)(4). First, this is a cross-issue not before the Court and no appeal was allowed. Second, the record contained SCRG's unopposed, detailed affidavit. (Ex. F, JA2 pp. 114-115.) (Judge Bartle had just addressed the same issue under analogous facts, with the identical result.

Lewis v. Lycoming, Civ. No. 11-6475, 2012 WL 2422451, at *5-6 (E.D.Pa. June 27, 2012)). Third, plaintiffs argue they did not have a full opportunity to oppose – but that is not correct. They tactically chose not to file affidavits or attach evidence thereto, instead arguing the need for a hearing – augmented with 9 pages of unsupported exhibits. (Ex. G, JA2 pp. 126-134.) Finally, there was no 'surprise' to excuse plaintiffs' failure to make a record where SCRG raised the issue and facts in earlier papers (Ex. H, JA2 p. 140) then cited *Lewis v. Lycoming*.

IV. Procedural Point 4: Reply as to the District Court's Findings of Fact

Both sides now agree (Opposition at 17) that the "district court relied on the allegations in the complaint in determining . . . Appellees' [jurisdictional, mass action exception] claims." Plaintiffs argue that the Court correctly used these as the source for fact findings because "[s]ection (d)(11)(B)(ii)(I) is couched in terms of the plaintiffs' *claims,* and the complaint reflects the plaintiffs' claims." *Id.* This reverses the correct burden and is contrary to the Court's holding as to that burden.

V. Reply to the Facts in Plaintiffs' Brief

At page 1 of the Opposition, plaintiffs open with the charge (without citation) that injuries arose from a "Superfund site owned by [SCRG]. . . ." This is *not* a Superfund site nor is there any suggestion of this in

the record. *See* EPA Superfund List, www.epa.gov/superfund/sites/query/queryhtm/nplfin.htm#VI. The opposite is true. SCRG's opening brief states (with citations) that SCRG successfully litigated to obtain a full-remediation, court-approved, *non-EPA* CERCLA consent decree requiring Alcoa to fix Area A and its surrounds. That court found the decree (on which the EPA commented) will completely solve all future Area A red mud issues like those raised here. This is just one example of inaccurate 'facts' absent any reference to the record, ubiquitous in plaintiff's brief. Thus, SCRG will first reply broadly to the picture drawn of the Site in this manner.

Plaintiffs portray a desolate, wind-blown ghost town in which SCRG has done nothing to stop red dust and asbestos whistling around for 11 years. It is allegedly a place where the residue from Area A and structural asbestos combine in a (legally desirable for plaintiffs) *homogenous* swirl of particle-filled neglect. But as the record reflects, nothing could be further from the truth. From 2002 to 2010 this was a thriving brownfields site. (Ex. H at ¶5, JA2 p. 114.) Beginning in 2002, pursuant to the sales agreement, Alcoa was removing or encapsulating asbestos built into the structures and by 2003 was remediating Area A under DPNR's control and supervision.[1] As that was under

[1] In *St. Croix Renaissance Grp. v. Alcoa World Alumina and SCA,* Civ. No. 04-67, 2011 WL 2160910, at *2 (D.V.I. May 31, 2011) ("SCRG v. Alcoa") the Court noted that Alcoa (and its

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way, SCRG's office was moved from Boston to the USVI. (Ex. H at ¶¶4-5, JA2 p. 114.) Major tenants were sought for a deep-water-port light industrial area. More than 45 full-time employees worked in the rejuvenation effort – plus many contractors and subcontractors. *Id.* The old refinery plant was cut apart and shipped away under DPNR permitting and oversight; and a re-purposed port attracted the largest commercial entity to St. Croix in years. As a tenant, Diageo/Captain Morgan built a green, ultra-modern distillery (within *50 feet* of Area A, between Area A and plaintiffs). It makes 20 million proof/gal/year and will yield $130 million in taxes. *See,* www.diageo.com/en-sc/newsmedia/pages/resource.aspx?resourceid=655.

Then, beginning in 2005, despite its being a *BFPP/Innocent Purchaser* and the government passing statutory brownfields protections, SCRG was forced to litigate with successive parties: first a contingency-based tort lawyer who got a *deal* with a USVI agency to do 'cost-recovery' cases against local industries. (SCRG was only caught up in that as a BFPP. It was quickly offered a *de minimus* settlement, but the past refinery operators fought that and the case was not dismissed for cause for three more years. *U.S.V.I D.P.N.R. v. SCRG,* Civ. No. 1:07-114, 2011 WL 833227, at *4 (D.V.I. Mar. 4, 2011) ("no evidence of . . . any recoverable response costs."))

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contractor) damaged the piles and dust suppression system in Area A during part of its 2003, post-sale remediation efforts.

Allegations made there led to an action against Alcoa where, in refusing to overturn the punitive damages award, that court noted how "outrageous[ly]" Alcoa had defrauded SCRG. *SCRG v. Alcoa,* 2011 WL 2160910, at *2 (D.V.I. May 31, 2011). Next, there was a demolition firm that a court found failed to get permits and which invented the phantom "carried by the wind" (Opposition at 5) asbestos story.[2] While SCRG eventually won all of this litigation, it ate up time and resources. But the rehabilitation of the Site went on.

Then came successive waves of toxic tort plaintiffs – *thousands* – more than 3,000 on an island of only 60,000 people. There is not one single document even hinting at asbestosis. There is not a single documented medical claim of record. Yet, these plaintiffs were also represented by plaintiffs' local counsel in serial class and non-class cases, in association with off-island class action 'specialists.'

SCRG's partners, who had done ten brownfields projects across several jurisdictions without a single

[2] Plaintiffs' local counsel, Attorney Rohn, knows that this was a discredited plaintiff's fabrication as she was also plaintiff's counsel in *Bennington Foods, L.L.C. v. SCRG,* Civ. No. 06-154, 2010 WL 1608483 (D.V.I. April 20, 2010) where all of this was litigated. There, after a jury trial, the court found that SCRG told plaintiffs, the demolition contractors, not to proceed without valid permits *several times.* But they did so – and then concocted the "free flying asbestos" allegations by mischaracterizing a DPNR report when they could not perform (which led, in part, to SCRG's defense verdict). *Id.* 2010 WL 1608483, at *2-3.

suit, were handcuffed – the lost time and 'friction costs' of such litigation forced a shutdown. (Ex. H at ¶¶6-15, JA2 p. 114-115.) Moreover, although the USVI passed brownfields statutes when SCRG was obtaining the property, the Court is asked to take judicial notice that the promised protective regulations were never written. So SCRG now has just five USVI employees – and has returned to Boston while waiting for the endless USVI aggregate litigation machine to *slowly* grind. *Id.* at ¶15, JA2 p. 115. Remand to the overwhelmed St. Croix court would extend this for years. With this in mind, SCRG provides just a few more examples of plaintiffs' skewed Site portrayal:

a. "These piles of industrial byproduct include *hazardous* materials. . . ." Opposition at 5. Not true. This red mud and its constituents were found *not* to be hazardous materials by the Bevill Amendment, 40 C.F.R. § 261(b)(7). The materials in Area A are *well* below RCRA levels (at 40 C.F.R. § 262.22) which is why it was re-permitted for open storage.

b. "The remaining unrefined bauxite, meanwhile, is stored in a damaged shed that does not prevent the bauxite from blowing off the property." *Id.* at 5. Untrue, as Alcoa took its bauxite *ore* and most equipment when it left.

c. "Red dust . . . is a cancer hazard. JA49-50." *Id.* at 5. The USVI residue is not the higher pH material (above pH 12.5) normally referred to as red mud in studies. The post-1972

St. Croix plant was unique, utilizing a water wash.

d. "[T]he refinery is also rife with loose (friable) asbestos fibers, which, like the red dust and bauxite, are not secured." *Id.* at 5. Even in 2006 this was untrue – as discussed above, "vast amounts of loose, blowing asbestos" was an *allegation* by the losing party in *Bennington.*

e. "SCRG has done nothing to seal, secure, clean up, or otherwise prevent the toxins from continuously blowing . . . " *Id.* This assertion is unsupported and wildly untrue, as discussed in SCRG's opening brief and here.

Thus, one of the world's largest international food producing businesses just built a modern, multi-million dollar distillery *50 feet from Area A* – while the mythical (but for plaintiffs, legally necessary) 'merging' of the 30+ year residue 'event' with unrelated asbestos activities, is, like each breathlessly described 'fact,' just vapor.

VI. Reply as to the Definition of "an event"

Cases. Plaintiffs direct the Court to three cases: *Allen v. Monsanto Co.,* 2010 WL 8752873 (N.D. Fla. Feb. 1, 2010), *Mobley v. Cerro Flow Prod.*[3]

[3] No. 09-697-GPM, 2010 WL 55906 (S.D. Ill. Jan. 5, 2010).

and *Hamilton v. Burlington N. Santa Fe Rwy. Co.*[4] The previously uncited *Allen* case was fully discussed in Appellant's opening brief, and plaintiffs raise no new arguments. The *Allen* court's concern about *Zeno's Paradox* that "any event could always theoretically be broken down into other events 'mere seconds long'" (Opposition at 9) lacks force in light of four decades of different types of acts in Area A by 9 parties and multiple of contractors – interrupted by a number of major hurricanes (both before and after SCRG's purchase). In fact, Attorney Rohn was counsel in a recent case where her clients sought a determination against several of the same 9 parties. That court give her clients *exactly* what they asked for – a holding that when Hurricane Georges hit this Site in 1998 and caused this same type of dispersion, it was a discrete, single event; *necessary* to avoid a CAFA mass action. *Abednego,* 2011 WL 941569, at *1. (This Court is asked for judicial notice that Jeanne (T.S. in 2004) and Omar (Cat. 3 in 2008) hit the USVI post-purchase.)

In *Mobley,* there is only a mention of 1332(d)(11)(B)(ii)(I) in one sentence; the reference is in passing, does not support plaintiffs and is dicta. (*Mobley* was decided on the same very strict textual reading of the '3 x 99 plaintiffs' issue in *Abrahamsen v. ConocoPhillips, Co.,* 2012 WL 5359530 (3d Cir. Nov. 1, 2012)).

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[4] No. A-08-CA-132-SS, 2008 WL 8148619 (W.D. Tex. Aug. 8, 2008).

The third case, *Hamilton,* is problematic for plaintiffs. As an aside, after the instant appeal was allowed, representation here passed to *Public Justice* – a group with an associated practice advocating for class actions to remain in state courts.[5] The class action industry's appreciation of, and desire to defend the Senate *non-Report's* view of "an event" is understandable as "cases involving environmental torts" now get diverted to state courts for no apparent reason. Perhaps that is why *Hamilton* is discussed at length despite the obvious downside for these plaintiffs.

The *Hamilton* court noted that it was the first court to consider the definition of an event under the newly enacted CAFA. Although it has never been followed or even cited on this point, that court did state that it did not feel comfortable "limit[ing] the 'local occurrence' exception to a single, discrete event." (That ended up being dicta, as it was actually decided on another basis.) However, that other basis creates a serious problem for plaintiffs in spotlighting *Hamilton.* That court's ***actual*** *holding* was: "the 100 year chain of actions allegedly taken by different Defendants at different times with different negligent

[5] *See* Public Justice (formerly Trial Lawyers for Public Justice) mission statement as to Class Action Preservation, at www.publicjustice.net/what-we-do/access-justice/class-action-preservation. (Public Justice had not appeared in the two courts below. Local counsel has not entered her appearance here in 13-1725.)

or intentional motivations cannot constitute an 'occurrence . . . '." *Id.* 2008 WL 8148619, at *12.

Because SCRG has no such agenda, as an alternative solution it invites the Court to insert the phrase "during the 41 years from 1972 when Area A opened" for the "100 year[s]" in *Hamilton* and then adopt the identical language/reasoning.

As was the case in *Hamilton,* the complaint here alleges "a *series* of continuous *transactions*. . . ." *Id.* at ¶471 (This closely tracks *LaFalier's* "series of potentially related events" language, 2010 WL 1486900, at *4.[6]) Even leaving aside the asbestos for a moment, plaintiffs not only aver that red mud has blown on their properties during hurricanes, but also raise "flooding *and other physical disturbances*" (¶508) including "occasions when bulldozers ran over" Area A (¶467) which includes Alcoa's post-2002 work (¶475). They aver this was done not only by the many past operators, but also by Glencore Ltd., Glencore Int'l AG and Century "add[ing materials] and continu[ing] to stack and store them." (¶470)[7]

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[6] Plaintiffs argue that the court in *Aana v. Pioneer* stated no basis for its decision. However, it precisely follows the 9th Circuit (*Nevada v. Bank of America*) and *LaFalier* for the *well-settled* (at least outside of "cases involving environmental torts") proposition that "a series of potentially related events" is not "an event."

[7] What more could there be to establish *Hamilton's* "chain of actions . . . taken by different Defendants at different times with different negligent or intentional motivations?" The *vast*

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Plaintiffs Suggest Definitions from other Areas of Law. Certainly some insurance decisions and parts of the toxic tort industry define "an event" as plaintiffs request. But SCRG cited to *London Mkt. Insurers,* 146 Cal.App.4th 648, 661 (2007) for a court's take on the common meaning from Random House Webster's College Dictionary (from an asbestos dispersion case) that is much more plausible as to Congress' intent. Plaintiffs, apparently forgetting that the CAFA mass action provisions also apply to non-environmental cases, suggest, at 14,

> not only is this definition the most sensible, but it is already used by [the toxic tort] industry in the context of ongoing toxic exposure – there is no reason to think that Congress intended . . . different.

This is a regression to the idea that a special level of scrutiny should be applied when defining "an event" for "cases involving environmental torts." In other words, it is circular reasoning going back to the Senate Report. Moreover, there ***is*** a reason to "think that Congress intended" the opposite. Both chambers

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irony is that a court remitted $6 million in *SCRG v. Alcoa* (at *2-3) that SCRG could not collect from Alcoa for Alcoa's contractor's 2003 Area A bulldozing negligence, as Alcoa didn't *direct* him. But, bizarrely, *plaintiffs seek damages from SCRG here for that contractor's exact,* ***same*** *2003 negligence.*

fulminated against class action lawyers and the state courts Congress felt so loved them.[8]

General Intent of CAFA and the **Senate Report**. Plaintiffs concede the Report is not *really* a committee report, though contend it should still be followed as "there is nothing in CAFA's pre-enactment history that contradicts the Report." *Id.* at 16. That is not accurate as plaintiff's case, *Hamilton,* makes clear at *10:

> [T]he legislative history of CAFA in general and its mass action provisions in particular documents *more debate than consensus*. . . . "negotiations surrounding enactment of this bill tell a typical story of legislative battle among interest groups, Congress, and the President." Barnhart v. Sigmon Coal Co., 534 U.S. 438 . . . (2002). The often confusing provisions of CAFA "reflect[ ] a *compromise amidst highly interested parties attempting to pull the provisions in different directions.*" (Emphasis added.)

The order must be reversed with remand instructions per the opening brief.

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[8] *See generally,* Howard M. Erichson, CAFA's Impact on Class Action Lawyers, 156 U. Pa. L. Rev. 1593 (2008) (describing much of everything said or written by Congress as being inordinately strident, with unusually vocal antipathy.)

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 1st[th] day of April 2013, a true and correct copy of the foregoing Letter Reply Brief of Appellant St. Croix Renaissance Group, L.L.L.P. was filed with the Clerk of the Court and served on opposing counsel using CM/ECF. An original and nine copies were also sent by Express USPS Mail to the Clerk of the Court – with a copy sent by email to Plaintiffs' counsel the same day, at the following addresses:

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