DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

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

DEFENDANT ST. CROIX RENAISSANCE GROUP L.L.L.P.'S REPLY TO PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS MOTION FOR SEVERANCE PURSUANT TO RULE 21

SCRG hereby responds to the plaintiffs' opposition to SCRG's motion to sever. Two preliminary 'procedural' comments are in order.

First, the plaintiffs' opposition memorandum is out of time, having missed the initial due date (August 24th) as well as the date a response was promised (September 10th) in the plaintiffs' first motion for an extension of time to respond to this motion. Thus, SCRG moved to have its motion deem conceded (D.E. 25), which motion has not been opposed and is pending. While the plaintiffs have filed a second motion to file their opposition out of time (D.E. 26), that motion was opposed and has not been granted.

Second, the plaintiffs assert in footnote 2 of their *Opposition* to the motion to sever [D.E. 29] that they have filed a jurisdictional motion for remand that needs to be decided first. However, no such motion has been filed, as the plaintiffs only filed a request to file such a motion out of time (D.E. 10),[1] as to which this Court entered a

[1] The docket entry states: "MOTION for Extension of Time to File Plaintiffs' Third Motion to Remand for lack of Federal Subject Matter Jurisdiction by Plaintiff Eleanor Abraham,

"Notice" stating that this was an unnecessary request, since jurisdiction can be raised at any time. (D.E. 13) The proposed motion to remand was simply an exhibit to that motion for an extension, which was never then filed as a motion.[2]

With the foregoing comments in mind, SCRG will address the points raised in the plaintiffs' opposition memorandum, looking first at the undisputed facts and then the applicable law. For the reasons advanced by SCRG, it is respectfully requested that the relief sought be granted so that the claims of all of the plaintiffs except one be severed and dismissed as permitted by Rule 21 and the applicable law. *See, Coughlin v. Rogers,* 130 F.3d 1348, 1350-52 (9th Cir. 1997)(affirming Rule 21 severance and dismissal of multiple claims except one named plaintiff); *Aaberg v. Acands Inc.,* 152 F.R.D. 498, 501 (D. Md. 1994)(granting dismissal of all claims under Rule 21 except one named plaintiff).

I. Facts Giving Rise To The Plaintiffs' Claims

Plaintiffs assert on page 8 of their opposition memorandum as follows:

> In this case, Plaintiffs have made numerous allegations that their exposure to the red dust, coal dust, and asbestos occurred from strong winds blowing the toxic material from SCRG's alumina refinery onto their property and persons and that their exposure to the dangerous material were a result of a series of these dispersions.

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et al.. Motions referred to Magistrate Judge George W Cannon. (Attachments: # 1 Supplement, # 2 Exhibit, # 3 Text of Proposed Order) (Rohn, Lee) (Entered: 04/12/2012)"

[2] SCRG has drafted a response to the version of the Motion to Remand that was attached as an exhibit. If that exhibit is filed as a motion without any changes, SCRG will immediately file its response that has already been prepared.

They further aver in their opposition memorandum on page 13 that these exposures constitute the same "series of transactions" because:

> Here, all the Plaintiffs were injured in substantially the same way, by the same substances, and at the same time—they were exposed to toxic dusts blown from the refinery onto their properties and into their lungs during high winds on St. Croix.

However, in paragraphs 467 to 471 of the plaintiffs' amended complaint (DE 15), plaintiffs generally allege separate exposures on various unknown dates **over at least the ten year time period** to different distinct contaminants, including (1) bauxite ore from a storage shed (released during Hurricane Georges, which occurred before SCRG purchased the property), (2) structural asbestos blowing from demolished buildings and (3) bauxite residue allegedly blown from the Site.[3]

Thus, while the plaintiffs try to gloss over their own pleadings, it cannot be disputed that the amended complaint combines claims for people living over a very large and varied physical area on St. Croix for dramatically different periods of time -- all of whom have completely different levels of exposure (to three different materials with three completely different sources) with different types of personal injury and property damage claims unique to each person.[4]

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[3] Coal dust has now been added in the plaintiff's opposition memorandum, even though SCRG has never used coal to operate the site's power plant.

[4] As noted in SCRG's initial motion, the plaintiffs live in diverse geographic areas on St. Croix, so that it would be impossible for those east of the site to be exposed when the wind blew west, while allegedly exposing plaintiffs west of the site. Even those west of the site would not all have the same exposures when the wind blew west, as those in Harvey, who are close to the SCRG site, would have a different exposure that those miles away in White Bay. Moreover, those who left St. Croix would not have the same exposures as those who have always resided on St. Croix. Of course, SCRG denies

The liability issues are also not common to all plaintiffs. For example, the asbestos claims raise issues different that red dust claims. Likewise, Moreover, the amended complaint states in paragraph 469 that the Plaintiffs suffered injuries that were caused by the release of bauxite ore in 1995 -- claims that are completely separate as SCRG did not own the property in 1995.

II. Rules 20 and 21-Applicable Law

The plaintiffs argue that SCRG's request for Rule 21 relief should be denied because the plaintiffs have allegedly been properly joined under Rule 20(a), which provides as follows:

> **Rule 20. Permissive Joinder of Parties**
> (a) PERSONS WHO MAY JOIN OR BE JOINED.
> (1) Plaintiffs. Persons may join in one action as plaintiffs if:
> (A) they assert any right to relief jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and
> (B) any question of law or fact common to all plaintiffs will arise in the action.

However, the facts alleged by the plaintiffs demonstrate that joinder under Rule 20 is not appropriate, warranting dismissal of all but one claim under Rule 21.

In this regard, two people who did not even live in the same area of St. Croix at the same time could not be exposed to the same alleged release of some contaminant, as clearly such releases could not be from "the same occurrence"? Similarly, they could not have the same exposure to multiple releases if they did not live in the same area of St. Croix at the same time.

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that any of these individuals have suffered injuries, as under the plaintiffs' theory, virtually everyone on St. Croix has been exposed to these alleged contaminants.

Indeed, the plaintiffs chose to ignore the comments made by Judge Bartle in *Henry v St. Croix Alumina,* 2008 WL 2329223 (D.V.I. June 3, 2008) involving a claim for alleged exposure to bauxite dust from the same site (now owned by SCRG) during one event (Hurricane Georges), stating in part:

> This case differs from the typical "mass accident" or "mass disaster" action such as a plane crash or plant explosion where issues of causation almost certainly will be common to all class members. Here, causation cannot be so easily generalized. *Id.* at *5

Judge Bartle then went on to note that while there may be some common questions of law and fact **regarding liability**, the individual plaintiffs still had **separate and distinct person injury claims**, noting as follows:

> With respect to personal injury claims, each plaintiff must prove causation. Each will need to prove the duration and nature of his or her exposure to the two released substances, bauxite and red mud. Some plaintiffs may have been exposed to only one substance, while those exposed to both may have been exposed in differing degrees or combinations. The possibly differing levels of toxicity of bauxite and red mud will further complicate matters. *Id.* at *5. [Emphasis added].

The issues in the case before this Court are even more "individualized" than those in *Henry* – as even the liability issues will not necessarily be common to all plaintiffs because of the ten year exposure period as opposed to one event, as well as because of the additional contaminants at issue in this case, including asbestos and coal dust.

Similarly, the plaintiffs chose to ignore any discussion of the holding cited by SCRG in *Gary v Albino*, Civ.10-886, 2010 WL 2546037 (D.N.J. June 21, 2010), discussing the serious practical problems for this Court in administering the cases and in holding a trial on such individualized claims. As noted in *Gary*:

> Although Rule 21 is most commonly invoked to sever parties improperly joined under Rule 20, "the Rule may also be invoked to prevent prejudice or promote judicial efficiency."
>
> Specific factors to be considered in determining whether severance is warranted include: "**(1) whether the issues sought to be tried separately are significantly different from one another, (2) whether the separable issues require the testimony of different witnesses and different documentary proof, (3) whether the party opposing the severance will be prejudiced if it is granted, and (4) whether the party requesting severance will be prejudiced if it is not granted.**" (citations omitted)

While the plaintiffs chose to ignore this point, how can this Court realistically hold a trial involving over 500 individuals, where, as Judge Bartle put it, "each plaintiff must prove causation. Each will need to prove the duration and nature of his or her exposure to the [four] released substances, [coal dust, asbestos] bauxite and red mud." The fact that these alleged releases occurred at completely different times over a 10-year period (unlike the limited event in *Henry* which arose out of a documented release of bauxite ore rather than red dust after a hurricane) makes this task virtually impossible, which explains why the plaintiffs chose to ignore this point raised by SCRG.

The cases cited by the plaintiffs are equally distinguishable. Two of the opinions do not even involve Rule 20 or Rule 21 issues. *See, e.g., Turner, et al., v. Murphy Oil USA, Inc.*, No. 05-4206 Consol. Case Sec. "L"(2), 2005 U.S. Dist. LEXIS 45123, *2 (E.D.La. 2005); *Fiorentino v. Cabot Oil & Gas Corp.*, 750 F. Supp. 2d 506 (M.D. Pa. 2010); *In Re Digitek Products Liability Litigation*, MDL NO. 2:08-md-01968, 2009 U.S. Dist. LEXIS 113947, *1 (S.D. W. Va. Aug. 3,

2009). Indeed, *Turner* involved claims arising out of one occurrence (Hurricane Katrina), while *Digitek* involved claims arising from the plaintiffs' use of a specific product.

Similarly, many (if not most) of the cases cited by the plaintiffs dealt with the sufficiency of the pleadings, which is an issue in the Rule 12(e) motion that is pending, but which is not an issue in this motion. *See, e.g., Phillips v. County of Allegheny*, 515 F.3d 224, 233 (3d Cir. 2008)(dealing with pleading standards under *Twombly); Wilkerson v. New Media Tech. Charter Sch., Inc.*, 522 F.3d 315, 322 (3d Cir. 2008) (dealing with *Twombly* issue); *Consumer Protection Corp. v. Neo-Tech News*, No. CV 08-1983-PHX-JAT, 2009 WL 2132694, *1 (D. Ariz. July 16, 2009)(dealing with notice issues in a complaint).

As for other cases that did discuss Rule 20 or Rule 21, most are irrelevant, discussing Rule 20 in general without dealing with the specific issues raised in this motion regarding the misjoinder of multiple plaintiffs who have different, individualized claims. *See, e.g., Al Daraji v. Monica,* No. 07-1749, 2007 U.S. Dist. LEXIS 76205, 2007 WL 2994608, at *10 (E.D. Pa. Oct. 12, 2007); *Cooper v. Fitzgerald,* 266 F.R.D. 86, 88 (E.D. Pa. 2010).

As for the two cases that did discuss Rule 20 where multiple plaintiffs were involved, these cases are both distinguishable from the issues here. For example, in *Moseley v. City of Pittsburg Public School District*, No. 07-1560, 2008 U.S. Dist. LEXIS 42189, at * 6 (W.D. Pa. May 27, 2008), the case involved claims of multiple plaintiffs arising out of the general employment policies that

resulted in racial discrimination by the employer (General Motors). Clearly that case is distinguishable from the facts in this case, as the plaintiffs' claims of racial discrimination presented inter-related questions of fact and law since the same employer and its general employment practices were involved.

In *German v. Federal Home Loan Mortgage Corp.*, 896 F. Supp. 1385, 1400 (S.D.N.Y. 1995), multiple plaintiffs sued various property owners for lead poisoning. The Rule 21 issue involved a request by one of the defendant owners to sever the claims of one group of the plaintiffs' claims against it where there were multiple defendants facing the same claims. These facts are clearly distinguishable from the issues in this case, Indeed, in that case, the court found that severance would not promote judicial economy, an issue the plaintiffs in this case did even discuss, as noted.

Thus, despite a plethora of citations, the plaintiffs did not submit any cases which supported their arguments that Rule 20(a) warranted the joinder of the plaintiffs' claims in this case.

In fact, while the plaintiffs attempt to argue that Judge Cabret's order in *Alexander v. Hovic* (attached by both parties as an exhibit) is favorable to them, it is directly on point in support of SCRG's motion to sever. In that case a group of workers in the Hess refinery all claimed they were exposed to asbestos while working in the refinery at various times, which Judge Cabret found to be an improper joinder. Here, over 500 plaintiffs claim exposure to asbestos (and other contaminants) blowing from SCRG's site at various times. While the plaintiffs

argue this was a "series of transactions", it is no different than the claims by workers in the same work place alleging various exposures while present in the same location. In short, severance is appropriate where the only relationship of the claims is that the arose from different exposures from the same place over an extended period of time.

III. Conclusion

In summary, it is respectfully submitted that relief under Rule 21 is clearly appropriate in this case so that each plaintiff other than one named plaintiff should be directed to re-file their respective claims as a separate cases.

Dated: September 25, 2012

/s/

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Dated: September 25, 2012

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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of September, 2012, I filed the foregoing with the Clerk of the Court, and delivered by ECF to the following:

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